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Transnational and Trans-Territorial Rule-Making A Basic Framework

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Transnational and Trans-Territorial Rule-Making - A Basic Framework

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Mapping Trans-Territorial Rule-Making.....	4
Unilateral rule-making with trans-territorial effect.....	5
Trans-territorial rule-making by international organizations.....	7
Executive rule-making by standard setting and the creation of conditionalities	10
Consequences on Rights and Interests of Individuals.....	13
De-constitutionalization.....	14
Empowerment of the Executive.....	18
Empowerment of Experts	19
Some Conclusions.....	20

Abstract:

This Article discusses the reality of executive rule-making procedures with trans-territorial effect, with other words, the creation of non-legislative rules which have an effect outside the territorial limits of the jurisdiction of origin. It maps the phenomenon, discusses some of its central challenges for the realization of general principles of law and considers possible legal approaches addressing these. One of the most important issues thereby is to find workable solutions in the context of the pluralism of sources of law – national, supranational and international.

I. INTRODUCTION

Executive rule-making is characterized by the creation of acts which, albeit often legislative in character, do not follow a formal parliamentary legislative process. Executive rule-making powers are generally powers delegated to administrative bodies and institutions or, for example in the area of standard setting, hybrid public-private actors. In many instances, rule-making powers are also delegated to supranational or

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international bodies. This is a phenomenon not only in the quasi-federal system of the European Union but, as further discussed in this article, a reality in many areas such as international environmental law setting rules on fisheries, forestry and air pollution as well as in matters such as food safety with the *codex alimentarius* or banking regulation with standards being set by the Basel committee. Such delegation, in turn, often in practice leads to an almost mandatory application of the content of foreign rules in the domestic legal system – both in the form of rules established on the international or supranational level, as well as in the form of mutual recognition and enforcement of rules established in foreign jurisdictions. Examples for such obligations arise from the WTO’s TBT and SPS agreements. An important phenomenon of modern public law is thereby the permeation of the link between rule-making and the territorial reach of the law of a jurisdiction.¹ This Article therefore discusses various aspects and consequences of the phenomenon of de-territorialization of executive rule-making.

At issue is whether there are any standards for trans-territorial rule-making which could ensure compliance with key values of public law such as the rule of law, respect for fundamental rights, participatory forms of governing, and accountability of actors. In recent years, much thoughtful scholarship has been developed on “global administrative law”. This scholarship seeks to understand the regulatory framework of international administrative cooperation as well as international organizations active in matters traditionally regarded as matters belonging to administrative law.² But these discussions also pre-date the coining of the phrase “global administrative law” in the academic

¹ The reach of public law of a jurisdiction is generally limited, according to the traditional notion of territoriality under public international law, to the territory of that jurisdiction. See Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 229 (2010).

² See generally, e.g., 9 GERMAN L.J. 1375 (2008) (featuring thirty articles on the exercise of public authority by international organizations); 68 L. & CONTEMP. PROBS. 1 (2005) (featuring twelve articles on the emergence of global and administrative law); see also *Publications*, INST. FOR INT’L L. & JUST., N.Y. UNIV. SCH. OF L., <http://ilj.org/publications/GlobalAdministrativeLawSeries.asp> (last visited Apr. 14, 2013) (hosting a working paper series on global administrative law). Single articles have also been published on the topic. See, e.g., Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT’L L., 187 (2006). For more in depth discussion, see Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT’L L. & POL’Y 663 (2005); B.S. Chimni, *Co-optation and Resistance: Two faces of Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL’Y 799 (2005); Benedict Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 EUR. J. INT’L L. 23 (2009) [hereinafter Kingsbury, *Global Administrative Law*]; Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005); Andrew D. Mitchell & John Farnik, *Global Administrative Law: Can It Bring Global Governance to Account?*, 37 FED. L. REV. 237 (2009).

literature. Many of the more traditional concepts addressing aspects of public law that transcend the territorial reach of public law have already been questioned in the context of the discussion of transnational law.³ “Transnational law” is a term which is slightly misleading when it comes to public law,⁴ because the link between the law and its applicability is not the “nation” given that many states are composed by multiple nations but the territorial reach of a jurisdiction. For this reason, focusing on executive rule-making outside of states, this Article uses the more precise but less common term “trans-territorial.” In any case, “transnational” and “trans-territorial” both look specifically at those matters which “trans”-cend the traditional dichotomy of distinguishing between national versus international law and a clear delimitation of these spheres. The reality what one might describe as post-*Westphalian*⁵ trans-territorial public law is that it transcends territorial limits of jurisdictions. The jurisdictional reach appears increasingly more akin to a continuum in which the purely national and the purely international – i.e., inter-state – are the two extremes of a range instead of a strict dichotomy.⁶ Many options of the exercise of public powers lie in-between, and this Article focuses on these areas.

The concepts and consequences of this phenomenon discussed in this Article are mainly illustrated with the help of examples from the law of the World Trade Organization (WTO). Not only is the WTO probably the best known international structure to many readers, but it also offers a rich pallet of examples due to the complexity of topics addressed within the WTO and the relative maturity of its legal

³ The term was introduced into the mainstream legal debate by PHILLIP C. JESSUP, *TRANSNATIONAL LAW* (1956). In the following years, the debate regarding rule-making had remained in a conflicts of law setting under the concept of the dichotomy between international administrative law (as the national law of conflicts in administrative matters) as well as on public international law governing international organizations.

⁴ The notion of transnational actually seems to have arisen in the context of and as counterpart to “international law.” Craig Scott, “*Transnational Law*” as *Proto-Concept: Three Conceptions*, 10 *GERMAN L.J.* 859, 865-866 (2009). This was a further development of the “law of nations” which in effect is “inter-state law.” *Id.* He however argues that since “pretty well all users of ‘transnational law’ discourse understand this in the sense of ‘trans-state’ and, as such, from a theoretical perspective, it is arguable that nothing is lost to continue this convention.” *Id.* at 866. However, one might, to the contrast, also argue that attempting to achieve terminological precision might contribute to clarity of conceptual thinking.

⁵ The Westphalian model “conceived the nation-state to be the sole sovereign entity on the world stage.” Robert A. Schapiro, *In the Twilight of the Nation-State: Subnational Constitutions in the New World Order*, 39 *RUTGERS L.J.* 801 (2008). Michael Burgass, Hans Vollaard, *Analysing Westphalian states in an integrating Europe and globalizing world*, in: Michael Burgass, Hans Vollaard (eds.) *State Territory and European Integration* Routledge (London, New York 2006), pp. 1-15.

⁶ Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 *N.Y.U. J. INT’L L. & POL’Y* 663 (2005).

order. WTO law promotes the two phenomena of trans-territorialized rule-making: First, WTO law not only itself sets rules complied with by the WTO member states, but it also, second, requires that its members, under certain circumstances, mutually recognize each other's regulatory standards⁷ and comply with other members' private rule-making and commonly accepted technical standards.⁸ The approach of this Article is thus both descriptive, in that it seeks to map the phenomenon, as well as normative, in that it asks what could be done in view of the so perceived reality. Conversely, this Article does not focus on what should be dealt with in the national or the international sphere.

II. MAPPING TRANS-TERRITORIAL RULE-MAKING

A. Background

Executive rule-making takes place on multiple levels by international and supranational organizations, national government bodies, or by reference to standards set by private actors. It can be created outside of a state, but it can also be the result of extra-territorial application of domestic law to situations located beyond the territory of the regulating state.

Today's de-territorialization of executive rule-making appears to have begun with increased regulation of conditions for cross-border trade and commerce. This regulation was initially accomplished through international treaties such as the 1883 Paris Union Convention for the Protection of Industrial Property⁹ or the 1886 Berne Convention for the Protection of Literary and Artistic Work.¹⁰ Later, more encompassing treaty regimes

⁷ See, e.g., World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures, art. 4.1, Apr. 15, 1994 [hereinafter Sanitary and Phytosanitary Measures Agreement] (requiring that members recognize other member's regulatory standards); Agreement on Technical Barriers to Trade art. 6, Apr. 15, 1994, Marrakesh Agreement of Establishing the World Trade Organization [hereinafter TBT] (ensuring that members accept the results of conformity procedures of other members, even if they differ from their own).

⁸ See, e.g., TBT, *supra* note 6, at art. 8 (requiring that members ensure that any of their non-governmental bodies comply with assessment procedures).

⁹ 1883 Paris Union Convention for the Protection of Industrial Property, Mar. 20, 1883, *available at* http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html. The Paris Union Convention required a certain degree mutual recognition of IP rights granted by other signatory states.

¹⁰ 1886 Berne Convention for the Protection of Literary and Artistic Work, Sept. 9, 1886, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. As the Paris Union Convention, also the

such as the 1948 General Agreement on Tariffs and Trade (GATT) emerged.¹¹ In the 1990s, a period of rapid growth and development of international structures brought GATT into the fold of the WTO.¹²

In many respects the regulation of trade led to a spill-over of regulatory action into areas such as health and safety regulation, banking and insurance regulation, working conditions and labour regulation, taxation and distribution of tax powers, and protection of investments. Another source of trans-territorialization arose from the need to regulate consequences of activities which are not limited to territorially-defined political borders such as environmental regulation and, to a certain degree, regulation of the Internet.¹³ Despite the many differences amongst the “trans-territorialized” regulatory regimes, they both generally have the capacity to exercise considerable influence in domestic administrative practice and decision-making.

For reasons of clarity, the following mapping exercise of trans-territorial rule-making will first look at unilateral rule-making which transcends the territorial limitations of a jurisdiction with *de jure* or *de facto* trans-territorial effect. It will then address trans-territorial rule-making by international organizations, standard setting, and rule-making by conditionality of financial aid by international banks.

B. Unilateral Rule-making with Trans-territorial Effect

The applicability of the public law of one jurisdiction in another jurisdiction is set nationally in the context of what is known as “international administrative law.”¹⁴ Despite the fact that such law is essentially national, it does have to comply with principles of public international law, especially the “links doctrine” as was developed in the wake of the International Court of Justice’s (ICJ) less than universally endorsed

Berne Convention required mutual recognition of the protection of intellectual property rights granted in other states party to the agreement.

¹¹ General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194.

¹² Article XI of the 1994 Marrakesh Agreement Establishing the World Trade Organization.

¹³ See, e.g., Hoi Kong, The Disaggregated State in Transnational Environmental Regulation, 78 MO. L. REV. (2013); Russell L. Weaver, Duncan Fairgrieve & Francois Lichere, The Creation of Transnational Administrative Structures Governing Internet Communication, 78 MO. L. REV. __ (2013).

¹⁴ Kingsbury, *Global Administrative Law*, *supra* note 2, at 34.

Nottebohm decision.¹⁵ This doctrine recognizes as connecting factors, the right to regulate situations having a genuine or effective link to state powers,¹⁶ such as those relating to territoriality, citizenship, and the right of self-organization.¹⁷

Of those three factors, the most commonly applied factor in administrative rule-making is the territoriality principle. Under a strict reading of that principle, states – and supranational organizations such as the EU – cannot enact measures on the territory of another state without the latter’s consent. Positively formulated, the territoriality principle allows a state to exercise regulatory powers unilaterally with respect to all matters related to the territory, either (1) in the context of “subjective territoriality” – which provides a basis of jurisdiction over acts which originated within a foreign territory but were implemented or completed within the relevant state’s own territory – or (2) in the context of “objective territoriality” – a connecting factor in cases in which the affected activity originates within a state’s territory but is implemented or carried to its conclusion abroad. Thereby states have been applying their rules in an extra-territorial fashion. Classic examples have been extra-territorial application of antitrust rules.¹⁸ Newer forms of extra-territorial jurisdiction affect activities which by nature have no, or only little, physical contact with the territory of a jurisdiction such as telecommunications, and Internet law.¹⁹

¹⁵ *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6).

¹⁶ In *Nottebohm* (*Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6)) the ICJ used the phrase “genuine connection,” *Id.* at 23. It is no accident that these links reflect the three-tiered definition of a state in public international law: the existence of a defined territory, a stable population and the possibility of exercising public power by means of autonomously organising some form of a government. See with further explanations James Crawford *The Criteria for Statehood in International Law* 48 BYBIL (British Yearbook of International Law) 93 (1976-77).¹⁷ FREDERICK ALEXANDER MANN, *THE DOCTRINE OF INTERNATIONAL JURISDICTION REVISITED AFTER TWENTY YEARS* 9 (1985); FREDERICK ALEXANDER MANN, *THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW* 3 (1964); Piet Jan Slot & Eric Grabandt, *Extraterritoriality and Jurisdiction*, 23 COMMON MKT. L. REV. 545 (1986).

¹⁷ FREDERICK ALEXANDER MANN, *THE DOCTRINE OF INTERNATIONAL JURISDICTION REVISITED AFTER TWENTY YEARS* 9 (1985); FREDERICK ALEXANDER MANN, *THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW* 3 (1964); Piet Jan Slot & Eric Grabandt, *Extraterritoriality and Jurisdiction*, 23 COMMON MKT. L. REV. 545 (1986).

¹⁸ See, e.g., Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT’L L. 783 (1984); see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-45 (2d Cir. 1945) (discussing the extraterritorial application of U.S. Antitrust Laws); *Case T-102/96, Gencor Ltd. V. Comm’n*, 1999 E.C.R. II-00753, ¶¶ 123-27 (discussing the extraterritorial application of EU antitrust and merger control provisions).

¹⁹ For this reason, for example the 1988 International Telecommunication Regulations (ITRs) were developed at the 1988 World Administrative Telegraph and Telephone Conference (WATTC-88) as supplement the International Telecommunication Convention with the objective of facilitating “global

But there is another dimension to trans-territorialism of executive rule-making. Treaties under public international law may require “mutual recognition” of rules set by other states. Executive rule-making of one state can thereby become applicable by transfer from the law of one jurisdiction into that of another. Voluntary mutual recognition schemes, which are not based on explicit obligations in international or supranational legal systems, include mutual recognition of decisions granting and withdrawing citizenship rights and the use of drivers’ licenses from other jurisdictions. Moreover, bilateral or multilateral free trade agreements or treaties on customs unions frequently contain obligations of mutual recognition of foreign regulatory standards as equivalent to national ones. Where that is the case, a state or jurisdiction refusing to accept the regulatory approaches by others will have to prove that there are overriding concerns of public policy and that there exists a proportionate approach to the non-acceptance of a rule. The possible reasons for non-compliance with foreign law are pre-defined in WTO law and are generally related to public policy concerns regarding issues of health and safety, national security, and environmental protection to name just a few.²⁰ These difficulties of unilateral rule-making with trans-territorial effect in a globalizing world have led to an increasing demand for international organizations as arbiters and often standard setters.

C. Trans-territorial Rule-making by International Organizations

Many international organizations have been granted rule-making powers and in some cases, even single case decision-making powers. Such powers are conferred on traditional international organizations including as the already mentioned WTO. At first glance the WTO appears to be an international organization of this “classic” setting, with rules applicable between states and a small secretariat general administering the treaty provisions. The WTO is, however, a highly judicialized organization by means of its

interconnection and interoperability” of trans-territorial telecommunications traffic. They establish inter alia standards for international routing, charging, accounting and billing between operators and have been criticized for not sufficiently taking into account the non-territorial nature of the internet.

²⁰ See, e.g., Appellate Body Report, *European Communities-Measures Concerning Meat and Meat Products (Hormones)*, ¶ 16, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998); Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

sophisticated dispute settlement system. Less visibly, the WTO has also set up standing committees to establish interpretative texts for the WTO agreements. These committees essentially engage in the equivalent of executive rule-making for further concretization of the more general WTO treaty provisions. An example of this is the WTO's Committee on Sanitary and Phytosanitary Measures (SPS Committee), which issues decisions on common understandings of the interpretation of SPS Agreement articles.²¹ Compliance with these interpretations will create the *prima facie* understanding of compliance with the treaty obligations mostly related to the field of food, animal feed and plant health.

Another example of rule-making by an organization under public international law is the International Labour Organization (ILO). The ILO is composed of a General Conference of representatives of the member states; a "Governing Body" representing governments, employers, and workers; and, finally, an International Labour Office which in turn is controlled by the ILO's Governing Body.²² When proposing standards in the form of recommendations and conventions, the ILO acts as a de-facto rule-maker for labor standards and protection of fundamental rights of workers.²³ However, international organizations exercising rule-making powers do not need to be public. Hybrid public-private forms of organizations on the transnational levels also exist. For example, a hybrid public-private organization engaged in standard setting is the Internet Corporation for Assigned Names and Numbers (ICANN), which is in charge of taking individual decisions on top-level domain name registration for the Internet. Thus, implicit in ICANN's operations is the exercise of rule-making powers concerning the distribution of top-level domains. ICANN, as a private body, is linked to public

²¹ See, e.g., WTO SPS Committee Decision, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/19 (Oct. 24, 2001).

²² Elisabetta Morlino, *Labour Standards: Forced Labour in Myanmar*, in in GLOBAL ADMINISTRATIVE LAW – CASES, MATERIALS, ISSUES 154-56 (Sabino Cassese et al. eds., 2d ed. 2008), available at www.iilj.org/GAL/documents/GALCasebook2008.pdf.

²³ See, e.g., NORMLEX Information System on International Labor Standards, *List of Instruments by Subject and Status*, <http://www.ilo.org/dyn/normlex/en/f?p=1000:12030:0::NO> (last visited Mar. 20, 2013) (listing standards in force). Compliance with these standards is monitored by means of annual reports of the ILO member states. NORMLEX Information System on International Labor Standards, *ILO Constitution*, art. 23-24, http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO (last visited Mar. 20, 2013). The representation procedure under which any industrial association of workers or employers can make representations to the International Labour Office against any of the Member States is found in Article 24 of the ILO Constitution, and a complaints procedure under which one ILO member may file a complaint against another is found in Articles 26, 27, 28 and 33 of the ILO Constitution. See *id.*

international law bodies, such as the World Intellectual Property Organization (WIPO), through its dispute settlement system.²⁴ Disputes involving Internet domain names are settled in the forum of the WIPO's Arbitration and Mediation Center.²⁵ The hybrid public-private rule-making power of ICANN is apparent in the manner in which the WIPO's Arbitration and Mediation Center uses standards established by ICANN as criteria for its arbitration decisions.

Another example of a hybrid organization exercising rule-making functions – at least for those who participate in a specific sport in the context of the international Olympic movement – is the International Olympic Committee (IOC), which is composed of various National Olympic Committees (NOC), each organized either as a private or public organization under the law of individual states.²⁶ In addition to the IOC, the governing bodies of specific sports are often organized into international federations as well as regional and national sub-organizations. Perhaps the most prominent example of these governing bodies is found in soccer, which is governed by an international federation, the Federation Internationale de Football Association (FIFA), but also influenced by regional organizations, such as the Union of European Football Associations (UEFA) in Europe, and smaller national leagues. These structures regulate rules of the games, create sanction regimes for rule violations standing independently from tort claims under national law, and define standards for national criminal law enforcement, such as in the context of doping.²⁷

The effect of rule-making by organizations which are organized under public international law vis-à-vis individuals depends upon whether the treaty provisions on which they are based establishes direct effect “within” the states that have signed it. The courts of member states to a treaty organization generally decide this unless, as in the case of the European Union (EU), the states have delegated the decision of this question to a common court.²⁸ Direct effect is established by national judges on the basis of

²⁴ See Bruno Carotti, *Alternative Dispute Resolution: The ICANN's Uniform Dispute Resolution Policy (UDRP)*, in GLOBAL ADMINISTRATIVE LAW – CASES, MATERIALS, ISSUES, *supra* note 19, at 154-56.

²⁵ *See id.*

²⁶ Lorenzo Casini, *Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA)*, in GLOBAL ADMINISTRATIVE LAW-CASES, MATERIALS, ISSUES, *supra* note 19, at 37.

²⁷ *Id.*

²⁸ See Consolidated Version of The Treaty on European Union, art. 19, Feb. 7, 1992, 2010 C 83/13 O.J. (L 30.3).

whether the treaty parties wanted to confer rights and obligations on individuals – in which case a treaty may be “self executing” – or whether the treaty only intended the state should be bound given, internally, the possibility to act differently even if, externally, the state is risking that it would be obliged to pay damages or suffer other sanctions for non-compliance.²⁹ The increasing plurality of sources with trans-territorial effect have raised the question of direct effect to a highly contested phenomenon. This contested question exists even where international treaties have their own quasi-judicial modes of interpreting the treaty law and the obligations of parties. Again, the WTO serves as a good example. The case law of the Court of Justice of the European Union (CJEU), for example, denies direct effect of WTO law within the EU even in cases in which the WTO’s dispute settlement body has defined the content of the EU’s obligation under WTO law in a specific ruling.³⁰ Next to the promulgation of “formal” international organizations active in the field of rule-making, also less formalized hybrid structures exist which contribute by setting standards for rule making and for mutual recognition.

D. Executive Rule-making by Standard Setting and the Creation of Conditionalities

De-territorialized rule-making often exists in the form of “soft” standard setting. Rather than as directly applicable hard law, soft standard setting allows standardization on the transnational level to be undertaken by public bodies under public international law. It can also be the result of either networks of national public actors or private and public-private hybrid bodies. Public bodies establishing standards include, for example, the Organization of Economic and Commercial Development (OECD) in Paris, an international organization in which states are members. The OECD is active in establishing model standards³¹ and best practice examples including the very influential draft bilateral tax agreements.³² An example of a network-based standard setting is the

²⁹ See, e.g., Jan Klabbers *International Law* Cambridge University Press (Cambridge 2013) 291-295.

³⁰ See, e.g., Case C-377/02, Van Parys v. BIRB, 2005 E.C.R. I-1465.

³¹ See, e.g., ORG. ECON. & COMMERCIAL DEV., OECD STANDARD CODES FOR THE OFFICIAL TESTING OF AGRICULTURAL AND FORESTRY TRACTORS-2013 (2012), <http://www.oecd.org/tad/code/General%20texts.pdf>.

³² See, e.g., ORG. OF ECON. AND COMMERCIAL DEV., MODEL AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS (2002), <http://www.oecd.org/tax/transparency/taxinformationexchangeagreementstieas.htm>.

work of the International Competition Network (ICN), which is an organization of competition agencies throughout the world that exchange practices and concrete information about law enforcement activities in the field of antitrust.³³ Such networks can function by developing standards on their own account or by weaving together publically set and privately set standards to form a hybrid product. An illustrative example of such an approach is the Basel Committee on Banking Supervision (BCBS), which is an influential gathering of top-level national and regional banking regulators.³⁴ The BCBS is a regulatory network that is thus not intergovernmental in nature but might be more aptly described as an inter-agency network – albeit of central banks that are traditionally very independent agencies of a state.³⁵ This network’s key activity is the joint setting of standards in the form of guidelines for national and regional central banks.³⁶ A particularly influential example thereof is the “International Convergence of Capital Measurement and Capital Standards,” developed in the form of the “Basel II” and successor “Basel III” standards, addressing regulation, supervision, and risk management of the banking sector.³⁷

The Basel standards define criteria that private for-profit credit rating agencies must fulfill in order for their assessments to be used for regulatory purposes in the Basel rules on capital requirement for banks.³⁸ The specific decisions of private for-profit companies – i.e., the credit rating agencies – are thus incorporated by reference into public regulatory standards. This leads to an overall hybrid form of public-private regulation. Initially “soft” standards of banking regulation, which are the basis for rating agency activity, thus become hardened through reference in public documents to the results of these very agency ratings.

³³ See *About, INT’L COMPETITION NETWORK*, <http://www.internationalcompetitionnetwork.org/about.aspx> (last visited Apr. 14, 2013).

³⁴ They include representatives from central banks of Argentina, Australia, Belgium, Brazil, Canada, China, the EU, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States of America. See *Fact Sheet-Basel Committee on Banking Supervision*, BANK FOR INT’L SETTLEMENTS, <http://www.bis.org/about/factbcb.htm> (last visited Mar. 29, 2013).

³⁵ Maurizia De Bellis, *The Public Enforcement of Global Private Standard Setting: The Role of Credit Rating Agencies in Basel II*, in *GLOBAL ADMINISTRATIVE LAW – CASES, MATERIALS, ISSUES*, *supra* note 19, at 23, 25.

³⁶ See *id.*

³⁷ *Id.*

³⁸ *Id.*

Further examples of such symbiotic relationships that have a significant impact on real life are evident in standards which can become binding by means of references in international treaty regimes, and therefore can establish obligations for their member states to comply with. Returning to the aforementioned example of the WTO's SPS agreement, its Article 5.1 finds that "Member states shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations."³⁹ The standards for such "assessment techniques" referred to in this paragraph are often established by other international organizations or networks of actors discussed above, such as the World Health Organization's (WHO) *codex alimentarius* for food safety and food designation.

A similar symbiotic relationship exists between obligations to other products. For instance, Article 2.4 of the WTO Agreement on Technical Barriers to Trade states that "where technical standards are required and relevant international standards exist or their completion is imminent, Members shall use them"⁴⁰ Article 2.5 of the same agreement then continues, in its second sentence, to contribute to 'hardening' non-binding international standards by giving a strong incentive for compliance with them by stating that "[w]henver a technical regulation is prepared [by a WTO member state] . . . and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."⁴¹ Compliance with internationally recognized standards can therefore be highly advantageous for member states to the agreement.⁴²

A very different form of rule-making is exercised by international financial institutions such as the World Bank in Washington D.C. or the European Investment

³⁹ Sanitary and Phytosanitary Measures Agreement, *supra* note 7, at art. 5.1.

⁴⁰ TBT, *supra* note 7, at art. 2.1.

⁴¹ *Id.* at art. 2.5.

⁴² One of the main sources of technical standards on the international level is the International Standardization Organization (ISO) (*see About ISO*, INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/about.htm> (last visited Apr. 14, 2013)). ISO is an international body composed of national and regional standard setting organizations, some of which are organized under private law, and others of which are public bodies albeit with private participation. Standards published by ISO are established through formalized procedures, commonly starting with the proposal of new work within a committee by one of its members but also including industry participation.

Bank in Luxembourg (EIB).⁴³ Their regulatory powers arise from the possibility of linking financial benefits, such as obtaining a credit, with certain conditions.⁴⁴ These conditions can deeply influence the political decision-making of national governments and even, in a sense, curtail the most sacred of rights traditionally wielded by parliaments: the budgetary powers. Because of the relevance of conditionality of loans to states can have for the legitimacy and accountability of public decision-making internal accountability mechanisms are increasingly created, for example as complaint boards against the World Bank or EIB decisions regarding enforcement of the conditions. Individuals, as well as public bodies, have the right to complain against recipients of funding from these banks who are non-compliant with the set conditions or with general principles of good governance.⁴⁵

III. CONSEQUENCES ON RIGHTS AND INTERESTS OF INDIVIDUALS

A. *General Considerations*

The tentative mapping of trans-territorial executive rule-making activities demonstrates that in today's world, the realms of what traditionally was distinguished as public international law, on one hand, and administrative law, on the other hand, are increasingly convergent. Many international agreements and organizations are directly concerned with tasks of executive rule-making which transcends the territorial borders of jurisdictions. Such transcending also takes place by means of mutual recognition or tolerated extra-territorial application of national law. To date, no single overarching set of rules or principles has been established as the general guidelines for public

⁴³ See generally MAARTJE VAN PUTTEN, *POLICING THE BANKS: ACCOUNTABILITY MECHANISMS FOR THE FINANCIAL SECTOR* (2008).

⁴⁴ See *id.* at 33.

⁴⁵ See, e.g., Daniel D. Bradlow, *Private Complaints and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403, 405-06 (2005); Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177, 203-19 (2005); Robert Hunter Wade, *Accountability Gone Wrong: The World Bank, Non-Governmental Organisations and the US Government in a Fight over China*, 14 NEW POL. ECON. 25 (2009); see also EUR. INVESTMENT BANK, *THE EIB COMPLAINTS MECHANISM* (2010), http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf (providing an explanation of the EIB Complaints Mechanism).

international law, international administrative law, or any treaties or conventions between states which could function as body of “constitutional”-type norms.

Trans-territorial executive rule-making procedures and the underlying values are, as was illustrated by the examples discussed above, by contrast, established in the context of policy-specific sectoral agreements and networks. These are often pragmatically developed to address the shortcomings of the very notion of territorially-bound public law of states.⁴⁶ The prerequisites for the legality and legitimacy of trans-territorial rule-making activities become increasingly more relevant as international organizations, standard setting bodies, and mutual recognition regimes are becoming more relevant to individuals, while at the same time, the administrative law regimes of states are becoming increasingly internationalized.⁴⁷ Through the above described direct or indirect channels, individuals find themselves subject to executive rule-making established outside the procedural and constitutional legal framework of their home jurisdiction. This means that many important areas of regulatory activity can be removed from the traditional oversight mechanisms of parliamentary control and judicial review which exist in the national context. The internationalization of regulatory regimes thus comes at a ‘price’ – I will address in the following three types of consequences which are, first, de-constitutionalization (B), the empowerment of the executive branch of powers (C) and the empowerment of experts (D).

B. De-constitutionalization

The development of trans-territorial rule-making regimes also has the effect of de-constitutionalization of rule-making procedures by, for example, circumventing participatory forms of rule-making and transparency requirements enshrined in national

⁴⁶ They range from providing a framework for public action in the form of exchange of ideas and creating a forum for development of best practices to international organisations with their own (quasi-) judicial review procedures and those with specific enforcement regimes. Some organisations, like for example the WTO, are based on ‘traditional’ public international law concepts of state membership and state obligations. This goes so far as to project the illusion to be found throughout the language of the WTO agreements of “states” actually being involved in international commerce instead of individuals. Other forms of organisation like that of the OECD are, although traditionally established under public international law, more akin to networks. Further, informal inter-agency networks, such as the international competition network, set informal soft law standards for interpretation and law enforcement of law. Privately organised bodies are relevant to the notion of trans-territorial regulation such as was discussed above in the context of domain name registration through ICANN.

⁴⁷ See VAN PUTTEN, *supra* note 43, at 3 (discussing the spread of globalization).

law.⁴⁸ The lack of overarching legal framework establishing values and principles, as well as serving as benchmark for acceptable procedures, is at the heart of de-constitutionalization through trans-territorialization. The question for trans-territorial rule-making is whether, and where, to look for alternative criteria of good executive rule-making procedures which would legitimize the trans-territorial effect of rule-making. Of course, it would be naïve to expect a coherent hierarchically constructed set of constitutional norms, such as those citizens have become accustomed to in many national jurisdictions, for regulation of matters which now find themselves in the space in-between the purely national and the purely international (in the sense of the traditional notion of public international law as law between states). The debate on the possibilities of constitutionalization of public international law, or some of its regimes such as the WTO, is a sufficient reminder as to the attractiveness of the goal as well as the difficulties associated with achieving it.⁴⁹ One of the problems that is evident when debating the constitutionalization of public international law based regimes is that there are obviously many different understandings of what would legitimately constitute a constitution.⁵⁰ To some, constitutionalization means establishing a framework of ‘higher’ legal principles. But the very absence of an identifiable constitutional foundation also gives rise to specific questions of accountability and legitimacy of regulatory activity beyond the territorially bound state. To others, the notion of a negotiated approach of rule-making, developed in a dialogue between different systems standing in non-

⁴⁸ Annette Elisabeth Toeller & Herwig C.H. Hofmann, *Democracy and the Reform of Comitology*, in DELEGATED LEGISLATION AND THE ROLE OF COMMITTEES IN THE EC 25, 30 (Mads Andenæs & Alexander Türk eds., 2000); Michel Rosenfeld, *Constitutional Versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity*, 32 CARDOZO L. REV. 2339, 2339, 2351 (2011); Fritz W. Scharpf, *Economic Integration, Democracy and the Welfare State*, 4 J. EUR. PUB. POL’Y 18, 27-29 (1997).

⁴⁹ See, e.g., JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 11 (2009); Ernst-Ulrich Petersmann, *Constitutionalism and WTO Law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 32, 34 (Daniel L.M. Kennedy & James D. Southwick eds., 2002) (providing a more specific reference to the WTO).

⁵⁰ For excellent discussions in a book which has unfortunately in the literature only gained little recognition – maybe due to its inclusion into a series of “international studies in the theory of private law” – see TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004); see also Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *surpa*, at 3, 4-10; Christoph Möllers, *Transnational Governance Without a Public Law?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *surpa*, at 329, 337.

hierarchic relations, carries in itself the core of a discursive approach leading to an outcome in some ways legitimated by deliberative elements.⁵¹ Such forum for deliberative intervention could serve as a constitutional forum.

More generally speaking, however, although, no policy-specific regime equals another, the values pursued under the heading of ‘constitutionalization’ can generally be described to include notions of accountability, transparency, democratic participation, and procedural justice in both the exercise of public functions and the protection of the rule of law.⁵² Whether such values are protected in the context of trans-territorial executive cooperation or the delegation of powers to the international level depends on several factors generally related to the “hardening” of the legal regimes and the introduction of independent mechanisms of review and sanctioning.⁵³ The language of such approaches is related to legal notions valuing legal certainty over diplomatic negotiations.⁵⁴ In that sense, one of the central factors that appears to be influencing the real effect of trans-territorial rule-making is whether an international regime directly or indirectly confers rights and obligations on individuals.⁵⁵ If an act of trans-territorial rule-making has such effect, it will generally be of much higher significance to individuals. Further factors for relevance to individuals are also whether an agreement regulates itself or whether it – by means of cross referencing – makes more or less binding standards or by hybrid forms of rule-making.

Whether the procedure leading to an act of transnational rule-making directly or indirectly protects individual rights therefore might be regarded to depend both on the procedure provided for in the rule-making regime and the procedural standards which, in the alternative, would be applicable on the national level. In some cases, international rule-making might offer higher standards than the national approach, while with regard to other countries, it might not. Whether an individual living in a system with a high

⁵¹ See, e.g., Jens Steffek, *Sources of Legitimacy Beyond the State: A View from International Relations*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 50, at 81, 81-83, 100-01 (detailing further references also from the legal-sociological and political science debate).

⁵² See Louis J. Virelli III, *Science, Politics, and Administrative Legitimacy*, 78 MO. L. REV. __, __ (2013) (beginning of Part III).

⁵³ Kalypso Nicolaidis, Gregory Schaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 LAW AND CONTEMPORARY PROBLEMS (2005) 263.

⁵⁴ Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, Harvard Jean Monnet Working Paper 9/00.

⁵⁵ Jan Klabbers *International Law* Cambridge University Press (Cambridge 2013) 292.

protection of individual rights should contend with a lowering of the standards of procedural rights offered to her or him by an international regime is a complex question. It relates to how participatory government and transparency of a legal system are valued. It also relates to the question whether the potential specific values purported by a rule-making regimes such as having environmental or trade benefits spread to a greater amount of individuals around the world, outweigh the potential reduction of individual influence on specific rules as a consequence of the spreading of trans-territorial rule-making.

Where trans-territorial rule-making activities develop direct effect, the question might be whether it would be possible to protect individual rights in the procedure of rule-making, at the rule-making level, through internal control and balance mechanisms that can be independently reviewed. These internal controls are the strongest when individuals have rights of access and can ensure remedies.⁵⁶ Also, where there is no court-like structure, internal accountability mechanisms such as those developed by the World Bank or the EIB can serve as examples of internal control.⁵⁷ With the effective establishment of consequences for a finding of wrongdoing, the persuasive effect of rules might grow, and with it, the role of the rule of law over diplomatic negotiations.

An alternative might be the protection of rights on the “enforcement”-level, which is often the state level. This might be especially relevant in cases of failure of the decision-making level to comply with basic requirements of the rule of law, of procedural justice, or of fundamental rights.⁵⁸ The challenge has been described well by Joerges who states:

⁵⁶ An interesting example from the realm of public international law based regimes includes the European Court of Human Rights (ECtHR). See Bonnie H. Weinstein, *Recent Decisions From the European Court of Human Rights*, AM. SOC. OF INT’L LAW (May 2000), <http://www.asil.org/insigh45.cfm>.

⁵⁷ See *Complaints Mechanism*, EURO. INV. BANK, <http://www.eib.org/about/accountability/complaints/index.htm> (last visited Mar. 20, 2013) (detailing EIB internal accounting mechanisms); *The Inspection Panel*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64132056~theSitePK:380794,00.html> (last visited Mar. 20, 2013) (detailing World Bank’s internal accountability mechanisms).

⁵⁸ An example of this is the non-enforcement in the EU of UN security council decisions on what the UN in self-congratulatory fashion called ‘smart’ sanctions directed against individuals in absence of a regime sufficiently protecting the rights of individuals or granting guarantees of minimum procedural justice. See joined Cases C-402/05 P, *Kadi v. Council of the Eur. Union.*, and C-415/05 P, *Al Barakaat Int’l Found. v. Council of the Euro. Union*, 2008 E.C.R. I-06351; Case C-402/05 P (Opinion of Advocate General), *Kadi v. Council of the Eur. Union*, 2008 E.C.R. I-06351; Case C-415/05 P (Opinion of Advocate General), *Al*

[T]ransnational governance poses fundamental challenges for all international legal disciplines and their commitments to constitutional democracies; if, and, indeed, because transnational governance emerges beyond the realms that states can control, it poses a threat to the type of legitimacy that the citizens of constitutional states feel entitled to expect. And the search for legitimate transnational governance would be hopeless if legitimacy were equated with the type of *demos*-anchored constitutionalism that nation states have established.⁵⁹

The question thus appears very much to be a question of the pluralism of legal orders resulting in a mutual control between regimes – be they on the international or the national levels.

C. Empowerment of the Executive

This discussion, however, is in itself a case in point of the fact that the development of trans-territorial rule-making strengthens the role of the executive branch of powers vis-à-vis political supervision through parliamentary and other forms of oversight including judicial review. Furthering of independence of the executive branch of powers can be regarded as an implicit result of executive actors re-constituting themselves in international networks. Given that traditionally, in western democracies, the international relations are a prerogative of the executive branch of powers,⁶⁰ internationalization of regulatory action can also be a form of self-liberalization of the executive. By expanding means of trans-territorial action, the executive branch of government is thus working towards allowing for an effective exercise of powers.

However, public law arguably is destined to establish more than just forms of effective action, as an equally, if not more, important measure exists in the form of the twin goal of protection of individual rights. The question is how principles, procedural rules, and mechanisms designed to ensure the rule of law, legality, accountability, transparency, and participation can be achieved. These issues bring back the question of

Barakaat Int'l Found. v. Council of the Euro. Union and Comm'n of the Euro. Cmty., 2008 E.C.R. I-06351. The case has led to a rich academic discussion which is impossible to fully cite here. See, e.g., Grainne de Búrca, *The ECJ and the International Legal Order: A Re-Evaluation*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* 105, 107 (Grainne de Búrca & J.H.H. Weiler eds., 2012).

⁵⁹ Christian Joerges, *Constitutionalism and Transnational Governance: Exploring a Magic Triangle*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM*, *supra* note 50, at 339, 340.

⁶⁰ See *Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice*, INTER-PARLIAMENTARY UNION (2006), <http://www.ipu.org/dem-e/guide-7.htm>.

constitutionalization or the procedural protection of values generally enshrined in public law regimes under the rule of law. This shift of powers towards the executive branch is also reflected in the fact that matters traditionally treated as public international law have been the realm of diplomats.⁶¹ Further, “high policy” has increasingly been brought to the area of administrative law and described as a “transition from diplomacy to law,” especially in cases in which administrative law regimes are equipped with strong dispute settlement mechanisms.⁶²

D. Empowerment of Experts

The shift of powers towards the executive branches of power is only part of the story. With increasing importance of references to standards set by experts assembled under the auspices of self-regulation or of expert panels of international organizations,⁶³ one might claim that we are not only witnessing, on the international level, a transition from the rule of diplomats to lawyers, but also to technical experts. The real-life reason is that what might not be possible to achieve on a national level due to the highly political nature of a measure, might through the veil of expertise-driven international regulation, become palatable to the national audience. One of the answers to the problem of finding an acceptable balance between differing regulatory levels or philosophies of risk-regulation in international trade as well as often in national legal systems has been to reduce the power of political executives by referring to the presumably “neutral” forum of experts.⁶⁴

How does this ethos of expertise, as one might refer to it, influence the notion of executive rule-making in the context of de-territorialized exercise of public powers, and what is the role of law in the area of de-territorialized executive rule-making? In an ideal world, experts would be guarantors of independence by virtue of being bound by the scientific method as well as epistemic values of the scientific community. By acting

⁶¹ *See id.*

⁶² J.H.H. Weiler, *The Role of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Resolution*, 35 J.WORLD TRADE 191, 192-97, 200 (2001).

⁶³ See part II. D. of this article.

⁶⁴ For instance, the Global Forest Expert Panels, launched in 2007, provides “independent scientific assessments of key issues in order to support more informed decision-making at the global level.” *Global Forest Expert Panels*, INT’L UNION OF FOREST RESEARCH ORGS., <http://www.iufro.org/science/gfep/> (last visited Mar. 20, 2013).

according to their professional ethos and seeking recognition in these circles, they would comply with an independent code of conduct free from outside influences. This optimistic, even idealistic, account is, of course, not what the reality holds out for regulatory regimes. Similar to national law, where the approach to referring to technical standards is also an important phenomenon, three of the central questions are: How to address the reality of scientific uncertainty and justifiably differing opinions within the scientific community? Who is going to be represented? Who asks the questions and sets the agendas for the experts to address?

Solutions to these types of questions could be imagined by mixing the models, of purely expertise-based decision making with more broad pluralist participation in order to attempt to counter-balance disadvantages associated with each. Difficulties, of adding participatory procedures outside of the national context, however, exist. These include the questions how participatory procedures could be designed in which stake-holders are sufficiently aware of the legal framework and will not experience problems of access to information and active participation due to language problems. Addressing these problems on a national scale is already not easy. Trying to develop such models on a scale involving all interests which are outside of the deciding jurisdiction has the potential to multiply these difficulties.

IV. SOME CONCLUSIONS

As a result of the aforementioned consequences, one might infer that the more the individual rights or economic interests of the parties subject to rule-making are affected, the more it might be relevant to ensure compliance with basic constitutional values such as the principle of legality, proportionality, accountability, transparency, rights of defense, and rights of participation, to name a few. These values should not be made subject or victim of the de-territorialization of executive rule-making procedures.

Administrations either seeking to enhance effectiveness of their activities through delegation of powers to bodies outside their jurisdictions or engaging in international cooperation should ensure that the exercise of these powers does not compromise fundamental values. One possible approach might be to consider creating an

international instrument similar to the Vienna Convention on the Law of Treaties of 1969, however, one which would not deal with interpretation of international treaties, but would instead address rule-making on the trans-national level.

A convention of this nature could establish minimum procedural rules for the setting of rules and standards by international organizations and standard setters. Examples of such rules exist. They are formulated in language and contain content similar to existing national administrative codes. For instance, the WTO Agreement on Technical Barriers to Trade (TBT), in annex 3 to Article 4.1 establishes a “Code of Good Practice for the Preparation, Adoption and Application of Standards.”⁶⁵ This code states, *inter alia*, that standards need to be announced in a publically available work program and that “[b]efore adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties.”⁶⁶ It continues to define the extent and conditions of the notification as well as rules on the use of responses obtained. A “body shall take into account, in the further processing of the standard, the comments received during the period for commenting” and respondents shall have a right to an “explanation why a deviation from relevant international standards is necessary.”⁶⁷ The TBT provisions are not the only example. Another is the Aarhus Convention,⁶⁸ which in Article 8 on “public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments” sets out minimum standards for public participation in executive rule-making through a notice and comment style procedure.⁶⁹

These examples might be criticized for containing only a basic framework. However, it is important to note that these examples show that procedural rules on rule-making procedures are beginning to emerge on the international level. The challenge

⁶⁵ Code of Good Practice for the Preparation, Adoption and Application of Standards, TBT, *supra* note 7, at Annex 3.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, *available at* <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>. The Aarhus Convention is a multilateral agreement on procedural rules to be adopted by its signatories in the field of environmental regulation and access to documents and information by individuals. Its signatories include many European states and the EU.

⁶⁹ *Id.*

now is to analyze the possibility of generalizing some of their approaches across policy sectors. Even if one were not to achieve an international convention on trans-territorial rule-making, the learned legal community might be able to begin distilling requirements for legitimate trans-territorial rule-making from these and similar examples.