THE MONTREAL PROTOCOL IN U.S. DOMESTIC LAW: A "BOTTOM UP" APPROACH TO THE DEVELOPMENT OF GLOBAL ADMINISTRATIVE LAW

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Increasingly, international regimes create regulatory systems that directly affect individuals, leading to reduced control by democratically-elected legislatures and executives. Global administrative law (GAL) scholars suggest that one way to address the accountability and legitimacy deficits inherent in such regimes could be through the "bottom up" application of administrative law principles by domestic courts and agencies to the actions of global regulatory regimes and the participation of domestic administrative officials in these regimes. This paper shows that many mechanisms and procedures advocated for by GAL scholars as part of a bottom up approach to the development of GAL can be seen in the United States's participation in the development of the 1989 Montreal Protocol on Substances that Deplete the Ozone Layer and its subsequent implementation by the U.S. Environmental Protection Agency. This paper argues that these procedures have increased participation and transparency in the development and domestic implementation of global regulatory decisions, but have done little to increase the accountability or legitimacy of the Montreal Protocol regime itself.

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Introduction

A widely expressed concern with the proliferation of international regimes and their increasing influence is that the globalization of regulation that affects private individuals leads to accountability and legitimacy deficits by divorcing regulation from the domestic context, where it is controlled by democratically-elected legislatures and executives.[1] Global Administrative Law (GAL) scholars suggest that these legitimacy and accountability deficits can be addressed at least in part through the application of administrative law principles to

1. *See, e.g.*, Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15, 16 (2005) (discussing how the situation of increasing regulation by international and transnational bodies has created an accountability gap); Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. Int'l L. & Pol. 695, 695 (2005) [hereinafter Stewart, *Global Regulatory Challenge*] (arguing that the shift of regulatory authority from nation state to a wide range of global regulatory regimes has resulted in sidestepping domestic accountability mechanisms).

global regulatory functions.[2] A global administrative law, they posit, can be developed either through the "bottom up" application of administrative law principles by domestic courts and agencies to the actions of global regulatory regimes and the participation of domestic administrative officials in these regimes, or through the "top down" application of administrative law principles to international regime action by international organizations and international tribunals.[3]

Many of the mechanisms and procedures promoted by scholars as part of a bottom up approach to the development of global administrative law can be seen in the United States's participation in the development of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol or Protocol)[4] and its subsequent implementation by the U.S. Environmental Protection Agency (EPA). This Note will show that, while this bottom up approach may be effective in the United States for increasing participation, reason-giving, and transparency, it is unlikely to be a successful way to increase the legality of global decision-making or to ensure effective review by courts. Moreover, because a bottom up approach primarily addresses domestic audiences rather than the broader global public that is affected by the actions of the regime, it is insufficient to secure the accountability and legitimacy of the regimes themselves.

Part I lays a foundation for the Note by fleshing out what is meant by a bottom up approach to the development of global administrative law, and by raising empirical and normative questions about the implications of this form of global administrative law development. Part II sets the stage for the Montreal Protocol case study with an overview of the Protocol's history, key features, and implementation in the United

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2. *E.g.*, Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1490, 1494 (2006); Kingsbury, Krisch & Stewart, *supra* note 1, at 16–17.

3. *E.g.*, Kingsbury, Krisch & Stewart, *supra* note 1, at 53; Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 71-72 (2005) [hereinafter Stewart, *U.S. Administrative Law*].

4. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29 [hereinafter Montreal Protocol], *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%201522/volume-1522-I-26369-English.pdf.

States. Part III explores examples of global administrative law practices in the development and implementation of the Montreal Protocol and examines two controversies in which U.S. courts were asked to review the actions of the government against principles articulated in formal Decisions of the Montreal Protocol Parties. Finally, Part IV draws lessons from this case study for the ability of a bottom up application of administrative law practices to promote global administrative law goals of increasing the accountability and legitimacy of the international regime and the domestic actors participating in it.

I. Approaches to the Development of Global Administrative Law

Over the last thirty years, in response to increasing economic globalization and a recognition of the global nature of pressing health and environmental concerns such as avian influenza and climate change, international regimes that aim to regulate individual behavior have become increasingly numerous and powerful.[5] Because these regimes regulate individuals and corporations with less mediation through the state, scholars and practitioners alike have become increasingly concerned with the democratic deficit implicit in regulation by unelected international bureaucrats.[6] In their article on the emergence of a global administrative law, Professors Kingsbury, Krisch, and Stewart note that this situation has stimulated the development of administrative law mechanisms at the international level, as well as the extension of domestic administrative law to international regulatory decisions.[7] Looking forward, they suggest that the application of administrative law principles to international governance could be a way to begin to overcome these legitimacy and accountability deficits, for example, by ensuring the legality of the administrative actions taken by the international body, protecting the rights of

5. These regimes range in structure from formal treaty organizations like the WTO to informal networks like the Basel Convention.

6. *See, e.g.*, Kingsbury, Krisch & Stewart, *supra* note 1, at 16 (describing factors contributing to an accountability deficit in transnational regulation); Stewart, *Global Regulatory Challenge*, *supra* note 1, at 695 (describing how global regulatory regimes escape both domestic and traditional international accountability mechanisms).

7. Kingsbury, Krisch & Stewart, *supra* note 1, at 16.

individuals and other affected actors, and promoting democracy.[8]

The normative aims of global administrative law can be grouped into four broad categories: (1) ensuring that the international regime is effective,[9] (2) ensuring that domestic and international administrators acting within and through the regime are accountable to legal principles[10] and to the public,[11] (3) ensuring that the regime is perceived as legitimate by those affected by it,[12] and (4) ensuring that the private rights of individuals and entities affected by the regime are protected.[13] The key administrative law principles, generally borrowed from domestic law contexts, which have been promoted to support the achievement of these values include transparency, participation, reasoned decision-making, legality, and effective review.[14]

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8. *Id.* at 43–44 (discussing three normative bases for global administrative law).

9. *See* Esty, *supra* note 2, at 1490, 1517 (listing "expertise and the ability to promote social welfare," which he calls "results-based legitimacy" as one of several bases for legitimacy in global governance); David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 770 (1994) (naming efficacy and accountability as "twin goals").

10. *See* Kingsbury, Krisch & Stewart, *supra* note 1, at 45 (suggesting that a possible approach to global administrative law could emphasize legality and focus on review of decision-making); Stewart, *U.S. Administrative Law*, *supra* note 3, at 74 (describing the traditional function of administrative law as ensuring accountability for the legality of administrative decisions).

11. *See* Stewart, *U.S. Administrative Law*, *supra* note 3, at 75 (mentioning that administrative law has "the broader goal of promoting responsiveness and securing accountability to social interests").

12. *See* Esty, *supra* note 2 (discussing different types of legitimacy and the importance of administrative procedural safeguards in international regimes where democratic legitimacy is lacking); *see also* Stewart, *Global Regulatory Challenge*, *supra* note 1, at 756 (listing enhancing legitimacy as a reason that international regimes adopt administrative law elements).

13. *See* Kingsbury, Krisch & Stewart, *supra* note 1, at 46 ("The most common rights-based justification of the need for a global administrative law is the conception of *individual rights* . . . ."); Wirth, *supra* note 9, at 797 (explaining that regularity and transparency of procedures are particularly important as states become less adequate representatives of non-governmental actors within their jurisdiction).

14. *See* Stewart, *Global Regulatory Challenge*, *supra* note 1, at 696 (describing global administrative law), 718 (listing key elements of U.S. administrative law); *see also* Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663, 690-92 (2005) (listing principles including legality, participation, consultation, hearing,

If a system of global administrative law incorporating principles of transparency, participation, reasoned decision-making, legality, and effective review is a positive development because it leads to greater regime effectiveness, accountability and legitimacy, and better protection of private rights, a key question is how such a system can be developed. Global administrative law scholars have suggested both top down approaches and bottom up approaches are possible.[15] In a top down approach, administrative law principles are incorporated at the global level by the international organization itself, or by an international tribunal or court reviewing the actions or decisions of the international organization.[16] In a bottom up approach, on the other hand, individual states within an international regime extend domestic administrative law "upward" to encompass decision-making at the international regime level, including participation by domestic regulatory agencies and officials in the development of applicable standards and regulations in the context of the international regime.[17]

In the United States, there are a number of ways that well-developed domestic administrative law practices could be extended to provide greater accountability for regulation arising out of an international regime. For example, before entering into negotiations in a international regulatory body, the domestic agency involved could use the notice-and-comment rulemaking process to describe and solicit comments on the regulations that the international body is going to consider on its proposed position. The agency could use those comments to inform its position in the negotiations or international decision-making in the same way it would use the comments to inform internal or inter-agency decision-making. Such a process could significantly increase participation of the domestic public in the making of regulations that directly affect them, although it flies in the face of traditional notions of diplomatic secrecy and would likely be portrayed by critics as unduly tying

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and reasoned decision-making); David A. Wirth, *The Uneasy Interface Between Domestic and International Environmental Law*, 9 AM. U. J. INT'L L. & POL'Y 171, 186–87 (1993) (promoting improved public access and public participation in multilateral fora).

15. *E.g.*, Kingsbury, Krisch & Stewart, *supra* note 1, at 53; Stewart, *U.S. Administrative Law, supra* note 3, at 71–72.

16. Stewart, *U.S. Administrative Law*, *supra* note 3, at 72.

17. *Id.*

the negotiators' hands. Another possibility would be for the domestic agency, when implementing a domestic regulation in accordance with a decision taken at the international level, to provide a summary and explanation of the discussions and decision-making at the international level that led to the proposed rule as part of the normal notice-and-comment rulemaking process. Such an explanation could even include an analysis and justification of the role of agency officials in the international decision-making process.[18]

U.S. domestic courts could play a key role in the development of global administrative law, either directly by reviewing actions of international bodies for compliance with due process and other applicable administrative law standards, or more indirectly by considering decision-making at the international level as part of the record when reviewing domestic agency implementation of an international norm, standard, or policy.[19] The latter approach would reinforce agency policies like the use of notice-and-comment process for participation in and implementation of international decision-making, while the former would be a way for courts to independently spur the development of administrative law principles at the international level.

Stewart notes three challenges that may be faced in developing global administrative law from the bottom up in the United States. First, administrative law principles are applied to formal agency rulemaking, but international negotiations and decision-making normally precede a formal rulemaking and are carried out more informally.[20] Therefore, the Administrative Procedures Act as it currently stands would not be grounds for a court to demand that an agency give notice and invite comment on these early stages or to require adequate reasoning for decisions at the international level. Second, promoting openness, transparency, and public involvement in the international phases of decision-making runs up against the traditional deference given to the executive in foreign relations, and could be seen as curtailing needed discretion and flexibility.[21] The potential for loss of discretion and flexibility

18. *Id.*
19. *Id.* at 78–79.
20. *Id.* at 75.
21. Stewart, *Global Regulatory Challenge*, *supra* note 1, at 753–54.

could make the executive branch less willing to adopt administrative law procedures in an international context, while the conflict with the established norm of foreign affairs deference might make courts reluctant to review the decisions and procedures followed. Finally, the application of domestic administrative principles to interactions with an international regime might draw opposition from other nations and international actors if it is seen as imposing U.S. norms or giving undue influence to U.S. domestic interest groups.[22] This challenge, however, will be of reduced concern if these principles can be portrayed as general legal principles supporting global values.

Surveying the current global administrative law literature[23] prompts several questions about a bottom up approach to the development of a global administrative law in the United States. One major question is whether some of the many administrative law procedures that could support the development of global administrative law tend to be easier than others to implement in the current U.S. system. It is equally important to see whether, in practice, a bottom up approach to developing a global administrative law supports certain values and principles better than others. A related question is to what extent this approach is likely to ensure accountability and enhance legitimacy and effectiveness of the international regime and/or the domestic agency. The rest of this Note will use the example of the development and implementation of the Montreal Protocol to explore the answers to these questions because, as a treaty that aims to regulate the actions of individuals, it raises precisely these accountability and legitimacy concerns. In order to facilitate this discussion, the next section provides general background information on the Montreal Protocol itself.

II. Overview of the Montreal Protocol

People in the United States and around the world began to be concerned with the problem of ozone depletion in the mid-1970s when researchers at the University of California demonstrated how chlorofluorocarbons (CFCs) destroy the

22. *Id.* at 755.

23. *E.g.*, Cassese, *supra* note 14; Esty, *supra* note 2; Kingsbury, Krisch & Stewart, *supra* note 1; Stewart, *Global Regulatory Challenge*, *supra* note 1; Stewart, *U.S. Administrative Law*, *supra* note 3.

stratospheric ozone layer,[24] which shields the earth from UV radiation that causes health and environmental harm including skin cancer.[25] International concern was heightened in the mid-1980s when scientists observed significant thinning of the ozone layer over Antarctica.[26] The global effects of ozone depletion demanded a global response,[27] and in the 1985 Vienna Convention states agreed to cooperate in researching and assessing the problem and to develop a protocol that would establish specific control measures.[28] In the Montreal Protocol, which came into force in 1989, state Parties agreed to reduce consumption of CFCs by 50% from 1986 levels and freeze consumption of halons.[29] The Protocol was later amended to require the Parties to completely phase out these and six other groups of ozone depleting substances, most in the mid-1990s or early 2000s.[30]

The Montreal Protocol established a complex regime for addressing the problem of ozone depletion in an ongoing manner. At a structural level, the Protocol has a standing Secretariat at the United Nations Environment Program (UNEP) headquarters in Nairobi which handles coordination and ad-

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24. Steven J. Shimberg, *Stratospheric Ozone and Climate Protection: Domestic Legislation and the International Process*, 21 ENVTL. L. 2175, 2183 (1991). Other chemical compounds that contain chlorine and bromine have been shown to react with ozone in a similar manner. The chemicals which are currently regulated as ODS under the Montreal Protocol and by the EPA are: halons, chlorofluorocarbons (CFCs), carbon tetrachloride, hydrobromofluorocarbons (HBFCs), methyl chloroform, chlorobromomethane, methyl bromide and hydrochlorofluorocarbons (HCFCs). U.S. ENVTL. PROT. AGENCY, MONTREAL PROTOCOL: REGULATORY SUMMARY 1 [hereinafter MONTREAL PROTOCOL: REGULATORY SUMMARY], *available at* http://www.epa.gov/ozone/downloads/MP20_Reg_Summary.pdf.

25. Protection of Stratospheric Ozone, 53 Fed. Reg. 30,566, 30,566 (Aug. 12, 1988) [hereinafter Montreal Protocol Final Rule].

26. Shimberg, *supra* note 24, at 2184.

27. *See* Montreal Protocol Final Rule, *supra* note 25 at 30,569 (explaining how ODS mix in the atmosphere and threaten the integrity of the ozone layer worldwide). Greenhouse gases that contribute to global warming are the other significant global pollutant.

28. EDITH BROWN WEISS, THE VIENNA CONVENTION FOR THE PROTECTION OF THE OZONE LAYER AND THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER 1 (2009), *available at* http://untreaty.un.org/cod/avl/pdf/ha/vcpol/vcpol_e.pdf.

29. *Id.* at 2.

30. MONTREAL PROTOCOL: REGULATORY SUMMARY, *supra* note 24, at 2. HCFCs, with a complete phase-out date of 2030, are the exception. *Id.*

ministrative matters,[31] three Assessment Panels which provide regular scientific and technical assessments to the Parties,[32] an Implementation Committee that considers and reports on non-compliance issues,[33] and annual Meetings of the Parties (MOPs) in which Decisions of the Parties are discussed and agreed upon.[34]

In addition, the Protocol provides for three different mechanisms for responding to new scientific knowledge or implementation problems. First, new chemicals may be added to the list of controlled substances through an amendment to the Protocol.[35] Amendments are only binding on States which ratify them, and States can continue to be Parties to the Protocol without ratifying subsequent amendments.[36] Second, targets and timetables for phase-outs may be adjusted by a two-thirds majority, and such Adjustments[37] are binding on all Parties.[38] Third, by the same two-thirds majority, the Parties at their Annual Meetings may make a variety of other Decisions relating to the implementation of the treaty. Such Decisions have laid out rules of procedure, established a financial mechanism and a dispute resolution process, and provided additional clarification on numerous terms in the Protocol.[39]

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31. *About the Secretariat*, U.N. ENV'T PROGRAMME OZONE SECRETARIAT, http://ozone.unep.org/new_site/en/about_the_secretariat.php (last visited Apr. 16, 2013).

32. *Assessment Panels*, U.N. ENV'T PROGRAMME OZONE SECRETARIAT, http://ozone.unep.org/new_site/en/assessment_panels_main.php (last visited Apr. 16, 2013).

33. *Non-Compliance Procedure (1998)*, U.N. ENV'T PROGRAMME OZONE SECRETARIAT, http://ozone.unep.org/new_site/en/Treaties/non_compliance_procedure.php (last visited Apr. 16, 2013).

34. *Meetings*, UNITED NATIONS ENV'T PROGRAMME OZONE SECRETARIAT, http://ozone.unep.org/new_site/en/historical_meetings.php (last visited Apr. 16, 2013).

35. WEISS, *supra* note 28, at 2.

36. *Id.*

37. Throughout this Note, I will capitalize the words Adjustment and Decision when referring to an Adjustment of the Protocol or Decision of the Parties to distinguish these formal terms from these words used in their generic sense.

38. Montreal Protocol, *supra* note 4, at art. 2 ¶ 9.

39. For a full list and text of all the Decisions of the Parties, see *Online Decisions*, U.N. ENV'T PROGRAMME OZONE SECRETARIAT, http://ozone.unep.org/new_site/en/Treaties/decisions_text.php (last visited Apr. 16, 2013).

In response to pressure from citizens concerned about the environment and chemical companies looking for a market for CFC alternatives, the United States strongly supported international efforts to address ozone depletion and the development of the Montreal Protocol.[40] The Protocol was ratified unanimously on March 14, 1988,[41] and Congress in 1990 enacted amendments to the Clean Air Act (1990 Amendments) implementing its provisions.[42] The EPA then promulgated regulations controlling ozone depleting substances as required under the Montreal Protocol and the Clean Air Act.[43]

III. "Bottom Up" Application of Administrative Law Principles in the Implementation of the Montreal Protocol

Because ozone depletion is caused by individual companies and people using ozone depleting chemicals, the ultimate goal of the Montreal Protocol regime is to regulate the actions of private parties within the borders of all members states, not just the behavior of states in relation to each other. The Montreal Protocol regime therefore raises the sort of accountability concerns that have motivated calls for development of a global administrative law.[44] Moreover, the implementation of the Montreal Protocol in U.S. domestic law shows many of the features of a bottom up development of global administrative law discussed in Part I, particularly transparency, participation, and reason-giving. The regime is thus a useful case study of the effectiveness of a bottom up approach to the development of global administrative law for achieving goals of regime effectiveness, accountability and legitimacy, and protection of private rights.

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40. Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 Harv. Envtl. L. Rev. 1, 4 (2007); *see also* Shimberg, *supra* note 24, at 2184–92 (arguing that U.S. domestic opinion supported stronger and even unilateral action throughout the development and early years of the Montreal Protocol).

41. Sunstein, *supra* note 40, at 1.

42. Clean Air Act Amendments of 1990, PL 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. § 7671).

43. Montreal Protocol Final Rule, *supra* note 25, and regulations at 40 C.F.R. pt. 82.

44. *See supra* Part I (discussing the concern with accountability deficits in global administrative law).

During the development of the Protocol, for example, the EPA informed the public of its involvement through notices published in the Federal Register[45] and invited public participation through a series of conferences on the science of ozone depletion and possible control measures.[46] The EPA and the State Department also prepared an Environmental Impact Statement (EIS) addressing the environmental impact of the Protocol,[47] and the EPA conducted a regulatory impact analysis on its proposed regulations under the Protocol.[48] In addition, throughout the implementation of the Montreal Protocol, the EPA has consistently implemented new adjustments to the Protocol and Decisions of the Parties through notice-and-comment rulemaking procedures, inviting and responding to public comment on the specific control measures to be adopted. The EPA has also asked for public comment to guide its participation in the annual Meetings of the Parties, particularly in the formulation of critical use exemptions for methyl bromide. Notably, the executive branch has driven this transparency and public participation, and the courts have not played a role in holding the EPA to norms of administrative procedure.

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45. *See* Environmental Impact Statement on Protocol to the Vienna Convention for the Protection of the Ozone Layer, 52 Fed. Reg. 29,110, 29,110 (Aug. 5, 1987) [hereinafter EIS Notice 2] (summarizing developments concerning the Protocol over the past three years); Stratospheric Ozone Protection Plan, 51 Fed. Reg. 1257 (Jan. 10, 1986) [hereinafter Ozone Regulation Development Plan] (describing the context for EPA actions on CFCs, including international developments) .

46. *See* Air Program; Stratospheric Ozone Protection Activities, 51 Fed. Reg. 21,576, 21,576 (June 13, 1986) [hereinafter Workshop Announcement 2] (inviting participation in a joint UNEP-EPA workshop on health and environmental effects of CFCs); Stratospheric Ozone Protection Activities, 51 Fed. Reg. 5091 (Feb. 11, 1986) [hereinafter Workshop Announcement 1] (inviting participation at a workshop on CFC use and emission control technologies and the joint UNEP-EPA mentioned above); Ozone Regulation Development Plan, *supra* note 45, at 1257 ("Throughout the implementation of this program, EPA encourages public review and participation.").

47. Protocol to the Proposed Convention for the Protection of the Ozone Layer Negotiated Under the United Nations Environment Programme; Meeting, 49 Fed. Reg. 30,823 (Aug. 1, 1984) [hereinafter EIS Notice 1]; EIS Notice 2, *supra* note 45.

48. *See* Protection of Stratospheric Ozone, 52 Fed. Reg. 47,489, 47,512–14 (Dec. 14, 1987) [hereinafter Montreal Protocol Proposed Rule] (describing the EPA's findings in the regulatory impact analysis).

This section will discuss the administrative law features in the development and implementation of the Protocol, while the following sections will explore reasons for their inclusion and implications for the development of global administrative law.

A. *Participation and Transparency in the Development of the Montreal Protocol*

During the preparation of the Montreal Protocol, the executive branch took a number of measures to increase public participation and transparency. Remarkably, these measures not only included meetings and informal exchanges of information but also various official procedures. These procedures included preparation of an EIS and publication of notices in the Federal Register,[49] which are standard domestically but are not generally used in the context of international negotiations. In entering into Montreal Protocol negotiations, the EPA and the State Department prepared an Environmental Impact Statement in accordance with the National Environmental Policy Act (NEPA), which requires the preparation of an EIS for any major federal action with significant environmental impacts.[50] Although NEPA normally applies only to domestic activities, Executive Order 12114 of 1979 explicitly extended the EIS requirement to "major Federal actions that could significantly affect the environment of the global commons outside the jurisdiction of any nation."[51] In the EIS, the EPA and the State Department evaluated the alternatives of no action, unilateral U.S. action, or several different international agreements, as well as discussing the chemicals covered, control measures, timing of implementation, and the potential impacts of each alternative on health, the environment, and socioeconomics.[52] The EPA also prepared a risk analysis and a regulatory impact analysis which were incorporated into the

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49. *See supra* notes 45–48 (listing the relevant Federal Register notices).

50. *See* 42 U.S.C. § 4332(2)(C) (2006) (describing the requirements of an environmental impact statement).

51. Exec. Order No. 12,114, 3 C.F.R. 356 (1979); *see also* EIS Notice 1, *supra* note 47, at 30,824 (noting that E.O. 12,114 "requires the preparation of an EIS for major Federal actions that could significantly affect the environment of the global commons outside the jurisdiction of any nation").

52. EIS Notice 2, *supra* note 45, at 29,112.

final EIS.[53] Although the final EIS was not released until after the President had signed the Montreal Protocol, it was still available in time to inform the Senate's ratification of the Protocol and adoption the 1990 Clean Air Act Amendments, as well as the EPA's subsequent regulations.[54]

In addition to following standard administrative law procedures in the preparation of an EIS and a regulatory impact analysis, the EPA also provided significant opportunities for public participation through a series of workshops. First, in anticipation of the preparation of an EIS in 1984, the EPA and the State Department held a "scoping meeting" to refine the list of significant issues to be considered in the EIS.[55] Interested parties were invited to make short oral statements at the meeting or to submit written statements.[56] Second, in the lead-up to the finalization of the Montreal Protocol, the EPA held a number of major workshops and conferences for the public. For example, a two-day workshop held in March 1986 examined future demand for CFCs and other ozone depleting substances and explored possible technical control options.[57] Additionally, a two-day workshop in July 1986 focused on alternative control technologies and their environmental and economic impacts.[58] For both of these workshops, the EPA solicited papers which it included as part of its own submission for UNEP conferences on the same topic held a few months later.[59] The UNEP and the EPA also co-sponsored a four-day conference on the health and environmental effects of ozone depletion and climate change for which they invited the public to submit proposals for presentations and posters.[60]

In contrast to traditional diplomatic secrecy, the EPA increased the transparency of the negotiation process by provid-

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53. STRATOSPHERIC PROT. PROGRAM, U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL IMPACT STATEMENT ON MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER i (Jan. 20, 1988).

54. The EIS was released on January 20, 1988, and the Senate ratified the Protocol on April 4, 1988.

55. EIS Notice 1, *supra* note 47, at 30,825.

56. *Id.*

57. Workshop Announcement 1, *supra* note 46, at 5091.

58. Workshop Announcement 2, *supra* note 46, at 21,577.

59. Workshop Announcement 1, *supra* note 46, at 5092; Workshop Announcement 2, *supra* note 46, at 21,577.

60. Workshop Announcement 1, *supra* note 46, at 5092.

ing periodic updates to the public through notices in the Federal Register.[61] For example, in the August 1987 Notice announcing a resumption of work on the EIS, the EPA and the State Department briefly discussed the progress of negotiations since 1984 and areas of remaining disagreement.[62] They also described the key provisions of the UNEP Secretary's proposed draft Protocol that the Parties expected to discuss at the upcoming Montreal conference.[63] In its December 1987 proposed rulemaking, after the signing of the Montreal Protocol, the EPA focused less on the process of the negotiations,[64] but it did provide a detailed narrative overview of the provisions of the Protocol.[65] Furthermore, the EPA explained why it judged the Protocol's control measures to be an appropriate response to problem of global ozone depletion.[66] Although the EPA did not provide the full analysis and justification of its role in the negotiations that Stewart suggests would be desirable,[67] the EPA's discussion of its reasons for supporting international action through the Montreal Protocol nonetheless allowed the public to question that position. This public response led to a dialogue in the 1988 final rulemaking on the relative merits of unilateral U.S. action vs. multilateral action under the Protocol.[68] While it is unlikely that a court would overrule an agency's decision to support a multilateral process on the basis of insufficient reason-giving, from the perspective of developing stronger global administrative law, the process of giving written reasons that can be critiqued is a substantial step towards giving the public the ability to hold domestic agencies accountable for their participation in international bodies.

B. *Participation, Transparency and Reason Giving in the Implementation of the Montreal Protocol in U.S. Law*

The Montreal Protocol was not only noteworthy for the attention given to transparency and participation in its devel-

61. *E.g.*, Montreal Protocol Proposed Rule, *supra* note 48; EIS Notice 2, *supra* note 45; Ozone Regulation Development Plan, *supra* note 45.
62. EIS Notice 2, *supra* note 45, at 29,111.
63. *Id.*
64. Montreal Protocol Proposed Rule, *supra* note 48, at 47,491.
65. *Id.* at 47,495–98.
66. *Id.* at 47,498–99.
67. Stewart, *U.S. Administrative Law*, *supra* note 3, at 72.
68. Montreal Protocol Final Rule, *supra* note 25, at 30,573–74.

opment, but also for the reflection of these values in the administrative procedures accompanying its implementation in the United States. Throughout the more than 20 year history of the Montreal Protocol regime, the EPA, as the primary implementing agency, has had to walk a fine line in balancing deference to the international regime with responsiveness to affected individuals and corporations domestically. The domestic notice-and-comment rulemaking process has been key to that balancing. A particularly good example of this balancing is seen in the annual process the EPA uses to request an exemption from the Montreal Protocol Parties ("Montreal Protocol Parties" or "Parties") for domestic production and consumption of methyl bromide.

When the Montreal Protocol Parties agreed to phase out methyl bromide by 2005, they provided an exception to the phase-out under which the Parties could "decide to permit that level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses."[69] In accordance with Decision of the Parties IX/6,[70] the Parties determine what critical use exemptions to grant in a three-part process in which individual countries submit annual "nominations" explaining the amount of methyl bromide they need to use for the next year.[71] In the United States, the EPA's nomination is based on applications for exemptions from individuals and companies received in response to a formal notice in the Federal Register.[72] The EPA also holds stakeholder meetings with growers around the country,[73] and asks applicants to discuss the technical and economic reasons that alternatives to methyl bromide would not be feasible.[74]

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69. Montreal Protocol, *supra* note 4, art. 2H(5).

70. Critical Use Exemptions for Methyl Bromide, Dec. IX/6 (Sept. 17, 1997), *available at* http://montreal-protocol.org/new_site/en/Treaties/decisions_text.php?m_id=23&show_all.

71. Protection of Stratospheric Ozone: Process for Exempting Critical Uses of Methyl Bromide, 67 Fed. Reg. 31,798, 31,800 (May 10, 2002) [hereinafter 2005 Critical Use Exemption Notice].

72. *See id.* (soliciting applications and describing the process of requesting a nomination).

73. *See* Protection of Stratospheric Ozone: Critical Use Exemption and Allocation Planning: Notice of Stakeholder Meeting, 68 Fed. Reg. 32,750-01 at 32,750 (June 2, 2003) [hereinafter Critical Use Stakeholder Meeting] (announcing stakeholder meetings).

74. 2005 Critical Use Exemption Notice, *supra* note 71. at 31,800.

The application process and meetings provide substantial opportunity for private companies, consortiums of growers, and local and state agencies to provide input on U.S. compliance with the phase-out and to directly shape the EPA's negotiating position in the Meetings of Parties dedicated to setting critical use exemptions for each party. Showing the importance of this domestic participation, the 2003 U.S. exemption nomination was entirely based on the EPA's review and analysis of the submissions.[75]

This emphasis on public participation, however, has been tempered by deference to the Montreal Protocol regime and the United States's treaty obligations,[76] with mixed results in terms of domestic participation and transparency. On the one hand, this deference to the Protocol regime has limited the ability of private domestic actors who will be regulated by the Decisions to control the process or the outcome. For example, the EPA has carefully tailored its exemption application form to the requirements of the Montreal Protocol's reviewing body and excludes requests that do not meet the criteria of Decision IX/6.[77] On the other hand, however, the explicit acknowledgement of the role of the international regime by the EPA in the administrative rulemaking provides a much greater degree of transparency and opportunity for comment by the regulated community than is traditional in the context of international decision-making. For example, in the 2005 rulemaking, the EPA requested and responded to comments on several aspects of implementing the critical use exemption, including

75. U.S. Envtl. Prot. Agency, 2003 Nomination for a Critical Use Exemption for Methyl Bromide from the United States of America 4 [hereinafter 2003 Nomination], *available at* http://www.epa.gov/ozone/mbr/downloads/2005CUNsummary.pdf.

76. For example, in the final rule exempting approved critical uses, the EPA discussed the text of the Montreal Protocol and the relevant Decisions of the Parties along with the Clean Air Act as legal requirements with which its actions had to comply. Protection of Stratospheric Ozone: Process for Exempting Critical Uses from Phaseout of Methyl Bromide, 69 Fed. Reg. 76,982, 76,984–85 (Dec. 23, 2004) [hereinafter 2005 Critical Use Exemption Final Rule].

77. *See* 2003 Nomination, *supra* note 75, at 4 (describing the application process and requirements).

whether use of existing stocks should be allowed and how critical use allowances should be allocated and traded.[78]

Overall, the EPA's approach in implementing the methyl bromide critical use exemption has been to follow closely the Decisions of the Parties about how to determine when a use should be considered critical (in other words, the overall framework for the exemptions), while letting domestic actors largely set the agenda in terms of what exemptions should be given and how the allowances should be administered. Although this participation gives domestic stakeholders more control over decisions that affect them personally, it does not allow them to challenge background norms developed at the international level. Since these background norms can set the overall direction and scope for domestic regulation, this is a significant failing.

C. *Judicial Review of EPA Actions Implementing the Montreal Protocol*

One of the propositions of a bottom up development of global administrative law is that, at least in part, courts will drive the process by reviewing agency actions to assure compliance with procedural administrative law principles.[79] However, in the more than 20 years since the Montreal Protocol was ratified, there have been very few challenges to the EPA's implementation of the Montreal Protocol. In fact, only two cases touch on the international dimensions of the United States's stratospheric ozone protection regulations. Both of these cases address the interesting question of the legal status of Decisions of the Parties in U.S. law. Although one court found the Decisions to be persuasive legal authority and one did not, both cases show that courts are reluctant to closely examine the international aspects of agency decision-making.

In *FRC International Inc. v. United States*, an importer of ozone depleting chemicals, which are generally subject to import tax under provisions of the U.S. tax code adopted in compliance with the Montreal Protocol, brought an action for refund of taxes paid on the grounds that its handling of the

78. *See* 2005 Critical Use Exemption Final Rule, *supra* note 76, at 76,987–91(responding to comments received).

79. *E.g.*, Kingsbury, Krisch & Stewart, *supra* note 1, at 55; Stewart, *U.S. Administrative Law*, *supra* note 3, at 71–72.

chemicals should have qualified for a recycling exemption.[80] The relevant section of the tax code states that "'[n]o tax shall be imposed . . . on any ozone depleting chemical which is . . . recovered in the United States as part of a recycling process.'"[81] Since the statute and implementing regulations do not define the phrase "recovered in the United States," the district court looked to Decision IV/24 of the Parties of the Montreal Protocol, in which the Parties "agreed to . . . clarifications of the terms 'recovery,' 'recycling,' and 'reclamation.'"[82] In his decision granting summary judgment for the United States, the judge noted that the definition from the Decision of the Parties was "certainly not binding on this court," but he nonetheless based his decision upon it because it was "helpful" and was the definition proposed by FRC, the non-moving party.[83] On appeal, the Sixth Circuit also looked to the definition of "recovery" in Decision IV/24 and agreed with the district court's conclusion that the recovery exemption did not apply to FRC's actions.[84]

In *Natural Resource Defense Council v. Environmental Protection Agency* (*NRDC v. EPA*), the D.C. Circuit court was faced with a much trickier question. NRDC argued that the EPA's 2005 critical use rule for methyl bromide was in violation of Decision IX/6, which established conditions under which Parties could request the critical use exemptions allowed by Article 2H(5) of the Montreal Protocol.[85] Because the Clean Air Act only permits the Administrator to allow production, con-

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80. FRC Int'l, Inc. v. United States, 278 F.3d 641, 641 (6th Cir. 2002). The decision below was on a motion for summary judgment by the United States.

81. FRC Int'l, Inc. v. United States, 82 A.F.T.R. 2d. 98-7074, 1998 WL 839432 (N.D. Ohio 1998), *aff'd*, 278 F.3d 641(6th Cir. 2002) (quoting 26 U.S.C. § 4682(d)(1) (1994)).

82. Meeting of the Parties to the Montreal Protocol, *Recovery, Reclamation and Recycling of Controlled Substances*, Dec. IV/24, ¶ 3 (Nov. 23–35, 1992), *available at* http://ozone.unep.org/new_site/en/Treaties/decisions_text.php?dec_id=346.

83. FRC Int'l, 82 A.F.T.R. 2d. The United States in its motion had not contested FRC's reliance on the definition of "recovery" supplied in Decision IV/24, but rather had argued that FRC's actions did not fit within the definition. FRC Int'l, 278 F.3d at 643.

84. FRC Int'l, 278 F.3d at 643–44 .

85. Natural Res. Def. Council v. Envtl. Prot. Agency, 464 F.3d 1, 5 (D.C. Cir. 2006).

sumption, and importation of methyl bromide for critical uses "to the extent consistent with the Montreal Protocol,"[86] NRDC argued that the EPA's actions were therefore not within its authority under the Clean Air Act.[87] The EPA, on the other hand, argued that it had complied with the binding portions of the Decisions, but that the portions relied on by NRDC were hortatory.[88] The court took a different approach, ruling for the EPA on the grounds that the Decisions of the Parties are not law and so cannot be relied on to the extent that they fill in gaps in the Protocol rather than clarify ambiguous terms.[89] Since Article 2H(5) only says that the parties may decide to permit a level of consumption or production "necessary to satisfy uses agreed by them to be critical,"[90] the court found that it was an unenforceable "agreement to agree" and subsequent Decisions could not be used to create a legally binding commitment enforceable in domestic courts.[91]

In making this argument, the court stressed that NRDC's interpretation of the Decisions would create "significant constitutional problems" in light of how Congress had implemented the Montreal Protocol through the Clean Air Act.[92] Specifically, the court said that "[i]f the 'decisions' are 'law'—enforceable in federal court like statutes or legislative rules—then Congress either has delegated law-making authority to an international body, or authorized amendments to a treaty without presidential signature or Senate ratification."[93] The court admitted that "the Supreme Court has not determined whether decisions of an international body created by treaty are judicially enforceable."[94] However, it strongly suggested that they should not be, stating that "there is considerable debate over the constitutionality of assigning lawmaking functions to international bodies" and that finding the Decisions enforceable would "raise serious constitutional questions in light of the non-delegation doctrine, numerous constitutional

86. 42 U.S.C. § 7671c(d)(6) (2006).
87. Natural Res. Def. Council, 464 F.3d at 7.
88. *Id.* at 8.
89. *Id.* at 9.
90. Montreal Protocol, *supra* note 4, at art. 2H(5).
91. Natural Res. Def. Council, 464 F.3d at 9–10.
92. *Id.* at 8.
93. *Id.*
94. *Id.*

procedural requirements for making law, and the separation of powers."[95]

The Sixth Circuit in *FRC International* seemed relatively comfortable with the role of the Meetings of the Parties in elaborating the Montreal Protocol regime and did not find a need to probe into the processes and procedures behind decision-making at the international level. In contrast, the D.C. Circuit in *NRDC v. EPA* was concerned with delegation of regulatory authority to unaccountable, unelected international bodies that have motivated the study of global administrative law. However, rather than doing something to address such concerns, such as reviewing the international decision in question based on administrative law principles, the *NRDC v. EPA* court simply ignored the issue entirely by holding that the Decisions are political commitments only. While this approach saved the court from having to enforce the decisions of an international body on domestic parties, the EPA nonetheless generally treats the Decisions of the Parties as legally binding.[96] The *NRDC* court's approach thus leaves an accountability gap because it makes the Decisions upon which the EPA is basing its implementation of the Protocol both judicially unreviewable in themselves and impossible to use as standards for cabining the EPA's discretion. Although the issue of the EPA's interpretation of the Decisions of the Parties was not challenged in *FRC*, in a more controversial case the *FRC* court's approach would also fail to hold the EPA accountable for the content of the international decisions it participated in making.

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95. *Id.* at 9.

96. For example, in every year since the ban on methyl bromide went into effect in 2005, the EPA has submitted its critical use nomination to the Technology and Economic Assessment Panel and has in each year promulgated regulations that limited U.S. consumption and production of methyl bromide to the amount approved by the Parties, even though this is invariably somewhat lower than the amount requested by the EPA based on information received from domestic users. For requested and approved critical use quantities, see *Summary of Critical Use Nominations/Exemptions by Countries up to MOP22*, U.N. ENV'T PROGRAMME OZONE SECRETARIAT, http://ozone.unep.org/Exemption_Information/Critical_use_nominations_for_methyl_bromide/Summary_of_Critical_Use_Nominations_after_MOP18.shtml (last visited Apr. 16, 2013).

IV. Implications for Bottom Up Approaches as a Method for the Development of Global Administrative Law

A. *Prominence of the Executive Branch in Bringing Global Administrative Law Principles into the Implementation of the Montreal Protocol*

The development and implementation of the Montreal Protocol in the United States is noteworthy for the degree to which the EPA and the State Department brought U.S. decision-making in the context of the international regime into the standard domestic procedural framework for agency action and rulemaking. Global administrative law scholars have highlighted a possible role for domestic courts in requiring agencies to adhere to administrative law principles.[97] One might also expect other actors such as the regulated industry, NGOs, or Congress to be quite concerned with regulation originating outside of domestic procedures designed to provide democratic accountability. Interestingly, in this case it was primarily the executive branch that drove the process, and there are several good reasons for this to be the case.

For one, courts have traditionally shown substantial deference to the President and the executive branch in the conduct of foreign affairs.[98] Significantly, no statutes or accepted legal doctrine make agencies' participation and decision-making at the international level subject to judicial review or a required part of the administrative record for subsequent domestic rulemaking. Thus, even if the agency discusses the commitments made at the international level as part of its notice of proposed or final rulemaking (as the EPA has often done in connection with the Montreal Protocol), a reviewing court may still uncritically accept the agency's determination.[99] Thus it seems unlikely that the courts will step in as effective promoters of administrative law principles in global decision-making.

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97. Stewart, *U.S. Administrative Law*, *supra* note 3, at 78–79; Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 L. & Contemp. Probs. 319, 327–28 (2005).

98. Benvenisti, *supra* note 97, at 328.

99. The decision in Natural Res. Def. Council v. Envtl. Prot. Agency, 464 F.3d 1 (D.C. Cir. 2006), is a good example of this.

By contrast, the EPA's internal culture supports applying administrative law principles to participation in international regulatory bodies like the Montreal Protocol. Unlike the State Department, the EPA is an agency that primarily engages in domestic regulation, where it is legally required under the Administrative Procedure Act to provide notice of proposed rules, accept and respond to comments, and provide detailed reasons for its final rulemaking.[100] To the extent that the EPA's participation in an international regime is intertwined with its domestic regulatory functions, as is the case with its regulation of CFCs, methyl bromide and other ozone depleting substances, it is only natural that the EPA would seek public input in developing its positions and make reference to the negotiations and decisions of the Montreal Protocol Parties in explaining its proposed and final rulemakings.

Another factor prompting the EPA's use of accepted domestic administrative procedures in an international context could be its desire to gain public acceptance of its regulations and to appear responsive to public pressure for action on ozone depletion. As Robert Putnam's Two-Level Game Theory suggests, engagement with the domestic public can be a way for an agency engaged in international negotiations to increase public understanding of the conditions of negotiation and support for its policies, thus improving the likelihood that any agreement reached will be ratified and implemented domestically.[101] Although Putnam focused on the negotiations leading up to an international agreement, his observations apply equally well to ongoing participation of an agency in an international regime and implementation of the regime domestically.

Because the EPA's implementation of the Montreal Protocol required direct regulation of private actors, the EPA found itself in a more vulnerable position than the State Department normally does in negotiating and implementing traditional

100. Administrative Procedure Act, 5 U.S.C. §§ 552–54 (2010).

101. *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 448 (1988) (discussing the role of Congressional and private-sector committees in helping persuade domestic constituent groups). Two-level game theory also explains how negotiators can use international agreements to achieve preferred policies at a domestic level, something that may well have contributed to the EPA's interest in the development of Montreal Protocol, but is beyond the scope of this Note.

state-to-state international agreements. On the one hand, there was substantial public concern in the United States with ozone depletion, and considerable pressure from the public, the scientific community and even Congress for the government to do something about the problem.[102] On the other hand, the phase-out of the various ozone depleting substances under the Montreal Protocol would have an impact on the American industries that manufactured or relied on those chemicals. While U.S. companies like DuPont were at the forefront of developing alternatives to CFCs and thus supported the international phase-out,[103] this was not the case with all the chemicals regulated. U.S. farmers, for example, relied heavily on methyl bromide for certain agricultural applications, and there were no substitutes readily available; they thus actively opposed phase-out measures.[104] Given these conflicting political pressures, the EPA may well have concluded that adherence to administrative procedures like public meetings and notice-and-comment rulemaking was the best way to shield its decisions and actions from attacks by either side. Reference to decisions made at the international level with which the EPA must comply could be particularly useful in this context as a way of framing regulations adopted domestically as beyond the EPA's sole discretion and thus less open to challenge.[105]

In other situations where an agency is implementing an international agreement, as in this case, the courts may be reluctant to interfere with executive branch conduct of judicial affairs, and the lead agency may be accustomed to following

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102. Shimberg, *supra* note 24, at 2184–92.

103. Elizabeth R. DeSombre, *The Experience of the Montreal Protocol: Particularly Remarkable and Remarkably Peculiar*, 19 UCLA. J. ENVTL. L. & POL'Y 49, 58 (2000); Chris Peloso, *Crafting an International Climate Change Protocol: Applying the Lessons Learned from the Success of the Montreal Protocol & the Ozone Depletion Problem*, 25 J. LAND USE & ENVTL. L. 305, 311 (2010); Sunstein, *supra* note 40, at 4.

104. Protection of Stratospheric Ozone, 58 Fed. Reg. 15,014, 15,035 (Mar. 18, 1993).

105. Rachel Brewster argues that the executive branch may favor international agreements because they are harder to change and thus can more deeply entrench a given preferred policy. Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 504 (2003). The EPA could be taking advantage of this by emphasizing the international components of its regulations.

domestic administrative procedures and looking for a way to insulate itself from conflicting political pressures. The experience of the Montreal Protocol with how administrative law principles were (and were not) applied to international decision-making is therefore unlikely to be unique to this treaty regime. Rather, the results of this case study suggest broader implications for the development of global administrative law in terms of which principles are likely to be promoted by a bottom up approach, and how successful such an approach may be for accomplishing the goals that global administrative law proponents hope it will achieve.

B. *Global Administrative Law Principles in the Implementation of the Montreal Protocol: Predominance of Transparency and Participation over Legality and Review*

As discussed in Part I, transparency, participation, reasoned decision-making, legality, and effective review are core principles that global administrative law scholars agree should be incorporated in a global administrative law system.[106] In the development and implementation of the Montreal Protocol, transparency, participation, and reason-giving were promoted while legality and effective review were not.

The extensive use of public meetings and notice-and-comment substantially increased the transparency of decision-making at the international level because interested individuals were able to attend meetings held by the EPA, the State Department, and the U.N.,[107] and because the EPA published information about the negotiations and described how its proposed regulations related to Montreal Protocol agreements.[108] Significantly, all this information was published in the Federal Register where it was publically available and where the regulated community would expect to find information relating to potential agency actions. Participation was also increased through public meetings where the EPA shared information about the program and allowed interested private parties to

106. *See supra* notes 9–14 and accompanying text (listing key principles of global administrative law).

107. *Meeting Announcement 2*, *supra* note 46; *Meeting Announcement 1*, *supra* note 46; Ozone Regulation Development Plan, *supra* note 45.

108. Montreal Protocol Proposed Rule, *supra* note 48, at 47,498–99; EIS Notice 2, *supra* note 45, at 29,111.

present papers and other information that the EPA used in international meetings and negotiations.[109] The comment portion of the notice-and-comment rulemaking of course also gave significant opportunities for participation to the regulated community and other interested parties. Arguably this participation was of limited value since decisions had already been made at an international level, but it nonetheless shaped the EPA's domestic implementation of those decisions.

Whether the EPA's actions led to more reasoned decision-making is a more complicated question. By including information in the Federal Register about the Montreal Protocol and how the Decisions of the Parties influenced the EPA's decisions about what regulations to propose and promulgate, the EPA gave more thorough discussions of its reasons for adopting regulations than if the Notices had only focused on domestic issues. However, such reason-giving is incomplete at best when the reasons for the decisions taken at the international level are not also put forward, because the result is that a significant part of the decision-making process is not open to review and critique.

Finally, without any significant review by the courts of the international elements of EPA rulemaking under the Montreal Protocol, all the actions of the executive branch that increased transparency, participation, and reason-giving were insufficient to ensure that the decisions adhered to legal principles. Notably, this failure comes primarily from the reluctance of the courts to provide a searching review, since the EPA's heavy reliance on the Montreal Protocol requirements in its notices, proposals, and rulemakings would form a sufficient basis for a court to review whether the EPA's application of the norms and policies developed at the international level was legal and well-reasoned. However, as discussed above, it seems that, at least in the case of an international regime like the Montreal Protocol where the domestic implementation is not particularly controversial, courts may not be likely to challenge the procedural or substantive legality of the international decision-making even if there is evidence in the administrative record to support such a review.

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109. Workshop Announcement 2, *supra* note 46; Workshop Announcement 1, *supra* note 46; Ozone Regulation Development Plan, *supra* note 45.

C. *Degree to which Incorporation of Global Administrative Law Principles Contributed to Achieving Goals of Protection of Rights, Accountability, Legitimacy and Effectiveness*

The value of global administrative law principles such as transparency, participation, reasoned decision-making, legality, and effective review is in their contribution to achieving global administrative law's primary goals of regime accountability, effectiveness and legitimacy, and the protection of private rights. However, the experience of the Montreal Protocol in the United States suggests that a piece-meal bottom up approach driven primarily by the executive branch will achieve only a limited version of accountability and may not do much to legitimize the regime or truly protect private rights.

In terms of protecting private rights, the global administrative law principles that were adopted in the implementation of the Montreal Protocol in the United States provided increased opportunity for affected individuals to make their voices heard through the notice-and-comment process as described above.[110] Industries that opposed more stringent regulation, as well as environmental groups that wanted stricter controls, both expressed their opinions. Such private stakeholders even challenged the EPA's interpretation of its obligations under the Montreal Protocol and questioned whether the Decisions of the Parties should be followed.[111]

However, without courts that are willing to examine the EPA's reasoning about how to implement agreements and decisions made in the context of the Protocol regime, administrative procedures are a weak protection for affected individuals. This can be seen in *NRDC v. EPA*, where the court refused to consider the merits of NRDC's argument that the EPA was harming its members by ignoring international agreements.[112] While it might not be immediately obvious how the *NRDC v. EPA* decision perpetuates the problem of weaker protection of individual rights, consider a counter-example where Congress passes a law with the same requirements as the Decisions at

110. *See* discussion *supra* Parts III, IV.B (discussing notice and opportunity for hearing in the development and implementation of the Montreal Protocol).

111. 2005 Critical Use Exemption Final Rule, *supra* note 76, at 76,988.

112. Natural Res. Def. Council v. Envtl. Prot. Agency, 464 F.3d 1, 9–10 (D.C. Cir. 2006).

issue in *NRDC v. EPA*. In that situation, a court would consider the text of the statute and the substance of the EPA's regulation to determine whether it was a reasonable interpretation. However, in this case, because the "laws" at issue were Decisions of the Parties rather than domestic statutes, the court allowed the EPA wide discretion in deciding how and whether to comply with such decisions, rather than considering the substance of NRDC's argument.[113] While this is not exactly the problem of private individuals being hurt by decisions of unaccountable global bureaucrats, it is the related problem of private individuals not being able to fully assert their rights in a domestic context because part of the decision-making was done at an international level which the courts will not or cannot adequately police. Although domestic courts have traditionally exercised extreme deference in reviewing decisions made at the international level, there is some evidence that this may be changing, with some domestic courts more assertively exercising jurisdiction where the work of international organizations is concerned.[114]

In terms of accountability, the bottom up application of administrative law principles created greater accountability of the EPA to the American public in its participation in and domestic implementation of the Montreal Protocol regime. While this has been somewhat limited by the courts' unwillingness to directly police the agency's implementation of Decisions of the Parties, the publication and discussion of agency actions and policies in the Federal Register has given the public the information to criticize the EPA's actions and hold the agency accountable through a range of political channels beyond judicial review of formal rulemakings.

However, accountability of a domestic agency to the domestic public for its implementation of an international regime is only one dimension of accountability, and the idea of accountability in a global administrative law context often includes accountability of the international regime itself to the

113. *Id.*

114. For further discussion of this issue, see Eyal Benvenisti & George W. Downs, *Court Cooperation, Executive Accountability, and Global Governance*, 41 N.Y.U. J. INT'L L. & POL. 931 (2009); Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009).

larger global public that may be affected by the decisions taken.[115] Here, although the EPA did include in the Federal Register some general discussion of the agreements of the Parties and the process of the negotiations, it did not sufficiently discuss decision-making at the international level to allow private parties to critique regime-level decisions or to take action against bureaucrats, agencies, and states. While a more thorough implementation of global administrative law principles of transparency and reason-giving could enhance accountability of the regime itself, the problem of accountability to the global public is a more intractable one.

Specifically, a bottom up conception of the development of global administrative law focuses on how individual countries participate in and implement the decisions of the international regime. This approach lacks mechanisms for promoting a broader global accountability. Even if all the member states developed procedures like those of the United States, this would increase accountability of national delegations and agencies in each country to their own publics, but would not bring in a broader global public voice. In fact, to the extent that the views of majorities (or influential minorities) vary from country to country, greater national accountability could lead to greater fragmentation at the international level. This lack of accountability across national borders is a particular concern in the context of international environmental treaties like the Montreal Protocol that are meant to address global problems like ozone depletion and climate change where the actions of people in one country directly affect people in other countries.[116]

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115. *See* Stewart, *U.S. Administrative Law*, *supra* note 3, at 64 (listing three possible approaches to accountability used in global administrative law studies).

116. Ozone depleting substances and greenhouse gases are all "global pollutants" which have their effects high in the atmosphere rather than over the particular country where they are used. For this reason, ozone depletion and climate change will affect people based on the geographic and climatic features of the area where they live irrespective of how much pollutants are released by those around them (for example, countries in the Sahara will suffer desertification and small island nations will lose a significant part of their territory to rising sea levels, despite the fact they are not heavily industrialized and have very low GHG emissions).

Accountability is closely related to legitimacy, the other central goal of developing a global administrative law,[117] and the U.S. experience with the Montreal Protocol shows a similar problem with legitimacy to that with accountability. Specifically, legitimacy of the participation of the domestic actor in the international regime is not the same as legitimacy of the regime itself, and there is also a difference between perceptions of legitimacy by the domestic constituents and by the broader global public. In the case of the Montreal Protocol, the EPA's use of administrative law processes appears to have legitimized the EPA's participation in the regime vis-à-vis the American public.[118] However, the problem of the legitimacy of the regime itself still persists. This can be seen in the *NRDC v. EPA* case, where the court indicated that if Congress had made the Decisions of the Parties binding on the United States domestically this would have been an unconstitutional delegation.[119] The lack of regime-level legitimacy flows naturally from the fact that the administrative processes put in place were all at the national rather than international level and so had little effect on the regime itself. It also suggests that another problem with a bottom up only approach to the development of a global administrative law may be its failure to further legitimize the regimes themselves as opposed to participation of domestic actors.

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117. Esty, *supra* note 2, at 1495–96, 1515–23.

118. It is worth noting, however, that independent economic and political factors unique to the problem of ozone depletion and CFCs make it important to use caution in attributing the success or lack of controversy around the Montreal Protocol in the United States to any structural features of the regime or procedural features of its implementation. I discuss this issue further in the next paragraph on effectiveness of the regime.

119. Natural Res. Def. Council v. Envtl. Prot. Agency, 464 F.3d 1, 89 (D.C. Cir. 2006). Although the court's decision could be seen as simply reflecting U.S. constitutional requirements, much of the scholarly and popular criticism of delegations to international bodies (including the articles cited by the *NRDC v. EPA* court) concerns the accountability of those bodies and the legitimacy of their decisions, precisely the issues the global administrative law approaches discussed in this paper aim to address. *See, e.g.*, Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 77 (2000) (arguing that a "formalist" approach to international delegation is needed because of accountability and legitimacy concerns); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1496–97 (2004) (listing diminished accountability as a problem with international delegations).

Addressing the question of the legitimacy of the Montreal Protocol regime vis-à-vis a broader global public is beyond the scope of this case study with its focus on domestic U.S. implementation. However, it is worth noting Stewart's suggestion that the imposition of U.S. administrative law procedures might lead to a backlash from other countries if they see it as "legal imperialism" that privileges U.S. interests.[120] In other words, a heavy-handed bottom up approach to developing global administrative law by the United States could potentially undermine the legitimacy of both U.S. participation and possibly even the regime itself in the eyes of the rest of the world.

Finally, in terms of effectiveness, the Montreal Protocol has been one of the most effective international environmental regimes, resulting in nearly complete phase-out of eight ozone depleting chemicals,[121] and a global reduction in emissions of over 95%.[122] In the case of methyl bromide, even though Parties were criticized for allowing broad exemptions, the total amount of the exemptions authorized across all Parties for 2012 was less than 8% of the amount authorized in 2005,[123] the first year after the phase-out. This demonstrates that the regime has been successful even in areas where there was initial resistance. Possibly the increased transparency and greater participation by domestic actors contributed to this effectiveness in the United States by legitimizing EPA regulations arising out of the regime.

However, the many other factors at play in this case caution against attributing too much to the use of administrative law processes. Most significantly, phasing out CFCs was a step that made sense economically for the United States even in the absence of an international agreement,[124] making domes-

120. Stewart, *Global Regulatory Challenge*, *supra* note 1, at 755.

121. MONTREAL PROTOCOL: REGULATORY SUMMARY, *supra* note 24, at 2.

122. Sunstein, *supra* note 40, at 3–4.

123. *Summary of Critical Use Nominations/Exemptions by Countries up to MOP22*, U.N. ENV'T PROGRAMME OZONE SECRETARIAT, http://ozone.unep.org/Exemption_Information/Critical_use_nominations_for_methyl_bromide/Summary_of_Critical_Use_Nominations_after_MOP18.shtml (last visited Apr. 16, 2013).

124. *See* Sunstein, *supra* note 40, at 55 ("To the United States, the monetized benefits of the Montreal Protocol dwarfed the monetized costs . . . . [T]he United States had so much to lose from depletion of the ozone layer

tic compliance much less dependent on the strength of the international regime than would otherwise be expected. There was also particularly strong public support for ozone regulation in the 1980s and 1990s,[125] which would have had a similar effect of insulating regulation arising out of the Montreal Protocol regime from criticism and resistance.

D. *Limitations of this Case Study and Directions for Further Exploration*

The goal of this Note is to explore the benefits and limitations of the application of administrative law principles in the implementation of an international regulatory regime in U.S. domestic law. The Montreal Protocol is an important case study for two main reasons. First, environmental protection is an area that has traditionally been regulated at a national level but where we can expect increasing efforts at regulation at the international level to respond to problems like climate change and marine resource depletion where the effects of individual actions go beyond national borders.[126] Second, since the United States has fully implemented the Montreal Protocol at a domestic level, it can show the interplay between U.S. and international regulatory regimes.

However, these benefits of the Montreal Protocol as a case study are also to some extent limitations. For instance, the fact that the United States at the national level had economic incentives for controlling ozone depleting substances[127] makes it

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that it would have been worthwhile for the nation to act unilaterally to take the steps required by the Montreal Protocol."). The same has not been true with other international environmental issues such as greenhouse gas regulation, making those issues much more intractable.

125. *See* Shimberg, *supra* note 24, at 2184–92 (describing scientists' discovery of a "hole" in the ozone layer in 1985, the ensuing Congressional calls for the EPA to regulate CFCs, and public attention and media scrutiny of the issue during the negotiation of the Montreal Protocol and the 1990 Amendments); Sunstein, *supra* note 40, at 4 (stating that American companies "stood at the forefront of technical innovation leading to substitutes for ozone-depleting chemicals.").

126. *See* Daniel C. Esty, *Breaking the Environmental Logjam: The International Dimension*, 17 N.Y.U. ENVTL. L.J. 836, 836–37 (2008) (discussing the importance of having the scope of regulatory authority match the scope of the environmental problem, and arguing that this requires international regulatory authority for certain global problems).

127. Sunstein, *supra* note 40, at 5.

hard to assess the independent effect of the various administrative law processes on the effectiveness and legitimacy of the Montreal Protocol at the domestic level. Perhaps more fundamentally, the fact that the Montreal Protocol is a highly developed international regime that has been implemented in a very formal way domestically means that the lessons of this case study may not be fully applicable to situations of less formal regulation such as standard-setting by intergovernmental or private networks of experts. Particularly, in a system that was not implemented domestically through statutes and regulations, it would be much more difficult for agencies to apply the type of administrative law processes used with the Montreal Protocol.

While these limitations do not negate the conclusions developed here, comparison with less formal systems and with less successful regimes could help elaborate which administrative law processes can most successfully be implemented in the context of different types of regime structures, as well as the extent to which challenges are specific to a particular type of regime. Comparison with domestic implementation of international regulatory regimes in other countries could also help by exploring the extent to which different administrative law processes and principles are more readily taken up and more influential based on the characteristics of the domestic legal system.

Conclusion

The Montreal Protocol has been implemented with great success both in the United States and around the world. It is also one of a growing number of global regulatory regimes that aim to control the behavior of individual actors within the boundaries of its member states, challenging theories of democratic accountability and legitimacy that have traditionally justified regulation by domestic agencies. The response by the United States to the challenge of integrating domestic and global regulatory functions under the Montreal Protocol was to extend key administrative law processes, most notably notice-and-comment rulemaking, to U.S. participation in the preparation of the Protocol and certain aspects of its ongoing activities, as well as to domestic implementation of decisions of taken at the international level in the context of the Protocol

regime. These steps allowed greater participation by U.S. domestic actors and increased transparency of decision-making, which made the EPA more accountable to the domestic public in implementing the control of ozone depleting substances.

In the context of a multilateral environmental treaty that aims to control a global pollutant, however, the regime's accountability and legitimacy to a global public are equally critical because the impacts of the actions of one individual are felt directly by other individuals around the world. Such concerns are bolstered by the fact that negotiating power at the international level is not necessarily related to the number of affected people each country represents. Greater procedural openness, transparency, regularity, and participation are therefore needed at the level of the international regime itself, where their benefits can accrue to all affected parties. This case study indicates that such system-level change is unlikely to begin at the domestic level, where national administrative protections will tend to privilege the individuals in powerful states like the United States with well-developed administrative law systems. More focused efforts within the international regimes themselves are therefore needed.