Study of the Hague System of International Design Patent Protection under the Paradigm of Global Administrative Law

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Since the advent of globalization, State functions and exercise of public power have increasingly moved to a global platform, particularly due to global trade networks and the infeasibility of mutual state isolation. Concerns regarding global trade and regulations span a wide range of sectors, such as, but not limited to,

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banking and financial regulations, air and maritime transportation, environmental concerns, intellectual property, telecommunications, international trade of products and services, agriculture, economic sanction policies, cross-border movements of populations, and the like.[1] Legal scholars have posited that the traditional State-centered approach does not adequately capture the global regulatory phenomenon because there is a paucity of normative force from State-centric view of law and traditional legal institutions under the different political and social circumstances that prevail in the global realm.[2] In particular, there is an interdisciplinary and complex regulatory space proliferated by international organizations that disparate from the traditional State-centered approach and which "transcend[s] the sphere of influence of both international law and domestic administrative law."[3]

The first section charts the evolution, functions, and principles of the Global Administrative Law framework. Global Administrative Law emerged as a new area of study because observed global regulatory practices could not be adequately explained by traditional international law theories and its legitimacy does not appear to be solely explained by parliamentary approval of treaties.[4] The theories of global administrative law attempt to provide conceptual vocabulary and tools for framing, explaining, and understanding this global regulatory and administrative space.[5] In brief, these theories begin by studying actual practice and empirical reality, and postulate theories that frame the observed practices under the lens of global administrative law, such that the global regulatory space is firmly positioned in the interstitial area between international law and administrative law, with a particular

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1 Sabino Cassese, *Administrative law without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663, 671 (2005) ("[T]here is no realm of human activity wholly untouched by ultra-state or global rules.").

2 Nico Krisch, *The Pluralism of Global Administrative Law,* 17 EUR. J. INT'L L. 247, 247–48 (2006).

3 LORENZO CASINI, *Beyond the State: The Emergence of Global Administration*, *in* GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK (Sabin Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri & Euan MacDonald eds., 3d ed. 2012), *available at* hap://www.irpa.eu/en/gal-section/global-administrative-law-the-casebook-2 (published as an e-book) [https://perma.cc/34FZ-MZXZ].

4 Krisch, *supra* note 2.

5 LORENZO CASINI, *Global Administrative Law*, *in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 199–219 (Jeffrey L. Runoff & Mark A. Pollack eds., 2022).

focus on the practical functioning of international organizations.

While international organizations play a vital role in global trade, regulations, and related concerns, and their activities in these areas can be regarded as administrative in nature, their regulatory powers are not always exercised through delegation from member states. Although international organizations are not a perfect global analog to State administrations, because there is no unitary global government, scholars of global administrative law base the unified global administrative law framework on principles, procedures, and norms that are common across a multitude of international organizations.[6] According to these theories, international organizations function in a "global administrative space," with each organization working to regulate its field of activity by setting their own norms, beyond merely acting as an instrument of its member States.[7]

The second section is a study of the international intellectual property regime for design patent protection, the Hague Agreement Concerning the International Deposit of Industrial Designs[8] (hereinafter the "Hague System"), through the lens of the Global Administrative Law framework.[9] Here, the study begins with the institutional framework for the Hague System, the associated treaty-based Normative Framework, and its procedural regime. In particular, the key player, the World Intellectual Property Organization (WIPO), which can be characterized as a formal intergovernmental organization[10] under the Global Administrative Law framework, is examined along with the complex multi-level governance associated with the Hague Agreement Concerning the International Deposit of Industrial Designs. Furthermore, the

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6 Casini, *supra* note 5 (Scholars of global administrative law noted that principles such as participation, transparency in rule making, consultation, due process, review mechanisms and accountability were endemic enough in a variety of international organizations to facilitate extracting a unified theory of global administrative law).

7 Krisch, *supra* note 4.

8 WIPO, HAGUE AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF INDUSTRIAL DESIGNS (Status on Nov. 13, 2023), https://www.wipo.int/export/sites/www/treaties/en/docs/pdf/hague.pdf [https://perma.cc/22S3-2NKF] [hereinafter Hague Agreement].

9 Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 17 (2005).

10 *Id.*

viability of intergovernmental and transnational networks[11] in the international intellectual property regime, as applicable to Design patent protection are contemplated. Finally, the Global Administrative Law framework's key principles of transparency, participation, and effective review[12] are applied to the Hague System to assess its soundness and regulatory accountability.

It is observed that the institutional framework of the Hague System lacks harmonized regulations, such as those contemplated or idealized by the Global Administrative Law framework. However, the system still exhibits a multi-level regulatory regime under the Global Administrative Law framework embodying soft law approaches, cooperation networks, multilayered decision-making and other facets of the framework, in a manner that complies with the framework's key principles of transparency, participation, and effective review, signaling soundness and regulatory accountability.

I. Global Administrative Law

A. Evolution of Global Administrative Law

It could be argued that exercise of administrative authority within a State, separate from judicial power, has been prevalent in its nascent form from *Missi Dominici* in the Holy Roman Empire[13] to the nineteenth century railroad commissions in the United States to deal with the consequences of industrialization.[14]

Administrative structures, which we would recognize as being such in the modern day, arose in late 19th century to address the practical problems that came with coordinating activities in a society moving towards industrialization.[15] Such administrative structures became prevalent in the global arena in light of globalization in the early 20th century, albeit with increasingly formal structures and regulations, with mixed success.[16] In spite of

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11 *Id*.

12 *Id*.

13 Charles S. Lobingier, *Historical Background of Administrative Law: The Inquest Procedure*, 16 NOTRE DAME L. REV. 29 (1940).

14 Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 439 (2003).

15 *Id*. (referring to the legislative creation of railroad commissions and other regulatory agencies).

16 *See generally* Jiunn-rong Yeh, *Globalization, Government Reform and the*

some setbacks, such as the demise of the League of Nations, which is arguably the first global international organization of its scale, preliminary ideas of global regulatory governance continued to proliferate.[17]

In more recent history, increasing transnational effects of the global economy fueled the need for a global conception of the shift of regulation from state-centered approaches to sharing of public authority with nongovernmental or other governmental actors, necessitating a new articulation of the global regulatory space by the post-Cold War 1990s.[18] After the end of the Cold War, legal scholars studied international legal and regulatory cooperation and complex global governance networks.[19]

The global administrative law framework for studying and articulating co-operative law, regulation, international governance, and administrative actions across States was brought into the forefront of legal scholarship with Charles H. Koch, Jr.[20] He espoused a "global federalism" trend directed towards the shift of law-making authority from the national courts to the supranational

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Paradigm Shift of Administrative Law, 5 NAT'L TAIWAN U. L. REV 113, 117–19 (2010) (charting evolution of administrative law and governance engendered by globalization, and outlining deficits regarding alignment of governmental and legal reforms and public-private fissures).

17 *See generally* John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 42 U. KAN. L. REV. 605 (1994) (describing several global international organizations such as the League of Nations, the United Nations, and the European Bank for Reconstruction and Development); and Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations,* 34 N.Y.U. J. INT'L L. & POL. 513, 514 (2002) (outlining that formation of the League of Nations, as an international institution, upended prevailing status quo, where "sovereign states were the only actors recognized by international law").

18 Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379–86 (2001) ("[t]he seemingly borderless nature of telecommunications and intellectual exchange, and the relatively easy flow of goods, capital, pollution, and disease across jurisdictional lines, increasingly requires a global conception of both problems and opportunities . . . globalization refers to a multiplicity of extraterritorial activities and their local effects . . . and . . . complex, dynamic, legal, economic, and social processes that operate within an integrated whole, in a manner that ignores territorial boundaries.").

19 *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

20 Charles H. Koch, Jr., *Introduction: Globalization of Administrative and Regulatory Practice*, 54 ADMIN. L. REV. 409 (2002).

tribunals, in the aptly titled Global Administrative Law symposium.[21]

Here, Koch began by evoking Anne-Marie Slaughter's essay entitled "Judicial Globalization" outlining international judicial interaction involving both "vertical" relations between national and international tribunals and "horizontal" relations across national borders.[22] Building upon this idea, Koch advocated for U.S. lawyers to be "sensitive to the sweeping impact of the global trade regime and become active players in every aspect of the shift to that regime."[23] Koch noted that U.S. lawyers and legal academics are at a disadvantage here due to the purported isolation of the U.S. legal community from other legal cultures.[24] However, Koch proposed that "administrative and regulatory practitioners and commentators are the best equipped to provide leadership" for the push towards a global approach to law, because administrative law's inherent interactions with myriad of diverse systems, and alternative constitutional and governmental principles, would best allow it to "easily focus its experience and expertise on the emerging law regarding global governments."[25]

Subsequently, in their seminal treatise as a part of the Global Administrative Law Research Project at New York University School of Law, Benedict Kingsbury, Nico Krisch, and Richard B. Stewart (referred to as "Kingsbury *et al*.") pioneered systematization of studies in "diverse national, transnational, and international settings that relate to the administrative law of global governance."[26]

B. The Global Administrative Law Framework

Kingsbury *et al*. adopted the lens of casting global governance in terms of administrative decision-making, including administrative law.[27] Kingsbury *et al*. formally defined Global

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21 *Id*.

22 Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000).

23 Koch, *supra* note 20.

24 Koch, *supra* note 20, at 410–11.

25 *Id*.

26 Kingsbury et al., *supra* note 9.

27 Kingsbury et al., *supra* note 9, at 27. *See also* Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the*

Administrative Law as

> mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make. Global administrative bodies include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.[28]

In framing global administrative law in the foregoing manner, Kingsbury *et al*. drew a distinction between a "classical theory" of international law where global governance is merely the governance of States' behavior with regard to other states, and the global administrative law approach.[29] Here, Kingsbury *et al*. asserted that global administrative law encompassed more than traditional international law involving law among states such as treaty law or custom law, and traditional domestic administrative law, albeit borrowing elements from and co-existing with the same.[30]

Kingsbury *et al*. formulated a sweeping view of the scope of global administrative law as one that includes not just traditional,

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International Legal Order, 17 EURO. J. INT'L. L. 1, 2 (2006) ("The concept of global administrative law begins from the twin ideas that much global governance can be understood as administration, and that such administration is often organized and shaped by principles of an administrative law character.").

28 Kingsbury et al., *supra* note 9, at 17.

29 Kingsbury et al., *supra* note 9, at 21, 23 ("The international administrative bodies responsible for promoting and supervising implementation often play a major regulatory role, outside of and contrary to the classical theory.").

30 Kingsbury et al., *supra* note 9, at 27, 29 ("We argue that current circumstances call for recognition of a global administrative space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each.") (As such Kingsbury et al. do not entirely discount traditional formal rulemaking, and instead emphasize their co-existence with informal counterparts in global administrative law).

formal rulemaking in the form of treaties negotiated by States, but also "informal decisions taken in overseeing and implementing international regulatory regimes," as well as secondary rulemaking that does not "require national ratification to be legally effective," which take on transboundary significance.[31] This broad formulation of global administrative law involved principles, procedural rules, and review mechanisms that work towards the transparency and accountability of administrative bodies, participation in the administrative structures, reasoned decision-making, mechanisms of review and assurance of legality in global governance, and devotes little significance to the particular substance of the administrative rules themselves.[32]

The global administrative law approach recognized two traditional types of regulatory bodies: formal inter-governmental organizations established by treaty or executive agreement, such as the U.N. Security Council,[33] and domestic regulatory agencies, such as national environmental regulators, that decide on issues of foreign or global concern developing a distributed administration in the international arena.[34] Although the foregoing types have been a part of conventional international administration, the global administrative law approach re-contextualized them in gray area or continuum between domestic and global regulations,[35] by deploying traditional administrative law tools such as procedural fairness, transparency requirement, and accountability control in a global setting.[36]

Additionally, the global administrative law approach recognized

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31 Kingsbury et al., *supra* note 9, at 17, 20.

32 Kingsbury et al., *supra* note 9, at 29.

33 Kingsbury et al., *supra* note 9, at 21.

34 Kingsbury et al., *supra* note 9, at 21–22.

35 Cassese, *supra* note 1, at 680 ("Global administration does not exist in isolation from the national level . . . There is a mixed, gray area between global regulatory systems and national regulators. This can serve the states and the global system, and sometimes both at the same time—states in making their voices heard in the global system, and the global system in penetrating states to reach civil society and local actors, even if this reach is generally lacking in global public powers. The global legal order is a saprophyte order unable to live on its own; it is necessarily related with others, and it makes them permeable, while reinforcing them at the same time. In contrast with international law, in global law, the two levels come together.").

36 Ming-Sung Kuo, *Between Fragmentation and Unity: The Uneasy Relationship Between Global Administrative Law and Global Constitutionalism*, 10 SAN DIEGO INT'L L. J. 439, 444 (2009).

three new types of global administrative bodies.[37] Informal intergovernmental and transnational networks, along with coordination arrangements, formed the first new type of global administrative bodies.[38] This involved a horizontal form of administration characterized by informal cooperation and an absence of a binding formal decision-making structure.[39] This could be obtained with or without a treaty framework, such as the Basle Committee which has no founding treaty but is an informal forum for coordinating banking policy.[40]

The second type of global administrative body was a hybrid intergovernmental-private administration carrying out public functions through formalized partnerships, such as the Codex Alimentarius Commission, which formulates food standards through participation by non-governmental actors as well as by government representatives.[41]

The third involved private regulatory bodies and non-governmental organizations exercising transnational governance functions, such as the private International Standardization Organization (ISO), which formulates worldwide standards for products and processes. Even though the actions of these private regulatory bodies, by themselves, are non-binding, they can take on regulatory and economic significance when adopted by regulatory decisions by treaty-based authorities such as the WTO.[42] This illustrates the overarching and overlapping nature of the various types of global administrative bodies.

C. Fundamental Concepts in the Global Administrative Law Framework

As discussed above, the global administrative law framework firmly positions the global regulatory space in the interstitial area between international law and administrative law, which the authors argue transcends the traditional dichotomy of domestic vs. international.

Kingsbury *et al*. propose a highly pragmatic approach rooted in

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37 Kingsbury et al., *supra* note 9, at 20.

38 Kingsbury et al., *supra* note 9, at 17, 20.

39 Kingsbury et al., *supra* note 9, at 21.

40 *Id*.

41 Kingsbury et al., *supra* note 9, at 22–23.

42 *Id*.

the practicalities of day-to-day operations in the international sphere.[43] The authors recognize that strictly adhering to the traditional State-centered approach would require basing global operations on highly varied procedural and substantive requirements, and national interests of States operating in the global space.[44] This would greatly impede management of actions in the global area and regulatory decision-making, by both State and non-State actors, if not preclude it entirely in some sectors.

However, this intense dysfunction is not observable in practice. In spite of the often conflicting State procedural and substantive requirements and global needs, the transnational regulatory space observably operates in a pragmatic cooperative regulatory commonality, which is necessary for the effective management and the regulation of activities outside of the domains of the States. Practical necessity drives obligation, co-operation, and compliance. Although Kingsbury *et al*. focus on the decision-making processes, and less so on the rightful authority behind the decisions made, the authors appear to draw the legitimacy of actions by bodies in the international space and the global administrative law framework itself, from both the tacit and overt acceptance and compliance of the member States with the global standards and procedures stemming from pragmatic regulatory commonality.[45]

As discussed previously, Kingsbury *et al*. formulate a sweeping view of the scope of global administrative law, which eschews the strict national barriers. The framework's subjects include States, formal inter-governmental organizations, informal intergovernmental and transnational networks, hybrid intergovernmental-private administrations, and non-governmental organizations, which are integrated into a global regulatory system.[46] The procedural and substantive principles and norms of this global regulatory system are viewed as being created in a non-monopolistic, disseminated manner, unlike the traditional view of

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43 Kingsbury et al., *supra* note 9, at 34.

44 Kingsbury et al., *supra* note 9, at 23.

45 Benedict Kingsbury, *Frontiers of Global Administrative Law in the 2020s*, (Inst. for Int'l L. and Just., Working Paper No. 2020/2 2020) (noting that Global Administrative Law Framework is a "product of accumulated discrete decisions by the different generative actors in different institutional settings, responding to the need to channel and discipline the exercise of administrative power occurring in certain recurring structural modes").

46 Kingsbury et al., *supra* note 9, at 23.

creation of laws based on collating interests of the associated subjects.[47] Here, the global regulatory system, in its respective sectors, promotes procedural and substantive norms of a global scope based on principles of participation, control, and accountability, which not only internally govern the global regulatory system itself, but also associated States and subjects when they operate in this global space.

Accordingly, Kingsbury *et al*. conceptualize a novel, complex, multi-faceted framework of global administration. The tenets of this framework, which distinguish it from the administrative theories that precede it, are: (i) pluralism;[48] (ii) multi-level transnational governance networks; (iii) the informality of global administration involving "soft law" (such as non-binding agreements, recommendations, guidelines, informal norms, and technical advice);[49] (iv) the inherent correlation between the type of regulatory regime and the sector in which it operates, leading to a sectoral, fragmented and asymmetrical regulatory regimes;[50] and (v) exercise of public authority by private regulatory bodies under delegated powers. Moreover, in this framework, domestic regulatory agencies are not relegated to the domestic sphere, but instead play an active part in global governance in conjunction with other actors from the private realm and international civil service.[51]

In this way, the Global Administrative law framework proposed by Kingsbury et al. addresses "the pragmatic needs of transboundary regulation underpinned by a normative aspiration to a global rule of law,"[52] while adopting the basic principles and mechanisms of administrative law such as standards of

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47 Kingsbury et al., *supra* note 9, at 16.

48 Kingsbury et al., *supra* note 9, at 43–44.

49 Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORG. L. REV. 319, 349 (2009).

50 Casini, *supra* note 5 ("[Global Administrative Law] is a sector-based law . . . has developed, and is applied, unevenly across different policy domains. Some regimes have a sophisticated level of governing mechanisms, while others hardly so. This asymmetry of course depends on several factors, such as time, scope, institutional design, states' powers, and civil society's role."). *See also* Cassese, *supra* note 1, at 679–80 (framing the global legal order as an "adhocracy" that does not follow a single model, but which instead adapts to the functions to be performed, sector by sector).

51 Kingsbury et al., *supra* note 9, at 21.

52 Ming-Sung Kuo, *The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury*, 20 EUR. J. INT'L L. 997, 997 (2009).

transparency, participation, reasoned decision making, legality, and effective review of the rules and decisions.[53]

D. Role of the State in the Global Administrative Law Framework

Kingsbury argues that global administrative law is a form of "inter-public" law, theorizing it as "the law between public entities outside a single state, these public entities being subject to public law and to requirements of publicness."[54] The global administrative law framework functions in a post-Westphalian space where "public power has moved beyond national governments into a plurality of international and transnational sites."[55] This appears to be in contrast to the classical theory of international law where the scope of international administrative law is limited to the extent a State consents to delegate to an international institution. Informal "transnational administrative bodies" undertake regulatory decision-making functions, outside of the control from States and their domestic legal control mechanisms and international organizations.[56]

That said, it does not appear that Kingsbury et al. envisage the global administrative law framework to sit above and separate from the State, but instead formulate a horizonal and vertical integration involving connection of national and global institutions on a horizontal plane, as well as mutual connections between the national and global levels in the vertical plane.[57] Under this framework, while States may have to concede or share authority with other States within international organizations, States can find scope for activity beyond their own borders in the global arena.

At the same time, norms and standards originating from decision-making at a global level can affect States, who may not have necessarily provided input, much less consent, regarding the same.[58] The global administrative law framework recognizes

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53 Kingsbury et al., *supra* note 9, at 28.

54 Kingsbury et al., *supra* note 9, at 167.

55 Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, *in* THE TWILIGHT OF CONSTITUTIONALISM 245, 245 (Petra Dobner & Martin Loughlin eds., 2010).

56 Kingsbury et al., *supra* note 9, at 16–17.

57 Kingsbury et al., *supra* note 9, at 53.

58 This is a common critique from the perspective of the Global South, who argue that global institutions are shaped by more powerful States to serve their own interests.

various sources of regulation, not just States holding public authority, but also by private bodies, individuals, firms, and market actors. Additionally, the global administrative law framework involves a high degree of self-regulation. States could be both regulators and subjects of regulation. Regulators and the regulated exist on the same legal plane, with collective decisions to cooperate and submit to shared rules.[59]

E. Revaluation of Global Administrative Law Framework for the 2020s

Benedict Kingsbury revisited the Global Administrative Law Framework to analyze its conceptual and contextual issues that might be relevant in the current decade.[60] Here, while noting that the Global Administrative Law Framework was born out of studying practice in the global regulatory space initially, Kingsbury suggests that this analytic and theoretical framework may have some influence on practice over time.[61] Kingsbury identifies the increasing function of private governance in Global Administrative Law Framework in an effort by private actors to promote their regulatory goals.[62] The principles of transparency, participation, reasoning, and opportunity for review promulgated by the Global Administrative Law Framework have been identified as permeating the functioning of bodies and actors in the global regulatory space, thereby enhancing quality, accuracy, and consistency in rule-making.[63]

However, Kingsbury acknowledges the drawbacks of utilizing the principles and procedures of the Global Administrative Law Framework in certain regulatory structures.[64] For instance, implementing the procedures can be cumbersome, lead to increased costs and undesirable delays, be detrimental to negotiation

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59 Cassese, *supra* note 1, at 669.

60 *See* Kingsbury, *supra* note 45.

61 Kingsbury, *supra* note 45, at 3.

62 Kingsbury, *supra* note 45, at 4 ("Pharmaceutical companies successfully pushed for extensive GAL procedures in the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the 2016/18 Trans-Pacific Partnership (TPP) agreements, in order to heighten intellectual property protections for their products and to constrain governments and certain competitors.").

63 Kingsbury, *supra* note 45, at 5.

64 *Id.*

flexibility, and may be unnecessary in some sectors while hurting regulatory efficacy in others.[65] That said, Kingsbury notes that global regulators should still adopt the principles and procedures of Global Administrative Law Framework in order to "obtain validation, recognition, and acceptance of their decisions and norms by relevant validating or recipient authorities or actors," and to promote "institutional and programmatic coherence."[66]

After charting the Global Administrative Law Framework from its inception to 2015, Kingsbury then delineates a contextual shift in the political and legal landscape that has somewhat stalled the Global Administrative Law project. Kingsbury contemplates reasons for this downslide including increasing general societal mistrust towards global governance and prominent political leaders promoting inward looking values that contradict those of global administration.[67]

Nevertheless, Kingsbury is not ready to relegate the Global Administrative Law Framework to the margins of the international arena.[68] First, although the current trends may be moving from global governance, globalization is still pervasive, even if for purely economic reasons. Kingsbury anticipates that as long as international institutions endure, so will the Global Administrative Law Framework.[69] Second, Kingsbury expects that the powers wielding the most influence in international organizations will see a shift away from North Atlantic dominance towards Asia, and from democratic systems to populist systems.[70] Third, the function of

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65 *Id*.

66 Kingsbury, *supra* note 45, at 7.

67 Kingsbury, *supra* note 45, at 12 ("Popular cynicism or indifference were accompanied by active resistance to particular visible or symbolic markers of 'global governance' at work. Donald Trump campaigned successfully in 2016 on opposition to TPP and a whole set of other trade agreements. His administration energetically extracted the US from commitments to the Paris Climate Agreement of 2015, the United Nations Educational, Scientific and Cultural Organization, and the Arms Trade Treaty.").

68 Kingsbury, *supra* note 45, at 36 ("Moreover, the already-existing governance structures have largely been maintained rather than abolished or superseded. While inter-governmental creation of new global legal institutions or major governance agreements was largely frozen from 2016 in the absence of US support, the leaders of most other states are well aware that cooperative international regulatory governance can enhance the effectiveness of their regulatory programmes, increasing the welfare of their members and, often, some broader constituencies as well.").

69 Kingsbury, *supra* note 45, at 14.

70 Kingsbury, *supra* note 45, at 14–15.

private governance in the Global Administrative Law Framework will only increase in the changing political landscape to fill the void left by intergovernmental governance.[71]

Fourth, the Global Administrative Law Framework's principles of transparency, participation, reason-giving, and opportunity for review are ideally placed to tackle upcoming seismic technological shifts.[72] Shifts such as increasing digitization, pervasive artificial intelligence, as well as granular and self-enforcing algorithmically coded law in the areas of big data and personalization of private law, all would indubitably require comprehensive global regulation.[73]

Kingsbury concludes by positing that the Global Administrative Law Framework will continue to endure, albeit in an altered manner to respond to the changing global trends.[74]

II. Study of the Hague System for international industrial design patent protection

In general, Intellectual Property (IP) encompasses a variety of economically valuable creations of the mind of an individual, on the basis of which States may confer property rights to the individual in the form of a legal grant of exclusivity for a predetermined period of time. Objectives of IP regimes include granting exclusive legal and economic rights to creators in exchange for promoting innovation and creativity, public dissemination of intellectual works, encouraging fair-trading, and enhancing economic and social development.[75] The proliferation of IP has mirrored that of globalization discussed previously. The immense growth of high-technology goods and their influence of every increasing global trade and economy have catapulted the importance and indispensability of IP rights both in the domestic setting and in the global arena, not just for industry players and States themselves but also for consumers and intermediary producers, leaving behind IP's

71 *Id*.

72 Kingsbury, *supra* note 45, at 15–16.

73 *Id*.

74 Kingsbury, *supra* note 45, at 37 ("Insofar as global administrative law is a functional response to 'the emergence of global governance and the corresponding need to regulate it', the practice of [Global Administrative Law] may be expected to continue.").

75 *See* P. Kanagavel, *Intellectual Property Rights: A Comprehensive Overview*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 663, 669 (2003).

modest origins.[76] However, IP law is conceptually complex and ever evolving, and its effective administration raises significant challenges, such as in comparison with contract law or property law which typically deal with a fixed set of goods or rights, although all of them may operate in the same sector of commerce.

The World Intellectual Property Organization (WIPO) identifies protectable creations as including "inventions; literary and artistic works; designs; and symbols, names and images used in commerce," with each being protected by different disciplines within IP law.[77] As examples, Patents are directed to protection of useful inventions, Copyrights are directed to protection of literary and artistic works, Trademarks are directed to protection of marks indicating origin of goods and services, while Trade Secrets are directed to rights with respect to "confidential information which may be sold or licensed."[78]

Patents typically refer to exclusive legal property rights granted to an inventor that prohibits others from making, selling, or otherwise using the patented invention.[79] There are two categories of Patents: (i) utility Patents are directed to novel, non-obvious, and useful inventions such as processes, machines, methods of manufacture, or composition of matter,[80] and (ii) industrial design Patents directed to new, original and ornamental or esthetic design for an article of manufacture.[81] In other words, a utility Patent is

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76 *See* Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. REV. 1063, 1068 (2017) ("At the beginning of the 19th century the United States was severely underdeveloped. Government intervention in the economy took the form of monopoly grants to encourage economic development, as well as tax breaks and other subsidies dedicated to the creation of infrastructure. The early American state also took a much heavier role . . . further[ing] a strongly national and pro-regulatory interpretation of the Commerce Clause, designed to facilitate national development."); *see also* Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 GEO. WASH. INT'L L. REV. 277, 285 (2001) ("Since the main value of high-technology products is intellectual property rather than traditional inputs such as raw materials, intellectual property protection became a fundamental part of the United States' trade strategy.").

77 WIPO, *What is Intellectual Property?*, https://www.wipo.int/about-ip/en/ [https://perma.cc/BL7U-9THN] (last visited Sept. 3, 2024).

78 *Id.*

79 35 U.S.C. § 271(a) (reciting Patent rights granted by the U.S., and standards for Patent infringement in the U.S.).

80 35 U.S.C. § 101.

81 35 U.S.C. § 171.

directed to protection of the way an article works and is capable of being used, while industrial design Patents are directed to the esthetic appearance of an article including its configuration, shape and surface ornamentation.

In particular, industrial design Patents are directed to protection of ornamental features of an invention such as, but not limited to, the shape of an article, surface features, two or three dimensional features, and other aesthetic features such as patterns, lines or color.[82] The U.S. Patent and Trademark Office defines a protectable design as consisting of "visual ornamental characteristics embodied in, or applied to, an article of manufacture" which are inseparable from the article to which they are applied, such that they cannot exist alone.[83] This paper is limited to the industrial design Patents (hereinafter referred to as "Industrial Designs"), as eschews discussion of utility Patents and other types of IP listed above.

Although, the area of industrial designs is relatively understudied in comparison with their utility counterparts, the importance of Patent protection for industrial designs has only increased. First, design Patents serve as vital tools to capture IP rights for ornamental or esthetic design for an article, which other forms of IP such as utility Patents, copyrights and trademarks cannot facilitate.[84] Second, designs drive brand recognition and function as source identifiers in the minds of the consumers in product categories where same or similar functionality is ubiquitous. In such scenarios, the visual characteristics of the designs are what help consumers distinguish between brands; hence, design Patents can take on high stakes both financially and for market viability of the brand.[85] Third, design Patents span a

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82 WIPO, *supra* note 77.

83 U.S. PAT. & TRADEMARK OFF, *Design Patent Application Guide*, https://www.uspto.gov/patents/basics/apply/design-patent [https://perma.cc/8C8B-7BHM] (last visited Sept. 3, 2024).

84 *See* Peter Lee & Madhavi Sunder, *Design Patents: Law Without Design*, 17 STAN. TECH. L. REV. 277, 285–88 (2013).

85 Apple and Samsung engaged in a $539 million, 7 year battle over U.S. design Patents D618,677, D593,087, and D604,305 directed to the outer design of the screens of iPhones, as well as arrangement of icons in the graphical user interface, where the U.S. Sup. Ct. in Samsung Elec. Co. v. Apple Inc., 137 S.C. 429 (2016), reconsidered the basis of the $1 billion award, culminating in a settlement in 2018. *See* Jacob Kastrenakes, *Apple and Samsung Settle Seven-Year-Long Patent Fight Over Copying the Phone,* THE VERGE, (Jun. 27, 2018, 2:59 PM EDT), https://www.theverge.com/2018/6/27/17510908/apple-samsung-settle-patent-battle-over-copying-iphone [https://perma.cc/49GU-5B4R].

myriad of market sectors, including, but not limited to, technology (both software and hardware), apparel and fashion, automobiles, consumer goods and appliances, textiles, medical equipment, and even products of artistic expression such as jewelry.[86] However, obtaining design Patent protection can be a prolonged process and cost-intensive, requiring inventors to navigate complex rules governing eligibility, which are exacerbated when inventors have to duplicate efforts in multiple States.[87]

A. National vs. International Patent law systems

As discussed above, globalization and the resulting streamlined access to international markets and interdependence between States has made multinational brands, companies, and products ubiquitous. Companies, ranging from large corporations to startup and solo inventors, are no longer limiting the market for the products to the State they are incorporated in. Instead, international reach of the products is a key strategy for many brands, with the period of exclusivity being vital to establish and compound brand success. Moreover, as manufacture and supply chain mechanisms become more global, interconnected, and complex, this international reach not only takes the form of sales in a multiples States, but also extends to manufacture of the products in one or more States far removed from the ultimate location of the sales. Accordingly, acquiring applicable IP protection for their inventions and products internationally has become crucial for companies, not just for protecting their IP rights in the markets their products are sold, and in the States where their products are manufactured, but also to preclude making of knockoff products that are often produced by remote entities.[88]

However, there is no State or entity that can grant a single "international" Patent that offers worldwide protection. Instead, the Patent system is largely an exercise in domestic law, with each State

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86 *See* WIPO, *Industrial Designs*, https://www.wipo.int/designs/en/ [https://perma.cc/AU32-SRPE] (last visited Sept. 3, 2024).

87 *See* Susanna Monseau, *The Challenge of Protecting Industrial Design in A Global Economy*, 20 TEX. INTELL. PROP. L.J. 495, 539 (2012).

88 For example, design copying and piracy is rampant in the fast fashion apparel industry, with copied designs being manufactured and sold at a fraction of the price. These goods are often manufactured in locations that the company or the owner of the design do not operate in. *See generally* Keyon Lo, *Stop Glorifying Fashion Piracy: It is time to enact the Innovative Design Protection Act*, 21 CHI. KENT J. INTELL. PROP. 159 (2022).

granting Patents in accordance with its own Patent law and requirements.[89] The Patent is typically granted by a domestic administrative agency, often termed as a national Patent Office (or a regional Patent Office such as the European Patent Office (EPO)).[90]

Such a Patent granted by a national Patent Office would only be enforceable within the geographic confines of the respective State. For example, a Patent granted in the U.S. would only be able to preclude manufacture or sale of an infringing product within the U.S., but would have no effect on manufacture or sale of an identical product outside the U.S. If the inventor seeks protection in the jurisdiction of a second State, the inventor must obtain another Patent from the Patent Office of the second State. However, navigating this patchwork system of national Patent Offices, with each national Patent Office having its own requirements in accordance with applicable domestic patent laws, poses a challenge for an inventor.

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89 U.S. PAT. & TRADEMARK OFF., *Protecting Intellectual Property Rights (IPR) Overseas*, https://www.uspto.gov/ip-policy/ipr-toolkits [https://perma.cc/3BVQ-XSBU] (last visited Sept. 3, 2024).

90 *See e.g.*, AFRICAN REGIONAL INTELLECTUAL PROPERTY ORGANIZATION ("ARIPO"), https://www.aripo.org/ [https://perma.cc/2FKA-55EF] (last visited Sept. 3, 2024); IP AUSTRALIA, https://www.ipaustralia.gov.au/ [https://perma.cc/8H45-3UBB] (last visited Sept. 3, 2024); BRAZIL NATIONAL INSTITUTE OF INDUSTRIAL PROPERTY ("INPI"), https://www.gov.br/inpi/pt-br [https://perma.cc/6JKG-UFPR] (last visited Sept. 3, 2024); CANADIAN INTELLECTUAL PROPERTY OFFICE ("CIPO"), https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en [https://perma.cc/JH3M-6FPV] (last visited Sept. 3, 2024); CHINA NATIONAL INTELLECTUAL PROPERTY ADMINISTRATION ("CNIPA"), https://english.cnipa.gov.cn/ [https://perma.cc/7PSQ-EPT4] (last visited Sept. 3, 2024); ETHIOPIAN INTELLECTUAL PROPERTY AUTHORITY ("EIPA"), https://eipa.gov.et/ [https://perma.cc/WR2J-3SRY] (last visited Sept. 3, 2024); EUROPEAN PATENT OFFICE ("EPO"), https://www.epo.org/en/about-us/at-a-glance [https://perma.cc/B74E-45NC] (last visited Sept. 3, 2024); GERMAN PATENT OFFICE ("DPMA"), https://www.dpma.de/english/ [https://perma.cc/L6YQ-5G2D] (last visited Sept. 3, 2024); INTELLECTUAL PROPERTY INDIA, https://www.ipindia.gov.in/ [https://perma.cc/G74M-C2XX] (last visited Sept. 3, 2024), INTELLECTUAL PROPERTY OFFICE OF SINGAPORE ("IPOS"); http://www.ipos.gov.sg [https://perma.cc/6FTX-LNAZ] (last visited Sept. 3, 2024); JAPAN PATENT OFFICE, https://www.jpo.go.jp/e/index.html [https://perma.cc/6NJJ-E3JK] (last visited Sept. 3, 2024); KOREAN INTELLECTUAL PROPERTY OFFICE ("KIPO"), https://www.kipo.go.kr/en/MainApp?c=1000 [https://perma.cc/P4SX-UX5R] (last visited Sept. 3, 2024); UNITED STATES PATENT AND TRADEMARK OFFICE ("USPTO"), http://www.uspto.gov [https://perma.cc/A2KU-744T] (last visited Sept. 3, 2024); UNITED KINGDOM INTELLECTUAL PROPERTY OFFICE ("IPO"), https://www.gov.uk/government/organisations/intellectual-property-office/about [https://perma.cc/DY4W-JSMD] (last visited Sept. 3, 2024).

The challenges faced by inventors were recognized very early in the development of IP when "foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna, Austria in 1873 because they were afraid their ideas would be stolen and exploited commercially in other countries." [91] To alleviate these challenges, States developed an international system for Patent protection based on the following primary international conventions and treaties in an attempt to harmonize Patent protection internationally. First, the Paris Convention for the Protection of Industrial Property (1883) (hereinafter the "Paris Convention") directed to establishing a union of signatory States for IP protection. States in the union are accorded: (i) uniform reciprocal national treatment such that foreigners from other signatory states are treated the same as domestic citizens with respect to obtaining Patent protection; (ii) right of priority allowing inventors in signatory States to preserve the earlier priority date of the domestic Patent filing so long as the counterpart foreign application is filing within twelve months of the first filing; and (iii) special arrangements that govern bilateral or multilateral agreements between signatory States for stronger IP cooperation. The Paris Convention is administered by WIPO and is still in effect to date.[92]

Second, Patent Co-operation Treaty (1970) (hereinafter "PCT") is directed to facilitating simultaneous Patent protection in multiple signatory States by filing a single "international" patent application, which has the effect of being filed in both the first State and all other designated signatory States by the inventor. The "international" patent application is then transmitted to the national Patent Offices of the designated signatory States as a part of a "national phase," where Patent office of each designated state then examines and potentially grants a Patent in accordance with the controlling domestic Patent law and procedures. The PCT system is directed to utility Patents and is administered by WIPO as well.[93]

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91 WIPO, *WIPO — A Brief History*, https://www.wipo.int/about-wipo/en/history.html [https://perma.cc/339R-PL4C] (last visited Sept. 3, 2024).

92 Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, *available at* https://www.wipo.int/wipolex/en/text/288514 [https://perma.cc/CK8E-4J4S]; WIPO, *Summary of the Paris Convention for the Protection of Industrial Property (1883)*, https://www.wipo.int/treaties/en/ip/paris/summary_paris.html [https://perma.cc/LG3M-F86W].

93 Patent Cooperation Treaty, June 19, 1970, 28.7 U.S.T. 7645, T.I.A.S. No. 8733, *available at* https://www.wipo.int/pct/en/texts/articles/atoc.html [https://perma.cc/N8QR-

Third, Hague Agreement Concerning the International Registration of Industrial Designs (1925) (hereinafter the "Hague system")[94] is directed to establishing an international system for protection of Industrial Designs in several member States via a single "international" Design application, filed in one language, with one set of fees. While WIPO administers the processing of the "international" Design application, similar to the PCT system, the granting of industrial Design registration remains under the control of each national Patent office.[95]

Other agreements such as Trade Related Aspects of Intellectual Property Agreement (TRIPS) (1994) further added provisions on industrial design, and brought in a large number of additional States into the fold.[96] TRIPS also set minimum standards for the type and duration of protection in the form of a minimum design Patent term of 10 years.[97] The TRIPS also was revolutionary in that it established an operative link between IP and trade, bringing IP into the forefront of trade negotiations.

B. The Hague System

The 1999 Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs allows applicants to apply using a single standardized international design application in a single language (English, French or Spanish) that can include up to 100 designs and can designate any number of the ninety-six (96) Contracting States.[98] As discussed above, the Hague system

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EVZD]; U.S. PAT. & TRADEMARK OFF., PURSUING INTERNATIONAL IP PROTECTION, *available at* https://www.uspto.gov/patents/basics/international-protection/filing-patents-abroad [https://perma.cc/E879-LK95].

94 First adopted in 1925, the Hague Agreement established the Hague System, which now is governed by two acts of the Hague Agreement, the Hague Act of 1960 and the Geneva Act of 1999, https://www.wipo.int/treaties/en/registration/hague/ [https://perma.cc/7EY3-7TKQ].

95 WIPO, *Summary of the Hague Agreement Concerning the International Registration of Industrial Designs* (1925), https://www.wipo.int/treaties/en/registration/hague/summary_hague.html [https://perma.cc/364P-P84D]; U.S. PAT. & TRADEMARK OFF., *Pursuing International IP Protection*, https://www.uspto.gov/patents/basics/international-protection/filing-patents-abroad [https://perma.cc/QA4E-7A9H].

96 Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 25–26, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

97 *Id*. art. 26.

98 Hague Agreement, *supra* note 8 (list of signatory States); U.S. PAT. & TRADEMARK

establishes an international system for the registration of designs. However, the Hague system does not harmonize international protection of industrial designs but focuses on establishing an international system of registration with a goal of streamlining and increasing efficiencies of national design Patent registrations in multiple contracting States.[99]

Regarding the Hague System's procedural regime, the procedure begins with an applicant filing an international application with WIPO, at which point the filing date or the international registration date starts the clock on the priority of the filed design.[100] Here, the International Bureau of WIPO's role is to function as a central agency for international deposit of the design.[101] Next, WIPO conducts a formality examination involving a preliminary review of form and content, such as whether contracting States have been properly designated, whether the quality of reproductions of the designs meet the requirements, and/or the like.[102] WIPO does not conduct substantive examinations, nor does it render decisions on whether a particular design is eligible for protection.[103] The applicant is given three months to remedy any

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OFF., *Hague Agreement Concerning the International Registration of Industrial Designs*, https://www.uspto.gov/patents/initiatives/hague-agreement-concerning-international-registration-industrial-designs [https://perma.cc/7FSG-WKBJ] (last visited Sept. 3, 2024); WIPO, *Hague System – Filing Applications*, https://www.wipo.int/hague/en/hague_file_renew.html [https://perma.cc/ZF8T-TDM3] (last visited Sept. 3, 2024).

99 Monseau, *supra* note 87, at 520 ("[The Hague System's] aim was to simplify the international legal procedure for obtaining protection for industrial designs by creating a centralized international deposit of industrial designs. This change would make it easier to register designs in multiple countries.").

100 WIPO, *How Does the Hague System Work?,* https://www.wipo.int/hague/en/how_hague_works.html [https://perma.cc/AXU3-WBJY] (last visited Sept. 3, 2024); The Hague Agreement Concerning the International Registration of Industrial Designs - Geneva Act of July 2, 1999, TRT/HAGUE/006, art. 14, *available at* https://www.wipo.int/wipolex/en/text/285214#article14 [https://perma.cc/8UJM-J7Z2].

101 *Guide to the Hague System Introduction*, WIPO, https://www.wipo.int/hague/en/guide/introduction.html [https://perma.cc/C9AE-2MTB] (last visited Sept. 3, 2024).

102 WIPO, *How Does the Hague System Work?, supra* note 100.

103 WIPO, *How Does the Hague System Work?, supra* note 100. Contrast with the more active role WIPO plays with respect to utility Patents as a part of the PCT system as a part of its centralized substantive examination procedures. Sarah R. Wasserman Rajec, *Advances in Patent Rights Acquisition in International Patent Law*, 41 CARDOZO ARTS & ENT L. J. 447, 451 (2023) ("During the international stage, the single application is subject to preliminary examination, resulting in an international preliminary examination report on patentability.").

deficiencies.[104] WIPO then transmits the application to the national Patent Offices of the designated member States.[105]

Next, the application is published as an international registration in the International Designs Bulletin, the official publication of the Hague System, typically around twelve months from the international registration date.[106] In the meantime, the Patent Office of each designated contracting State may perform substantive examination in accordance with the respective domestic law and requirements.[107] Each contracting State has the right to refuse protection within its own territory, as long as it notifies WIPO within a designated time period from the date of publication of the international registration, typically, within six months.[108] If no refusal is issued by a particular Patent Office that is designated by the application, protection is deemed to be automatically granted in that given jurisdiction.[109] WIPO transmits any refusals to the applicant.[110] The initial term granted under the Hague System is five years, which may be renewable to up to fifteen years. Some States may grant longer terms.[111]

C. World Intellectual Property Organization as a formal intergovernmental organization under the Global Administrative Law Framework

The World Intellectual Property Organization (WIPO) was created in 1967 under the WIPO convention, as an intergovernmental organization for administering IP matters internationally, which in 1974 became one of the specialized agencies of the United Nations system.[112] Most countries in the

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104 WIPO, *How Does the Hague System Work?, supra* note 100.

105 *Id.*

106 *Id.*

107 *Id.* For instance, statutory requirements for grant of a U.S. Design Patent include ornamentality, novelty, non-obviousness, enablement, and definiteness, under the backdrop of identified pertinent prior art. USPTO, Manual of Patent Examining Procedure (MPEP) § 1504.

108 WIPO, *How Does the Hague System Work?, supra* note 100.

109 *Id.*

110 *Id.*

111 *Id.*

112 WIPO, CONVENTION ESTABLISHING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO Doc. WO029EN (Sept. 28, 1979, amended Sept. 28, 1979), https://www.wipo.int/treaties/en/convention/ [https://perma.cc/T7GU-2HHJ].

world are members of WIPO with WIPO having 193 member states as of 2023.[113] WIPO administers twenty-six treaties, including PCT, the Hague agreement, the Paris and Berne Conventions.[114] A unique feature of WIPO is that, because it does not impose an obligation on members to become signatories to any of these treaties, all member States have the opportunity to contribute to discussions of IP issues at WIPO without having been tied to a treaty obligation.[115] The formal objective of WIPO is to "promote the protection of intellectual property throughout the world through co-operation among States and, where appropriate, in collaboration with any other international organization."[116] Unlike other U.N. organizations which are sustained by contributions from member States, WIPO is a self-funding agency, with fee-paying IP services, such as under the PCT and Hague systems, accounting for about 95 percent of WIPO's budget.[117]

As discussed previously, the global administrative law framework recognized the following types of international organizations or international regulatory bodies: (i) "formal inter-governmental organizations established by treaty or executive agreement;" (ii) domestic regulatory agencies that "take decisions on issues of foreign or global concern" developing a distributed administration in the international arena; (iii) informal intergovernmental and "transnational networks and coordination arrangements;" (iv) "hybrid intergovernmental-private administration" undertaking public functions through formalized partnerships; and (v) private regulatory bodies and non-governmental organizations exercising transnational governance

113 WIPO, MEMBER STATES, *available at* https://www.wipo.int/members/en/ [https://perma.cc/UJ2U-L6GA].

114 WIPO, WIPO-ADMINISTERED TREATIES, https://www.wipo.int/treaties/en/ [https://perma.cc/AM5T-JNDA].

115 Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of The Global Intellectual Property Regime*, 33 GEO. WASH. INT'L L. REV. 277, 297 (2001) (noting that U.S. regularly participated in discussions for revisions of treaty revisions relating to international designs even before it became a member of the Hague system).

116 Convention Establishing the World Intellectual Property Organization, July 14, 1967, art. 3, 6 I.L.M. 782, 784.

117 WIPO, RESULTS, BUDGET AND PERFORMANCE, https://www.wipo.int/about-wipo/en/budget/ [https://perma.cc/3QCY-9L59].

functions.[118] Of these, at first glance, WIPO best maps onto the formal inter-governmental organization type, as it is established by treaty.

WIPO provides administrative IP services, directed to streamlining applications for international IP rights and reducing costs, via single international design applications that designates contracting States by administering several IP treaties.[119]

Moreover, one of the functions of WIPO is rule-making and legislation, i.e., formulate IP norms and rules, via multilateral instruments.[120] Moreover, WIPO, in its capacity as a forum for multilateral coordination of international IP policy, "sponsors treaty negotiations to revise existing agreements, and sponsors conferences to discuss new international treaties."[121] WIPO has also attempted to harmonize national IP laws and commit all member States to minimum standards, albeit with mixed success.[122]

Additionally, IP is inherently dynamic and evolving. To keep pace with and respond to changes in technology, WIPO also employs "soft law" approaches which are integral to the Global Administrative Law framework. [123] In this regard, WIPO also includes a more flexible rulemaking system involving recommendations, guidelines, informal norms, and technical advice with input from States, which are non-binding. Because these "soft law" approaches do not require prolonged processes involved in formal binding adoption by member States, they can be swiftly implemented by member State as required.[124]

WIPO also undertakes quasi-judicial functions in the form of mediation, arbitration, expedited arbitration, and expert

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118 Kingsbury *et al*., *supra* note 9, 21–23.

119 WIPO, *Hague System – Filing Applications*, *supra* note 98.

120 Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law is Reconceptualising Intellectual Property*, 36 MICH. J. INT'L L. 557, 587 (2015).

121 Cheek, *supra* note 76, at 289–90.

122 Cheek, *supra* note 76, at 287–88.

123 Kingsbury & Casini, *supra* note 49, at 353.

124 Graeme B. Dinwoodie, *The International Intellectual Property System: Treaties, Norms, National Courts, and Private Ordering*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT 61, 80–84 (Daniel J. Gervais ed., 2007) (analyzing how WIPO has utilized soft law mechanisms such as the Uniform Domain Name Dispute Resolution Policy (UDRP) by "reducing the direct involvement of nation states and moving at a much brisker pace than found in the treaty revision process").

determination, via the WIPO Arbitration and Mediation Center.[125] However, WIPO lacks traditional enforcement mechanisms that may render these quasi-judicial functions incomplete. Here, WIPO also coordinates with other global regulatory regimes such as private bodies like Internet Corporation for Assigned Names and Numbers (ICANN), as a part of hybrid public-private rulemaking.[126]

WIPO is also a part of horizontal cooperation networks with other global regulatory regimes, involving both public and private actors.[127] As discussed above, WIPO coordinates with a gamut of stakeholders including States, private actors, industries, domestic administrative agencies, inventors, consumers, NGOs and the like. WIPO inevitably stands at the center of international IP regulation as a formal inter-governmental organization. However, WIPO is also embedded in several other facets of the Global Administrative Law framework, such as promulgating "soft law" approaches to global policy-making processes, top-down implementation of IP policies through member states as well as horizontal cooperation networks with other global regulatory regimes, shared governance, multilayered decision-making that spans local national, regional, and multilateral organizations, and the like. Accordingly, WIPO is a quintessential international organization that appears to be at the heart of the Global Administrative Law framework.

D. Complex multi-level governance associated with the Hague Agreement

As discussed above, the Hague system involves a composite administration procedure that involves close top-down interaction between WIPO, a formal inter-governmental organization, and

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125 WIPO, ALTERNATIVE DISPUTE RESOLUTION, https://www.wipo.int/amc/en/ [https://perma.cc/HZ63-Q89M].

126 WIPO, DOMAIN NAME DISPUTE RESOLUTION, https://www.wipo.int/amc/en/domains/ [https://perma.cc/7L8V-CUBD]; WIPO, SELECTED WIPO CORRESPONDENCE WITH ICANN, https://www.wipo.int/amc/en/domains/resources/icann/ [https://perma.cc/3KLJ-QX4M].

127 Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 HOUS. L. REV. 1187, 1192 (2009) (describing an "international IP regime complex" with institutions such as "the World Health Organization; the Secretariat of the Convention on Biological Diversity; the Food and Agriculture Organization; the United Nations Educational, Scientific and Cultural Organization (UNESCO); and the United Nations Conference on Trade and Development (UNCTAD)").

national Patent Offices, domestic regulatory agencies, both types of international regulatory bodies of the Global Administrative Law framework. The Hague system facilitates widespread global cooperation with respect to registration of designs across ninety-six (96) Contracting States.[128] While the Hague system establishes an international system for the registration of designs for streamlining and increasing efficiencies of national design Patent registrations in multiple contracting States, it does not harmonize international protection of industrial designs.[129]

However, WIPO's control and functions at the global level in the administration of the Hague system are limited, due to sharing of powers between WIPO and the States. The substantial decision on whether to grant a design registration remains in the hands of the national Patent Offices, and ultimately the State.[130] It is contemplated that one way to enhance the effectiveness of the Hague system is to make strides in harmonizing requirements for granting design registrations, to thereby establish substantive centralized examination at WIPO. Such efforts would transform the Hague System to a fully integrated regime as contemplated by the Global Administrative Law framework.

Moreover, the principle of review under the Global Administrative Law framework seems lacking under the Hague system. The Hague system lacks unified appeal procedures at the international level.[131] Implementing an appeal mechanism may help increase the legitimacy of the Hague system as an authority of industrial designs, with perhaps an application of respective domestic Patent law, but under a centralized, integrated framework. However, that would require approval from the member States. Considering the above, the Hague system could be characterized as

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128 WIPO, Hague Agreement, *supra* note 8; U.S. PAT. & TRADEMARK OFF., *supra* note 98; WIPO, *Hague System – Filing Applications*, *supra* note 98.

129 Monseau, *supra* note 87, at 520.

130 WIPO, *How Does the Hague System Work?*, *supra* note 100.

131 WIPO, GUIDE TO THE HAGUE SYSTEM, 60 arts. 8(3) and 12(3), *available at* https://www.wipo.int/export/sites/www/hague/en/docs/hague-system-guide.pdf [https://perma.cc/LN4Z-ETY5] ("If the holder contests the refusal, the ensuing procedure devolves exclusively at the national level, according to the requirements and procedures provided for by the applicable domestic legislation. The International Bureau is not involved in this procedure. An appeal against a refusal of protection must be submitted to the competent authorities of the Contracting Party concerned within the time limit and in accordance with the conditions laid down in that Contracting Party's own legislation.").

a multi-level regulatory regime under the Global Administrative Law framework, but as one requiring more top-down integration.

E. Intergovernmental and transnational networks in the Hague System

Informal, transgovernmental networks could be defined as decentralized networks directed to facilitating global governance. These networks involve substantive interactions between regulators, officials, legislators, industry representatives and bureaucrats from domestic agencies.[132] Such networks are readily observable in the international IP realm, particularly in the context of utility patents and trademarks. Not only are career civil servants, industry players, and domestic Patent Offices engaged in dialogue to further policy goals, but also pressure domestic Patent systems to coordinate with foreign counterparts.[133] Such coordination can help with facilitating favorable industry outcomes of comparable protection in foreign countries and with enforcing their IP rights abroad.[134] In this regard, USPTO officials assist foreign counterparts and work with lawyers in coordinating IP policies; thereby, forming "cross-fertilization" or "information exchange" networks.[135] Moreover, WIPO also participates in such networks by providing draft laws directed to creating effecting enforcement regimes, and facilitating conferences for exchanges between bureaucrats from industrialized and developing countries.[136]

Moreover, "coordination networks" directed to gradual alignment of regulation across states, while substantive grant decisions are still the domain of the State so long as they grant national treatment to others, are widely prevalent.[137] However, "mutual recognition" networks for establishing minimum

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132 *See* Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 183–84 (1997).

133 Cheek, *supra* note 76, at 278, 282.

134 *Id*.

135 Cheek, *supra* note 76, at 280, 306.

136 *Id*.

137 Cheek, *supra* note 76, at 280, 306; *See also* Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, *available at* https://www.wipo.int/wipolex/en/text/288514 [https://perma.cc/CK8E-4J4S]; and WIPO, SUMMARY OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY (1883), https://www.wipo.int/treaties/en/ip/paris/summary_paris.html [https://perma.cc/LG3M-F86W].

regulatory standards appear only to be moderately successful.[138] Here, while minimum standards with respect to number of designs in the application, single language, streamlined renewal, and minimum patent term have been successfully implemented,[139] there are no minimum standards with respect to formal requirements or the scope of protection, which vary across the States.[140] However, "harmonization networks" with standardized, identical regulations appear to be absent.[141]

That said, the above listed transgovernmental networks that are prevalent in the global IP space do not seek to supplant State authority and associated institutions, but instead serve to revitalize them and increase their effectiveness.[142]

F. Principles of Global Administrative Law Framework

Finally, the Global Administrative Law framework's key principles of participation, transparency, and review are applied to the Hague System to assess its soundness and regulatory accountability.

Decisional transparency can be defined as access to information and promoting "accountability directly by exposing administrative decisions and relevant documents to public and peer scrutiny."[143] Participation can be defined as a "formal opportunity to be heard, or to respond to any arguments that may be made against it."[144] As discussed, WIPO does not impose an obligation on members to become signatories to any of these treaties. All member States have the opportunity to contribute to discussions of IP issues at WIPO without having been tied to a treaty obligation.[145] WIPO allows for

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138 *Id*.

139 WIPO, HAGUE SYSTEM – FILING APPLICATIONS, https://www.wipo.int/hague/en/hague_file_renew.html [https://perma.cc/ZF8T-TDM3].

140 *See* Charles Rauch, *Hague to Break It to You: International Design Applications Are Not a Silver Bullet for Multijurisdictional Protection*, JD SUPRA (May 15, 2015), https://www.jdsupra.com/legalnews/hague-to-break-it-to-you-international-87774/ [https://perma.cc/S7WN-5Q6K] (last visited Jan. 22, 2024).

141 Cheek, *supra* note 76, at 281.

142 Cheek, *supra* note 76, at 320.

143 Kingsbury et al., *supra* note 9, at 37–39.

144 Kingsbury et al., *supra* note 9, at 24.

145 Cheek, *supra* note 76, at 297 (noting that U.S. regularly participated in discussions for revisions of treaty revisions relating to international designs even before it became a member of the Hague system).

the inclusion of stakeholder organizations, NGOs, industry groups, and others as observers at formal meetings.[146] WIPO also provides a plethora of material on internal decision making and the information and considerations on which decisions are based.[147] Moreover, because WIPO is a self-funding agency, WIPO can exhibit independence and transparency, unlike organizations requiring contributions from member States.[148]

Effective review of rules and decisions may be defined as an "entitlement to have a decision of a domestic administrative body affecting one's rights reviewed by a court or other independent tribunal."[149] The Hague system lacks unified appeal procedures at the international level.[150] Implementing an appeal mechanism may help increase the legitimacy of the Hague system as an authority of industrial designs in its own right, with perhaps application of respective domestic Patent law, but under a centralized, integrated framework. That said, with respect to WIPO's functions itself, there are several external and internal bodies to oversee and evaluate WIPO's operations and activities.[151]

In conclusion, the institutional framework for the Hague System, and WIPO in particular, is embedded in several other facets of the Global Administrative Law framework. Such as promulgating "soft law" approaches to global policy-making processes, top-down implementation of IP policies through member states as well as horizontal cooperation networks with other global regulatory regimes, shared governance, multilayered decision-making that spans local national, regional and multilateral organizations, and the like. Although the Hague system is deficient in harmonized regulations, the system still exhibits a multi-level regulatory regime under the Global Administrative Law framework, albeit one requiring more top-down integration. Moreover, the

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146 WIPO, *WIPO Observers*, https://www.wipo.int/about-wipo/en/observers/ [https://perma.cc/QC4F-6R7L].

147 *Id*. *See also* Kingsbury et al., *supra* note 9, at 37–39.

148 WIPO, *Results, Budget and Performance*, https://www.wipo.int/about-wipo/en/budget/ [https://perma.cc/25R3-K8BE].

149 Kingsbury et al., *supra* note 9, 39–40.

150 WIPO, GUIDE TO THE HAGUE SYSTEM, 60 arts. 8(3) and 12(3), *available at* https://www.wipo.int/export/sites/www/hague/en/docs/hague-system-guide.pdf [https://perma.cc/LN4Z-ETY5].

151 WIPO, *Oversight*, https://www.wipo.int/about-wipo/en/oversight/ [https://perma.cc/4UWT-9NS9].

Hague System comprises transgovernmental networks directed to promoting global IP policies and increasing efficiencies of administering institutions. Finally, the Hague System appears to largely function in accordance with the Global Administrative Law framework's key principles of transparency, participation, and effective review, signaling soundness and regulatory accountability.

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