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Christoffer C. Eriksen

The Expansion of International Law and the Use of National Administrative Discretion: The Impact on Administrative Battlefields

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TOWARDS A MULTIPOLAR ADMINISTRATIVE LAW:
A THEORETICAL PERSPECTIVE

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Prologue:
Towards a Multipolar Administrative Law: A Theoretical Perspective

The idea that administrative law concepts can remain stable over time has been abandoned. Today, administrative agencies are no longer conceived of as simply executive "machines" and command-and-control bodies. There is a growing tension within countries between the executive branches and social expectations for rights-based institutions, and administrative bodies accordingly develop in an increasingly interstitial and incremental manner. This also happens because the separation of society and administration is less clear, and the public-private dividing line has blurred: dual relationships are becoming an exception; networking and multipolar linkages between norms, actors and procedures are the rule. Legal systems have become more interdependent, due to the import-export of administrative models: this has several implications, such as the fact that some basic principles of administrative law beyond the State have been developing. Furthermore, economic and political analyses of public administrations are increasing; this requires the adoption of multi-disciplinary approaches in examining the field.

All these phenomena – to name but a few – constitute the main features of an emerging "multipolar administrative law", where the traditional dual relationship between administrative agencies and the citizen is replaced by multilateral relations between a plurality of autonomous public bodies and of conflicting public, collective and private interests. For a long time, administrative law was conceived as a monolithic body of law, which depended on its master, the modern State: as such, administrative law was intended to be the domain of stability and continuity. Continuity in the paradigms for study paralleled the idea of continuity in administrative institutions. However, from the last quarter of the 20th century, both assumptions became obsolete. Administrative institutions have undergone significant changes, due to several factors such as globalization, privatization, citizens' participation, and new global fiscal responsibilities. Thus, it is necessary to review the major transformations that took place in the field over the last 30 or 40 years, and to address the consequent transformations in the methods used to study this branch of law.

To analyze this emerging multipolar administrative law, the first objective should be to decouple the study of administrative law from its traditional national bases. According to this tradition, administrative law is national in character, and the lawyer's "ultimate frontier" is comparison, meant as a purely scholarly exercise. On the contrary, administrative law throughout the world is now grounded on certain basic and common principles, such as proportionality, the duty to hear and provide reasons, due process, and reasonableness. These principles have different uses in different contexts, but they share common roots.

A second objective would be to consider each national law's tendency toward macro-regional law (such as EU law) and global law. While the leading scholars of the past labored (to a great extent in Germany and Italy, less so in France and the UK) to establish the primacy of national constitutional law ("*Verwaltungsrecht als konkretisiertes Verfassungsrecht*"), today the more pressing task is to ensure that the

increasingly important role of supranational legal orders is widely acknowledged. Whereas administrative law was once state-centered, it should now be conceived as a complex network of public bodies (infranational, national, and supranational).

A third objective should be the reconstruction of an integrated view of public law. Within legal scholarship, constitutional law, administrative law, and the other branches of public law have progressively lost their unity: for instance, constitutional law is increasingly dominated by the institution and practice of judicial review; most administrative lawyers have been overwhelmed by the fragmentation of legal orders, which led them to abandon all efforts at applying a theoretically comprehensive approach. The time has come to re-establish a unitary and systematic perspective on public law in general. Such an approach, however, should not be purely legal. In the global legal space, the rules and institutions of public law must face competition from private actors and must also be evaluated from an economic and a political point of view.

To better analyze and understand such a complex framework, to elaborate and discuss new theories and conceptual tools and to favor a collective reflection by both the leading and the most promising public administrative law scholars from around the world, the Jean Monnet Center of the New York University (NYU) School of Law and the Institute for Research on Public Administration (IRPA) of Rome launched a call for papers and hosted a seminar (http://www.irpa.eu/gal-section/a-multipolar-administrative-law/). The seminar, entitled "Toward a Multipolar Administrative Law – A Theoretical Perspective", took place on 9-10 September 2012, at the NYU School of Law.

This symposium contains a selection of the papers presented at the Seminar. Our hope is that these articles can contribute to the growth of public law scholarship and strengthen its efforts in dealing with the numerous legal issues stemming from these times of change: discontinuity in the realm of administrative institutions requires discontinuity in the approaches adopted for studying administrative law.

Sabino Cassese, *Italian Constitutional Court*

Giulio Napolitano, *University of "Roma Tre"*

Lorenzo Casini, *University of Rome "Sapienza"*

THE EXPANSION OF INTERNATIONAL LAW AND THE USE OF NATIONAL ADMINISTRATIVE DISCRETION: THE IMPACT ON ADMINISTRATIVE BATTLEFIELDS

By Christoffer C. Eriksen[*]

Abstract

This paper explores how the use administrative discretion is affected by courts and tribunals having the power to interpret international treaties. In particular, the paper examines the impact of a distinct part of the practice of three different courts and tribunals: (1) The WTO Appellate Body and its interpretation of the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures; (2) the practice of arbitration tribunals which having the power to interpret bilateral investment treaties (BITs); and (3) the Court of Justice of the European Union's interpretation of the Treaty on the Functioning of the European Union and its prohibitions against restrictions on free movement. The paper demonstrates how the practice of these courts and tribunals imposes limitations on the use of administrative discretion which affects substantial portions of administrative activity in modern states, namely, the regulation of risk, property, and the movement of goods, persons, services and capital. On this basis, the paper argues that it is imperative that the future doctrine of administrative law take the practice of international courts and tribunals into account in its examinations and presentations of the norms determining the discretionary powers of administrative authorities.

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1. Public Administration beyond Deductive Logic

The concept of administrative discretion was central to administrative legal doctrine in the Twentieth century. Its significance reflects a particular way of governing within societies organized as constitutional democracies. Along different trajectories in different countries, the evolving processes of governing constitutional democracies have not been restricted to the deductive application of legislation enacted by elected representatives. In addition, the executive branch of government, agencies, directorates and other administrative authorities have all been provided with the powers to choose between different courses of action when exercising public authority. This paper explores how the uses of such discretionary powers are affected by legal courts and tribunals having the power to interpret international treaties. In particular, this paper examines how such courts and tribunals may impose limitations on the discretionary powers that are entrusted to the executive branch of government, agencies, directorates and other domestic administrative authorities.

Within constitutional democracies, the practice of entrusting un-elected administrative officials with discretionary powers has challenged theories of democracy, rule of law and freedom. Taken to the extreme, the implications of providing un-elected officials with discretionary powers are that the rulers are not elected, their use of power is not pre-determined by law, and that the governed may no longer know in advance how the governors will act. Because of these potential implications, it is imperative to explore the extent to which there are legal constraints on the use of the discretionary powers which independent courts may enforce. This task has been taken seriously by administrative legal doctrine. There are an overwhelming number of academic texts, probably in every country with an administrative legal tradition, which examines the standards by which their national courts review the use of discretionary powers. However, to date, there are few analyses which have attempted to examine the ways in which international courts and tribunals review the use of domestic administrative discretion.

While entrusting un-elected administrative officials with discretionary powers may be undemocratic, and may also challenge the rule of law and deprive people of their freedom, such powers may also be necessary for governing complex societies. At least

discretionary powers create opportunities for letting the use of public powers be influenced by different types of knowledge, experiences and interests.[1] If administrative authorities were merely empowered to apply laws enacted by elected legislators *deductively*, there would have been limited possibilities for the wider society and for experts to influence such administrative decisions. In this sense, providing unelected officials with discretionary powers has been a logical pre-requisite for the inclusion of conflicting interests and different forms of expertise in the administrative decision-making process.

Moreover, the executive branch of government, agencies, directorates and other administrative authorities, have also, at least to some extent, used their discretionary powers in ways which have been open to influence from both different and conflicting interests and forms of expertise. This has contributed to transform public administrations into arenas for contestation, deliberation, and negotiations.[2]

In the Twentieth century, these administrative arenas may have been dominated by domestic agents. But currently, these arenas are also affected by the widening and deepening of the field of international law, because international legal arrangements have expanded into new policy areas, and developed features which have increasing impact on regulatory matters previously conceived of as the domain of states.[3] Against the background of this expansion of international law, it is important to explore how the domestic administrative arenas are affected by the increasing amount of international treaties between states, and the ways in which they are interpreted by international courts and tribunals.

On the administrative arenas, specific principles and rules of administrative law may accommodate certain interests and forms of expertise in their struggle for influence, while making it more difficult for others to have an impact. This indicates that administrative law may, in itself, be a battlefield and a product of the struggles between

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1 For a discussion of the use of administrative discretion and the potential to include experts and interests in administrative decision making in the US, see R. Stewart, "The Reformation of American Administrative Law", 88 *Harvard Law Review*, (1975) pp. 1667-1831.

2 See S. Cassese, "New Paths of Administrative Law. A Manifesto", 10 *International Journal of Constitutional Law*, (2012) p. 610.

3 J. Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy", 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, (2004) pp. 547-562.

different interests.[4] By examining the ways in which international courts and tribunals review the use of administrative discretion, this paper explores one aspect of the battle over administrative law. Through this, the paper demonstrates that the law governing public administration is not only formed by states, or domestic agents, but also by other agents beyond state borders, such as international courts and tribunals. As such, this paper analyses administrative law as a set of norms formed by the interaction between multiple agents, and contributes thereby to a multipolar perspective on administrative law.[5]

The structure of the analysis is as follows: in Section 2 below, I indicate some lines in the governing practice that evolved in constitutional democracies which have accommodated the use of administrative discretion. This section also includes a couple of brief observations of the legal theory upon which the legal doctrines of administrative discretion are based. The purpose of this is to illustrate further how administrative discretion became a significant concept in legal doctrine in the Twentieth century. Then, the main part of the paper, Section 3, examines the various ways in which the courts and tribunals having power to interpret international treaties may impose limitations on the use of administrative discretion. Finally, in Section 4, a summary of these examinations shows how international courts and tribunals may affect the ways in which the public administration can include conflicting interests and different forms of expertise in its decision-making process (Section 4).

2. Administrative Discretion: Practice, Theory and Doctrine

Under the constitutional theory which emerged in the late-Eighteenth century, power exercised upon a discretionary basis, without explicit directives enacted by the representatives of the people, came to be seen as unconstitutional.[6] However, in the political practice within the constitutional frameworks, mass democracies evolved in the

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4 See G. Napolitano, "Conflicts in Administrative Law: Struggles, Games and Negotiations between Political, Institutional and Economic Actors", Draft paper to the IRPA-NYU JMC Seminar on "Toward a Multipolar Administrative Law: A Theoretical Perspective", New York, 9-10 September 2012.

5 See Cassese, *supra* note 2, pp. 609-610.

6 For a discussion of the analytical opposition between constitutionalism and discretion, see J. Elster "Introduction", in: J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy*, (Cambridge University Press, Cambridge, 1988).

late-Nineteenth and early-Twentieth centuries, in which the administrative branch was professionalised and came to incorporate different forms of rationalities in the administrative processes.[7] These professionalied administrative branches were also provided with extensive discretionary powers.

Although constitutional-based administrations were, in theory, merely empowered to act upon a statutory basis within a constitutional democratic-framework based upon rule of law, the statutes, nevertheless, allowed administrations to use their powers according to the rationalities to which they adhered. This tendency to provide administrations with the opportunity to use their powers according to the prevailing rationality seems to have increased in the late-Nineteenth century and early-Twentieth century. One possible explanation is that the elected representatives became increasingly unable to debate or to decide upon many of the increasingly detailed questions which emerged as a consequence of states taking on ever increasing responsibilities for the well-being of their populations. At least, this was the context in which political decisions were delegated to the discretion of the bureaucrats in the public administration. According to Jürgen Habermas, the administration began to perform functions, which in the "classical scheme of separated powers, were reserved to the parliamentary lawgiver".[8] Administrative officials could "no longer restrict their activity to a normatively neutral, technical competent implementation of statutes within the framework of normatively unambiguous responsibilities".[9]

From the mid-Twentieth century onwards, a series of administrative reforms sought to increase accountability and popular influence in administrative decision-making. Such reforms included the widespread adoption of acts regarding administrative procedure, the establishment of ombudsmen, *etc*. These reforms provided an institutional environment in which bureaucrats could exercise discretionary powers with a certain level of democratic legitimacy. Instead of being legitimated democratically from the top, *i.e.*, via elected representatives, the administrative reforms

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[7] M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, G. Roth and C. Wittich (eds.) [translators: Ephraim Fischoff *et al.*] (University of California Press, Berkeley CA, 1978), p. 984.

[8] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* [translated by William Rehg], (The MIT Press, Cambridge MA, 1996), p. 438.

[9] *Ibid*., p. 440.

facilitated bottom-up legitimacy, *i.e.*, via open and transparent decision-making processes in consultation with the interests affected.

While public administrations in many countries have recruited various types of expertise into their bureaucracies, and opened up for decision-making processes in consultation with the various affected interests, the different countries have developed diverse administrative institutions. Diversity in institutional design has emerged out of the political, economical, and social environments, all of which vary between countries and regions. In addition, the available choices for institutional change and adaptation to new circumstances have been - and still are - dependent on previous choices. In sum, diverse environments and path-dependency have produced a range of different ways through which public administrations have negotiated conflicts between the various interests and forms of expertise. In effect, administrative discretion have been used, limited, and exposed to judicial review in various ways in different countries.

Although the methods actually used to include the affected interests in public decision-making have varied in different states, many states did develop certain forms of bargaining-democracy and corporatism within liberal democratic and constitutional legal frameworks in the Twentieth century.[10] To some extent, bargaining between different interests became an important part of administrative decision-making processes in the US as a result of the New Deal legislation, which provided several agencies with extended powers.[11] But bargaining processes and corporatism within liberal democratic and constitutional frameworks became, perhaps, most evident in the Nordic countries after the Second World War.[12] For example, in a study from the early 1960s, the political scientist Stein Rokkan described the Norwegian political system as

[10] The term "corporatism" is here used as reference to the idea that states are governed by processes in which large interest groups have significant influence. For an analyses of the various forms of corporatism as interest representation in different countries, see Philippe C. Schmitter, "Still the Century of Corporatism?", in: F.B. Pike & T. Stritch (eds.), *The New Corporatism: Social-Political Structures in the Iberian World*, (University of Notre Dame Press, South Bend IN-London, 1974).

[11] See Stewart, *supra* note 1, 440 *et seq*.

[12] For a general account of the Nordic democracies, also including their corporatist features, see O. Petersson, *The Government and Politics of the Nordic Countries*, (Fritze, Stockholm, 1994), pp. 151-156.

"corporative pluralism", in which the resources around the bargaining table had more impact on peoples' lives than elections.[13]

Within systems of government organised as constitutional democracies, wider involvement in decision-making may have given their governing systems added democratic legitimacy, such as in the Nordic countries. [14] In addition, with their discretionary powers, the administrative authorities could also draw upon the knowledge of experts and specialists. By allowing experts to use public powers according to their own perception, the public decision-making process and its problem-solving capacity became increasingly professionalised. One example is the New Deal model of regulatory management in the US.[15] All this illustrates that the use of administrative discretion, within constitutional and democratic frameworks, allows administrative authorities to make assessments based upon processes in which different interests are weighed against each other, and in which private parties, organisations, local interests and other agents are included.

The re-organisation of the executive and administrative branches of government under the constitutional and increasingly-democratic legal framework in the Nineteenth and Twentieth centuries seems to have been entwined with the emergence of new legal concepts and doctrines, including that of "administrative discretion". In the administrative legal discourses in Europe and the United States, the concept of administrative discretion appeared in the late-Nineteenth century. It is reflected in the term "administrative discretion", and in functional equivalents such as *pouvoir discrétionnaire*, *Ermessen* and *forvaltningsskjønn* in the respective administrative legal doctrines of the UK, France, Germany and Scandinavia.

The term "administrative discretion" is used by many as a reference to the freedom, on the part of governments and their administrations, agencies, experts, local authorities or other entities which exercise public powers, to choose one of several

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13 See S. Rokkan, "Norway: Numerical Democracy and Corporate Pluralism", in: R.A. Dahl (ed.), *Political Oppositions in Western Democracies*, (Yale University Press, New Haven CT-London, 1967), pp. 70-115.

14 See J. Cohen & J. Rogers, "Secondary Associations and Democratic Governance", in: E.O. Wright (ed), *Associations and Democracy*, (Verso, London, 1995), p. 8.

15 See Stewart *supra* note 1, p. 440 *et seq*.

courses of action.[16] In legal doctrine, administrative discretion typically refers to the power entrusted to administrative authorities to decide upon the *content* of a decision, provided that the conditions for their powers are fulfilled.[17]

Historically, there are different origins of the current notions of administrative discretion. It can be understood as a continuation of past executive and administrative privileges in the present, and, as a consequence, of a particular theory of statutory interpretation.

Before the democratic and constitutional transformations which led to modern mass-democracies, the executive and administrative branches of government enjoyed certain privileges, *i.e.*, to govern outside the jurisdiction of other branches of government, notably the legislative and judicial branches.[18] This is often referred to as executive prerogative, or prerogative power. The conception is based upon a distinction between administration subject to legal control, and administration not subject to legal control, and is, therefore, intertwined with the differentiation of government into various branches, which began in the Seventeenth century, and the idea of the separation of powers. However, in modern constitutional democracies with rule of law, the notion of an administration not subject to law is, for the most part, meaningless.

However, the notion of an administration not subject to law could also be construed as a *meaningful* concept from a rule-of-law perspective, to the extent that the legislator has delegated certain powers to the administration, upon which the administration may choose which course of action to take. Moreover, the way in which administrative authorities exercise their powers is, in some cases, protected from full judicial control, even within constitutional democracies based upon rule of law.

In contrast, the concept of administrative discretion could also be understood as one element of the inevitable discretion exercised in the enactment of any statutory

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[16] For a discussion of a definition administrative discretion in those terms, see D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion*, (Clarendon Press, Oxford, 1986), p. 7.

[17] This is particularly central for German analyses, as their concept "*Ermessen*" is restricted to the power deliberately entrusted to administrative authorities to decide on the content of a decision, provided that the conditions for their powers are fulfilled.

[18] At least it seems as though the term "*Ermessen*" was used in German law in the Eighteenth century as reference to the prerogatives of the prince; see R.D. Pedersen, *Det forvaltningsretlige skøn*, [On administrative discretion], (Jurist øg Økonomforbundets Forlag, Copenhagen, 2006), p. 41 *et seq*.

provision.[19] This conception is based upon a distinction between the deductive and discretionary application of law and an early Twentieth-century perception of interpretation in legal theory, the so-called free law movement, which emphasised the impossibility of applying law through deductive logic alone.[20] In this view, administrative discretion is not necessarily different from the discretion exercised by the judiciary, as neither the administration nor the judiciary can rely on deductive logic alone when interpreting and applying a statutory provision to a specific case.

3. Challenging Domestic Administrative Discretion: Border-Crossing Legal Arrangements

3.1 Overview

The contemporary global legal landscapes encapsulate a range of legal arrangements which stretch across state boundaries. While these arrangements are rooted in practices and agreements with a long history, it is possible to observe changes that distinguish the present status from the past. The current international legal arrangements have, at the very least, expanded into new policy areas, and developed features which have increasing impact upon regulatory matters which were previously conceived of as the domain of states. This has contributed both to the widening and the deepening of the field of international law.[21] This expansion of international law has had inevitable effects on both governments and their domestic administrations.

There have been many attempts to analyze the widening and deepening of international law from a constitutional perspective. To some extent, it is possible to place these analyzes on a continuum between two opposite poles. Following Mathias Kumm, one side of the continuum is characterized by warnings against the threats to the functions of the constitutions of states (constitutional nostalgia). The other side is

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19 *Ibid*., p. 48.

20 For a recent comment on the German Free Law Movement, see F. Kantorowicz Carter, "Gustav Radbruch and Hermann Kantorowicz: Two Friends and a Book – Reflections on Gnaeus Flavius's Der Kampf um die Rechtswissenschaft (1906)", 7 *German Law Journal* (2006) pp. 657-700.

21 See Weiler, *supra* note 3.

characterized by hopes that border-crossing legal arrangements may serve similar functions as state constitutions (constitutional triumphalism).[22]

Many analyses on the nostalgic side of the continuum have focused on the sometimes unintentional effects of international legal protection of individual rights, and the constraints which they impose on the freedom of elected legislators. But focusing merely on the international constraints on elected legislators misses a significant set of consequences of international law for domestic decision-making processes: as more domestic policies and decisions are affected more substantially by international legal norms, the freedom of governments and their domestic administrations are also subject to limitations. These limitations, too, may also be the unintentional effects of international legal arrangements, but they have received less attention in academic analyses.

Certainly, there are many areas in which state parties have entered into treaties with other states, which explicitly and intentionally constrain the freedom of administrative authorities. Many of these arrangements encapsulate norms which explicitly constrain the freedom that administrative authorities may previously have had to choose between two or more courses of action when exercising public power in specific policy areas. There are hundreds of examples of such arrangements and norms, which affect a variety of policy sectors to which many domestic governments and administrations have been entrusted the authority to govern, such as the international norms setting out the procedures for public procurement, to mention just one example.[23]

But there are also treaties which have implications for domestic administrative processes on a wide range of policy areas, which are not necessarily intentional. The risk for such unintentional effects increases when treaties provide juridical experts in tribunals or courts with a mandate to interpret and to apply treaty provisions in individual cases. Their expertise is to interpret and to apply the relevant provisions in line with international law, not to assess the implications of their decisions for different

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22 See M. Kumm, "The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia", in: P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010), pp. 201-219.

23 See the 1994 WTO Agreement on Government Procurement.

administrative systems at national level. Under such arrangements, well-justified interpretations and applications of treaty provisions may have effects on administrative decision-making, including the use of administrative decisions, which were not foreseen by the treaty-makers.

For the purpose of demonstrating how certain courts and tribunals entrusted with the authority to interpret and to apply international treaties may affect the use of administrative discretion, the following analysis look at three different treaties. The three treaties are: (1) The World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement); (2) Standard bilateral investment treaties (BITs), (although there are hundreds of versions of BITs, most of these share several standard clauses, which allows analysis of a standard version of the different treaties); and (3) The Treaty on Functioning of the European Union (TFEU).

While there are significant differences between the three treaties in many areas, they all share at least one important quality: the authority to interpret and to apply all three treaties is delegated to tribunals or courts which are independent from the very states that are the parties to the respective treaties.

First, the SPS Agreement is covered by WTO's Dispute Settlement Understanding. In effect, it is the appointed legal experts in the WTO Appellate Body who are entrusted with the authority to interpret and to apply the provisions of the SPS Agreement.

Second, the "standard" bilateral investment treaties (BITs) have provisions on dispute settlement which typically include provisions determining that disputes between contracting parties are to be settled by arbitration.[24] Most modern BITs also include provisions governing the settlement of disputes between host states and investors, and also refer such disputes to arbitration.[25] While arbitration tribunals may be established in a number of different ways, several BITs use standardised procedures, such as those established by the International Centre for Settlement of Investment Disputes (ICSID),

[24] See R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, (Martinus Nijhoff, The Hague-Boston MA-London, 1995).
[25] *Ibid*.

the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce Court of Arbitration, the Stockholm Court of Arbitration, or the London Court of International Arbitration. Under these procedures, appointed, independent and neutral legal experts having the authority to interpret and to apply the BITs in the specific cases in question, provided that certain conditions are met.

Third, the authority to interpret and to apply the TFEU is delegated to the Court of Justice of the European Union (CJEU), formerly the European Court of Justice (ECJ). In contrast to the WTO Appellate Body and investment arbitration tribunals, the CJEU is engaged in closer interaction with the national courts of the Member States, as the latter may refer cases to the former.

There are extensive fields of research into the ways in which the SPS Agreement, BITs and the TFEU have been interpreted and applied. It is also well known that each of the three treaties, and the ways in which they have been interpreted and applied, have had an impact on administrative processes within states. But, to date, there has been no systematic or comparative analysis of how these treaties affect the use of discretionary powers in domestic administrations. Against this background, this paper limited itself to an examination of how certain provisions of each of these treaties place the above-mentioned tribunals and courts in a position in which they may affect the use of administrative discretion within states. In order to analyse the actual effects of the treaties on the use of administrative discretion, detailed studies of the practice of these institutions are required, as well as the impact that they have had in different countries. Accordingly, this paper presents an outline for further systematic and comparative analysis, rather than a conclusive assessment, of how the three above-mentioned treaties affect the use of administrative discretion.

3.2 Standardised Scientific Assessments: The SPS Agreement of the WTO

Within the WTO system, the SPS Agreement is an attempt to balance the need for risk regulation with the aim of liberalising international trade. The agreement applies to measures that are necessary to protect the life or health of humans, animals and plants

against a wide variety of different risks, the so-called sanitary or phytosanitary measures.[26] The term "sanitary or phytosanitary measures" encapsulates measures aimed at protecting human, animal and plant life against a variety of different risks, including, but not limited to, pests, diseases, and contaminants and toxins in foods, beverages and feedstuffs.[27] However, the SPS Agreement only applies to risk-protecting measures which may, directly or indirectly, affect international trade.[28] The legal form of the measure is irrelevant, as long as it is attributable to the member states.

Several commentators have interpreted the SPS Agreement as an instrument which obliges states to justify risk assessments through science rather than through democratic processes.[29] As argued by Elisabeth Fisher, such a reading misses a significant aspect of the SPS Agreement.[30] The agreement is a legal instrument which obliges states to implement certain administrative procedures and standards in the processes that they employ to deal with the risks to the life and health of humans, animals and plants. In effect, the SPS Agreement may interfere more with administrative decision-making than with legislative decision-making.

If democracy is used as a reference to legislative decision-making, Fisher is correct in her criticism of those who see the SPS Agreement as an instrument which obliges states to justify risk assessments through science rather than through democratic processes. However, democracy could also refer to the processes through which administrative authorities include different interests and forms of expertise.[31] In this sense, the SPS Agreement is an instrument which imposes certain scientific requirements upon the very democratic process that may take place *within* the administration.

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26 See the SPS-Agreement Article 1.

27 See the SPS-Agreement Annex 1.

28 See Annex 1 to the SPS Agreement. It specifies that SPS measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

29 See the discussion and the references in E. Fisher, *Risk Regulation and Administrative Constitutionalism*, (Hart Publishing, Oxford, 2007), pp. 175-180.

30 *Ibid*., p. 180 *et seq*.

31 See C.C. Eriksen, *The European Constitution, Welfare State and Democracy: The Four Freedoms vs National Administrative Discretion*, (Routledge, London and New York, 2011), pp. 31-36, and 162-168.

In sum, the different provisions in the SPS Agreement provide detailed regulation of how states are to protect the life and health of humans, animals and plants against adverse risks through administrative decision-making processes. This includes the specification of what an *adequate* level of protection against a given risk actually is. It also includes a regulation of the extent to which administrative authorities may exercise discretionary powers in order to determine whether certain actions are to be allowed or prohibited. Accordingly, the SPS Agreement interferes with the ways in which the public administrations in different countries have been entrusted with powers to make risk assessments within diverse political, social, institutional and economic environments.

As it is the legal experts in the Appellate Body of the WTO who are entrusted with the authority to interpret and to apply the provisions of the SPS Agreement, it is these experts who decide *how* the obligations under the agreement are to interfere with risk assessments in domestic public administration. These decisions are again dependent upon how the Appellate Body interprets the Agreement within the limits defined by the wording of the treaty and the available methods of interpretations recognised in international law.

It is evident that the wording of SPS Agreement imposes a number of constraints on the use of administrative discretion for the purpose of assessing risks to the life or the health of humans, animals or plants. Such constraints are imposed because the Agreement determines that an SPS measure is only valid if it is based upon a risk assessment (Article 5.1), and also defines what a risk assessment is (Annex A nr 4), and how it is to be carried out (Article 5.2). In effect, when adopting measures which may affect international trade, the administrations in the member states may not balance conflicting interests and/or the conflicting views of experts as they see fit, in order to avoid or to reduce the risks to the life or health of plants, animal or humans. Instead, they are required to carry out risk assessments that are in compliance with the requirements laid down in the SPS Agreement.

Performing risk assessments that comply with the requirements of the SPS Agreement may be well-designed in order to avoid measures that discriminate against foreign goods without good reason. However, the requirements defined by the SPS Agreement also constrain the possibilities for national administrations to balance

conflicting interests and expertise. As demonstrated in the case law of the Appellate Body, members of the WTO may not balance the available scientific knowledge against scientific uncertainty when determining whether to allow food products that contain certain hormones or genetically-modified organisms.[32] The evidence and the documents that national administrations may use in order to strike such a balance could be exposed to full judicial review by the WTO Appellate Body, based upon *their* interpretation of the SPS Agreement. In effect, administrations are constrained by the SPS Agreement and the Appellate Body when they seek to adopt measures aimed at protecting the life and health of humans, plants and animals, which not only take science into account, but also the perceptions and preferences of the relevant organisations, local interests and users. The available options on the bargaining table on which such matters may have been decided before, are, under the SPS Agreement, constrained by the review which all parties know that the Appellate Body may perform. If measures are adopted which may affect international trade, and which do not follow the requirements of the SPS Agreement, there is a real risk that such measures will be challenged by other WTO members, and found to be incompatible with the obligations of the member state under the SPS Agreement.

Although the wording of the SPS Agreement imposes a number of constraints on the use of administrative discretion, it also leaves significant questions open with regard to the use of administrative discretion. As observed by Fisher, one particular question with an impact on the use of administrative discretion is the type of trade liberalisation which the agreements promote. The preamble of the SPS Agreement may indicate that the aim is to stop disguised forms of protectionism. But, the SPS Agreement also includes provisions which aim to reduce regulatory heterogeneity. For example, Article 3.1 states that:

> To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist....

[32] See the Appellate Body Report in the case *EC - Hormones* WT/DS26, and the Appellate Body report in the case *EC - Approval and Marketing of Biotech Products* WT/DS/291.

If the purpose of the agreement is to stop disguised forms of protectionism, it is imperative to prevent cases in which administrative discretion is used to camouflage protectionist measures. But, if the purpose of the agreement is to reduce regulatory heterogeneity between the member states, then it is also important to facilitate standards for risk assessments, which are similar in different jurisdictions. This, as Fisher suggests, is best achieved "through limiting administrative discretion as much as possible through clear rules and analytical methods".

In effect, it is very much in the hands of the Appellate Body to determine whether the SPS Agreement is an instrument which merely prohibits the use of administrative discretion to camouflage protectionist measures, or whether it is an instrument which *also* seeks to limit the use of administrative discretion as much as possible. In effect, the interpretative choices made by the Appellate Body about the purpose of the SPS Agreement will have an impact on the extent to which the member states may entrust their administrative authorities with discretionary powers when making risk assessments. These choices will have inevitable consequences for the arenas in which different interests and expertise are confronted. If the members of the WTO are not allowed to provide their administrative authorities with a wide scope of discretion, the ability of administrative discretion to reflect processes of deliberation and negotiation, including those regarding conflicting interests and forms of expertise, will also be reduced.

3.3 Property Rights: BITs

There are myriads of agreements protecting private foreign investments. In the ICSID Database of Bilateral Investment Treaties, more than 2,200 agreements were registered as of April 2013.[33] Many are negotiated upon the basis of standard-model agreements, others are individually negotiated. Notwithstanding this, most BITs include certain standard terms, including definitions of investments,[34] standards of treatment for

[33] See https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main, last accessed 30 April 2013.

[34] BITs are, by definition, agreements about investments, and most BITs include provisions defining what investment is. Standard definition specifies that investment comprises every kind of asset, including

foreign investments, and provisions on expropriation and dispute settlement. The provisions on dispute settlement typically include provisions determining that disputes between contracting parties are to be settled by arbitration. As noted above, most modern BITs also include provisions governing the settlement of disputes between the host states and the investors.

The increasing number of BITs, as well as the increasing number of disputes settled by arbitration tribunals, has spawned academic analyses of how BITs affect domestic regulations.[35] These analyses have demonstrated that both provisions defining certain standards of treatment *and* provisions with expropriation clauses may have consequences for both legislative and administrative authorities in the states in which the investments are made (the host states). Accordingly, these analyses are relevant for the use of administrative discretion. However, to date, no analysis has, to my knowledge, engaged in any systematic examination of how the use of administrative discretion is affected by BITs.

In principle, all obligations to observe certain standards of treatment with regard to foreign investments may affect the use of public power, including both legislative and administrative discretion. As the majority of BITs oblige the host state to observe certain standards of treatment, most BITs also impose constraints on the use of legislative and administrative discretion. BITs typically encompass provisions under which states are obliged to observe standards such as fair and equitable treatment, non-discrimination, national treatment, and most favoured nation treatment.[36] The legislative and administrative authorities of a host state will violate its contractual obligations if they exercise discretion in ways which fail to observe the applicable standards of treatment with regard to foreign investments.

Similarly, the way in which BITs regulates the conditions for expropriation may also impose potential constraints on the use of public power, and thus also on legislative

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- but not limited to - elements such as movable and immovable property, shares of companies, claim to money, copyrights, trade-marks, know-how, business concessions under public law, including concessions to search for, extract and exploit natural resources. See Dolzer and Stevens *supra* note 24.

35 Two recent books which includes references to previous literature include Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, (Hart Publishing, Oxford, 2009), and I. Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration*, (Hart Publishing, Oxford, 2011).

36 See Dolzer and Stevens, *supra* note 24, p. 58 *et seq*.

and administrative discretion. It is recognised, under customary international law, that host states may expropriate foreign investments on their territory, provided that three conditions are met: it must be done for a public purpose; it must be done in accordance with the law; and the investor has to be compensated.[37] Against this background, most BITs have included provisions about expropriation that specify the content of these three conditions.[38] These provisions also impose constraints on the use of legislative and administrative discretion. If the legislative or administrative authorities in a host state exercise discretion in a way which qualifies as expropriation under an investment treaty, that state is obliged, by contract, to compensate the loss to the investors.

As extensively discussed in the academic analysis of BITs, the expropriation clauses raise particular challenges for the regulatory autonomy of the host states.[39] Such challenges usually arise because arbitration tribunals have not applied these clauses to cases in which host states formally expropriate property or annul the rights underlying an investment. Expropriation clauses are also applied to cases of indirect expropriation, where the state adopts measures which are considered to be the equivalent of formal expropriation.[40]

While arbitration tribunals have held states responsible to pay compensation in cases of indirect expropriation, they have also emphasised that states are entitled to govern their territory by normal regulations, without being responsible for paying compensation even though regulations may cause damage to an investor. Recent analysis of the case law of arbitration tribunals confirms that there are now a number of cases in which tribunals have found that ordinary regulatory measures do not create a duty to pay compensation even though foreign investment is adversely affected.[41] This could indicate that the use of administrative discretion for ordinary regulatory purposes is not likely to violate expropriation clauses in BITs. However, although arbitration tribunals have found that ordinary regulatory measures which have adverse effects on

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37 See, for example, F.J. Nicholson, "The Protection of Foreign Property under Customary International Law", 6 *Boston College Industrial and Commercial Law Review* (1965) pp. 391-416.

38 See Dolzer and Stevens, *supra* note 24, p. 97 *et seq*.

39 See Montt, *supra* note 35, and Alvik, *supra* note 35, which both include further references.

40 See R.D. Sloane and W.M. Reisman, "Indirect Expropriation and its Valuation in the BIT Generation", 75 *British Yearbook of International Law* (2004) p. 115.

41 See Alvik, *supra* note 35 pp. 263-264.

foreign investments do not necessarily create a duty to pay compensation, several tribunals have also maintained that regulatory measures could still create such a duty. In particular, a measure is not exempt from the expropriation standard, merely because it is regulatory, if it is the equivalent to an expropriation in substance and effect.

Although the case law of arbitration tribunals is consistent in seeing measures as indirect expropriation if they are equal to an expropriation in substance and effect, the case law is not consistent when it comes to determining what equivalence means. As summarized in a recent study by Ivar Alvik, the traditional approach has been that the sole criterion for whether a compensable taking has occurred or not is the effect of the regulation on the right or asset in question.[42] Under this approach, the reasons why public authorities have used their discretionary power in certain way is irrelevant. However, several commentators now see a number of cases which challenge the traditional approach, in that they adopt a more contextual assessment of whether a measure is equivalent to expropriation, including a proportionality review.[43] One example of such a contextual approach is the case of *Tecmed* v *Mexico*, in which the tribunal stated that, in order to determine whether certain measures were to be characterised as expropriatory, it would consider "whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality".[44]

There are a number of elements which may have an impact on the contextual assessments which the arbitration tribunals perform when deciding whether a measure is equivalent to an expropriation. But whether there is a public interest that motivates a certain measure does not seem to be a matter which is subject to intense review by the arbitration tribunals. For example, as shown by Alvik, in the case of *Saluka Investments* v *Czech Republic*, the tribunal stated that the state enjoyed "a margin of discretion in the exercise of [its] responsibility" to regulate, and that the relevant decision of the Czech National Bank (CNB) had to be accepted "in the absence of clear or compelling evidence

42 *Ibid*., p. 261 *et seq*.
43 *Ibid*., p. 265, which also include further references.
44 *Tecmed* v *Mexico* (Award, 2003), para 122, as discussed in Alvik, *supra* note 35, pp. 267-268.

that CNB erred or acted otherwise improperly in reaching its decision".[45] In contrast, a matter which the tribunals seem to review closely is whether the state has made a commitment to a foreign investor. In several cases, the tribunals reportedly held that investors that had not received any definite commitment from the host state had no legitimate expectation that they would be exempt from regulatory changes.[46] Conversely, arbitration tribunals have, in a number of cases, held that regulatory or comparable measures did, in fact, constitute indirect expropriation, because the specific commitments made or the expectations created by the government had, in effect, been broken.

The contextual assessments which the arbitration tribunals perform when deciding whether a measure is, in fact, equivalent to an expropriation may have an impact on the ways in which the administrative authorities in host states may exercise their discretionary powers. If their use of discretionary powers adversely affects foreign investment, protected by investment treaties, the state may be held responsible for the foreign investors' loss. Such a mechanism may be desirable in order to attract foreign investors and their capital, but it may also constrain the possibilities for national administrations to balance conflicting interests and forms of expertise.

One way of illustrating how judicial review performed by arbitration tribunals may constrain the possibilities for national administrations to balance conflicting interests and expertise is cases in which concessions have, at one point, been granted to certain enterprises, but where a need to revoke them or modify them appears at a later point. If new experiences or scientific evidence indicates that the enterprises which have been granted concessions may have detrimental effects on people's health, on the environment or on other public interests, there is obviously a need to consider whether the concession should be revoked or modified. In such cases, the public administrations operating within a constitutional democratic framework are required to balance different and conflicting interests when determining whether to revoke or modify the concessions granted, for example by imposing additional conditions. Typically, the possible detrimental effects of the concessions have to be balanced against the interests

45 *Ibid*., p. 269.
46 *Ibid*., p. 270.

of the concessionaire and its investors. Such balancing may not only take the invested capital in the enterprises into account, but also any scientific evidence of detrimental effects as well as the perceptions and preferences of the affected organisations and local interests. While domestic administrative law may provide a framework for how such a balancing is to be carried out, the administration may no longer merely rely on this framework when a potential annulment or modification of a concession may affects foreign investment protected by BITs.[47] Then, the ways in which the administration strikes a balance between the conflicting interests may be exposed to full judicial review by an arbitral tribunal. This, too, may affect the available options on the bargaining table on which such matters may have been decided before. If measures are adopted that create loss for a foreign investor, and these measures are incompatible with a fair and equitable treatment standard, an expropriation clause or an other standard in an investment treaty, there is a real risk that such measures will be challenged by foreign investors, and that the state will be found liable by an arbitration tribunal. This may make it more difficult for the affected organisations and local interests to influence the relevant decision-makings processes.

3.4. Free Movement in the EU's Internal Market: The TFEU and its Four Freedoms

In contrast with the SPS Agreement and BITs, the TFEU is a constitutive treaty for an organisation with intergovernmental, supranational and transnational qualities. As such, the TFEU is a far more comprehensive treaty than the SPS Agreement or BITs, but it is also more limited geographically, as it applies only to the Member States of the European Union.

Among the policy areas covered, one central aspect of the treaty is the provisions that oblige the Member States of the European Union to ensure the free movement of goods, persons, services and capital within the Union, commonly referred to as "the four freedoms". The Court of Justice of the European Union has interpreted and applied these provisions in such a way that they provide private parties with rights which have been used to challenge a number of different Member States policies, including risk

[47] In the current legal and economic landscape, it is not unlikely that regulations may affects such investments, as both numbers of BITs are increasing, as well as cross-border finance increases.

regulation and property rights as well. As demonstrated and extensively discussed in a number of academic contributions, the ways in which the European court has interpreted and applied the four freedoms have had significant institutional and even constitutional implications in Europe.[48] In addition, the obligations to ensure free movement, and the case law interpreting and applying these obligations has also had consequences for the use of administrative discretion.

There are at least four different categories of constraints on the use of national administrative discretion imposed by the obligations to ensure free movement:[49]

First, the commitment to establish and ensure the functioning of the internal market without barriers to free movement includes a commitment for the Member States to adopt measures to harmonise their laws, regulations and administrative actions. The way in which this commitment was interpreted and applied by the Commission and the Member States from the mid-1980s onwards has generated a mass of rules which have constrained the possibility for national governments and their administrations to regulate the economy and markets through the exercise of their discretionary powers under national law.[50]

Second, the Court of Justice of the European Union has developed a set of requirements for the implementation of measures intended to harmonise national laws, regulations and administrative actions.[51] This has also imposed constraints on the possibility of national governments and their administrations using discretion.

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48 Two seminal contributions are Joseph Weiler, "The Transformation of Europe" 100 *Yale Law Journal* (1991) and Miguel Poiares Maduro, *We the Court: The European Court of Justice and The European Economic Constitution* (Hart Publishing, Oxford, 1988).

49 See Eriksen, *supra* note 31, pp 54-59. See the Commission's White Paper on Completing the Single Market Commission of the European Communities (COM (1985) 310 final).

50 See, in particular, Case 120/78, *Cassis de Dijon* [1979] ECR 649, and thereafter the Commission's White Paper on Completing the Single Market Commission of the European Communities (COM (1985) 310 final).

51 Under TFEU Article 288 (previously EC Treaty Article 249) the Member States are free to choose both the form and the method of implementation for directives. But, according to the Court, directives which confer private parties with rights cannot be said to be fully implemented if these rights rely upon administrative discretion. See, for example, Case 29/84, *Commission* v *Germany* [1985] ECR 1661, para. 23 and Case 361/88, *Commission* v *Germany* [1991] ECR 2567. See, also, S. Kadelbach, "European Administrative Law and the Law of Europeanized Administration', in Ch. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market* (Oxford University Press, Oxford, 2002), pp. 167-206, at 193-4, and H. Bull, "The EEA Agreement and Norwegian Administrative Authorities", in: Fredrik Sejersted (ed), *Nordisk forvaltningsrett i møte EF-retten* [Nordic administrative law and EC-law] (Centre for European law University of Oslo, Oslo, 1996).

Third, constraints on the use of national administrative discretion have also appeared as a result of the construction of the four freedoms as rights which private parties may rely upon before national courts. This has given private parties the possibility of challenging the use of discretionary powers in specific instances, and also generated a case law which provides remedies for the protection of these rights, which further intensifies the constraints that these self-same rights impose upon the use of administrative discretion.[52]

Fourth, as further elaborated below, a particular type of constraint on the use of discretion at national level has also emerged as the Court of Justice of the European Union has conceptualised the four freedoms, not only as rights, but also as rights which may *not* be dependent on administrative discretion.[53]

Because the Court of Justice of the European Union has conceptualised the four freedoms, not only as rights, but also as rights which may *not* be dependent on administrative discretion, the court has moved into a position from which it has engaged in an intense review not only of how discretionary powers are exercised in specific cases, but also the extent to which it has been justifiable to entrust administrative authorities with discretionary powers, irrespective of how they are exercised.[54] This case law has produced a set of conditions which specify in which cases it may be acceptable - under EU law - to provide national administrative authorities with discretionary powers in the area of the economic freedoms. These conditions include, but are not limited to, the requirement that administrative discretion must be based upon objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of discretion on the part of national authorities, and thereby ensure that it is not used arbitrarily.[55]

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52 See Case 33-76, *Rewe-Zentralfi nanz eG and Rewe-Zentral AG* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, and Case 45/76, *Comet BV* v *Produktschap voor Siergewassen* [1976] ECR 2043, Case 222/84, *Johnston* [1986] ECR 1651, Case C-213/89, *Factorame* [1990] ECR 2433. For an extensive analysis of these and other judgments concerning effective judicial protection of rights which Community law confer on private parties, see A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, (Oxford University Press, Oxford, 2000).

53 One clear articulation is Case C-130/80, *Kelderman* [1981] ECR 527, para 14

54 Eriksen, *supra* note 31, pp. 63-115.

55 See the *Analir* Case C-205/99 [2001] ECR 1271 para. 38. The court has subsequently used the same formula in many of its other judgments, see Eriksen, *supra* note 31, pp 89 *et seq*.

The requirements for the use of administrative discretion that have been defined by the Court of Justice of the European Union do differ from the requirements that apply under domestic legal systems. As the case law shows, the Court has imposed stricter restrictions on the use of domestic administrative discretion than those imposed by domestic law, as administrative schemes that were valid under domestic law have been invalidated by the European Court because they endowed governments and administrations with discretionary powers which were deemed to be too extensive.

4. Negotiating Conflicts on Administrative Arenas: Changing Conditions under Border Crossing Legal Arrangements

The border-crossing legal arrangements analysed above show that the ways in which public administrations have negotiated conflicts between various interests and forms of expertise have become subject to international harmonisation. Under the SPS Agreement, BITs and the TFEU, international legal experts are provided with a mandate to interpret and apply these three treaties in ways which may have an impact on the use of administrative discretion. As the relevant courts and tribunals have interpreted and applied these treaties, they now set standards which affect the very ways in which administrative authorities may use their discretionary powers. In various ways, this may affect the conditions under which administrative authorities may negotiate compromises between conflicting interests and forms of expertise.

In the field of risk regulation, the SPS Agreement sets standards for how risk assessments are to be carried out, if the assessments lead to measures that may affect international trade. This obliges the contracting states to follow certain procedures and to base their decisions upon scientific knowledge. This may limit the available alternatives for negotiating compromises between different and conflicting interests and forms of expertise. In addition, the SPS Agreement may also limit the extent to which administrative authorities may be entrusted with discretionary powers. If reducing regulatory heterogeneity between the member states in the field of risk regulation is seen as the central aim of the agreement, then it make sense to impose the strictest limitations possible on administrative discretion in the member states.

For the regulation of property rights, the ways in which BITs set standards of treatment with regard to foreign investors, and oblige states to pay compensation for expropriation affecting foreign investments, also have consequences for the regulatory autonomy in contracting states. As states may risk economic liability if they violate standards of treatment or adopt regulations which may qualify as indirect expropriation, certain policy options may become too expensive. In effect, BITs may also limit the available alternatives for negotiating compromises between different and conflicting interests and forms of expertise.

Under the TFEU, the Court of Justice of the European Union and national courts are empowered to review the proportionality of any measures which may restrict the free movement of goods, persons, services and capital between the Member States. This, too, imposes limitations on the available alternatives for negotiating compromises between different and conflicting interests and forms of expertise at national level. In addition, as the Court of Justice of the European Union has interpreted and applied the TFEU, it also sets standards governing the extent to which administrative authorities may be entrusted with discretionary powers. In a number of cases, the Court has reviewed whether the discretionary powers entrusted to national administrative authorities were too extensive, irrespective of how they were used. As this review has, in several cases, led the Court to conclude that the discretionary powers were too extensive, the Court has also constrained the freedom which administrative authorities previously enjoyed under their domestic legal system. This may also serve to limit the flexibility of administrative authorities in processes in which they are seeking to find viable compromises between conflicting interests and forms of expertise.

The ways in which the SPS Agreement, BITs and the TFEU impose limitations on the use of administrative discretion affects substantial portions of administrative activity in modern states, namely, the regulation of risk, property, and the movement of goods, persons, services and capital – broadly defined. Moreover, the limitations on administrative processes that the three treaties impose are all motivated by certain economic considerations. In short, the treaties prohibit administrative discretion from being used in ways which make economic transactions more difficult, or reduce the value of an economic transaction in certain ways. This indicates that economic interests,

through border-crossing legal arrangements, have succeeded in reforming and reframing one aspect of administrative law, with significance for a number of different administrative processes. Conversely, it may have become more difficult for other interests to have an impact on administrative decision-making.

While border-crossing legal arrangements have succeeded in upgrading the importance of economic interests in administrative processes, this could be seen as a functional necessity for an increasingly globalised economy. When administrative authorities within a state exercise powers which affect parties beyond the borders of that state (extra-territorial effects), those parties may need certain guarantees against the potential misuse of those powers, in particular with regard to the discrimination of foreign interests. In this way, the limitations on administrative discretion may reflect the demands of the various processes of globalisation, under which people and states are becoming more inter-dependent.

Irrespective of the interests of those who may benefit from limiting administrative discretion, the three treaties examined above all illustrate that the norms determining the freedom of administrative authorities are no longer merely of domestic origin. Instead, these norms now seem to be formed by the interaction of multiple actors both within and beyond state borders.

Accordingly, the examinations above show one way in which administrative law has become multi-polar. However, more research is needed to unveil the full impact of this multi-polarity. In particular, the effects of the new international limitations on the use of administrative discretion may have different effects in different legal systems, depending - not least - also on how administrative discretion has been used and exposed to judicial review in different states. Accordingly, it is imperative that administrative legal doctrine and the analysis of international law incorporate these national differences in their analysis. Until we know more about these different effects, it is important that courts and tribunals are sensitive towards the administrative processes in which they intervene, when they interpret and apply treaties that impose limitations on the use of administrative discretion. Against this background, it is imperative that the future doctrine of administrative law take the practice of international courts and

tribunals into account in its examinations and presentations of the norms determining the discretionary powers of administrative authorities.

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