

NOTES AND COMMENTS

INTERNATIONAL ADMINISTRATIVE LAW

It is no longer extraordinary for national officials to look to United Nations agencies for rules and standards to guide their work. This is now done routinely in important sectors of national life in nearly all countries; examples include atomic energy, civil aviation, communicable disease control, meteorology, navigation, postal service and telecommunications, and international payments and foreign exchange. For at least some countries, the list of familiar subjects of international regulation has expanded to include such subjects as rules for the treatment of prisoners, occupational health and safety standards, the protection of labor's right to organize, the regulation of international trade and of the domestic conduct of multinational enterprises, the prescription of pure food and drug standards, and certain vessel construction, equipment, manning, and pollutant discharge standards. What is perhaps extraordinary is that little systematic attention has been paid to the techniques of international regulation, and to international administrative law embodying the contributions that can be made by experience in one sector to the successful application of international regulatory techniques in another. International regulation has become a permanent feature of the international legal process; international administrative law is the common thread that draws together the diverse subjects of international regulation.

Viewed as a discrete branch of international law, international administrative law is important from at least four distinct perspectives to four overlapping groups.

First, there is the parochial view of the participants: those subject or potentially subject to international regulation will have an abiding interest in its process and its product. The interests potentially subject to international regulation are wide indeed. They range from international travel, trade, and transfers of all kinds to the use of international areas and "common heritage" resources, and the protection within each country of internationally defined rights affecting important aspects of human life. In each of these spheres international organizations increasingly provide standards and procedures for the guidance or control of national action. Each such regulatory system will affect specific groups that need to know how the regime functions and what regulations it has produced.

Second, the architects of international regulation will want to look broadly at all regulatory regimes, comparing one with another to avoid pitfalls and maximize effectiveness in designing the particular regime with which they are concerned. Though the subject matters of international regulation are diverse, the techniques of regulation may be sufficiently similar so that much can be learned by careful comparison of the successes and failures experienced by different regulatory regimes.

Third, international lawyers handling matters governed by one regulatory regime will want to draw upon the law and precedents developed under other such regimes. For example, when guidance is needed in interpreting an international regulation, a persuasive source would often be the accepted practice under an analogous international regulation.

Fourth, statesmen and theorists pursuing a just and stable world order may find useful paths in the practice of international regulatory regimes. Although it has yet to be shown that international technical regulation "spills over" into international political cooperation, where political cooperation does exist, regulatory experience may provide precedents for institutionalizing that cooperation, and thus render it more stable and secure. As international regulation spreads from the intensely technical to the highly political, it would be rash to dismiss the potential impact of international administrative law on the structure of world order and peace. Some governments now accept international regulation not only of ship and air traffic, but also of freedom of association, of nondiscrimination, and of other human rights intimately affecting people's lives. Habits of accountability developing in such spheres may change concepts of national sovereignty in ways that can have a profound impact on the role of the state in the international order.

International administrative law thus has its consumers and practitioners, yet it is seldom acknowledged as the legitimate offspring of international regulation. Useful studies have been done of United Nations "lawmaking" in general, e.g., C. H. Alexandrowicz, *The Law-Making Functions of the Specialised Agencies of the United Nations* (1973), and of "lawmaking" in individual agencies, e.g., Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* (1969), and David Leive, *International Telecommunications and International Law: The Regulation of the Radio Spectrum* (1970). Comparative studies of international regulation seldom focus on the contribution of international regulation to international administrative law, however. David Kay's exemplary work for the American Society of International Law, for example, compares several regulatory regimes from the standpoint of the techniques used and their effectiveness in the contemporary political context. Kay's most recent work, *The Functioning and Effectiveness of Selected United Nations System Programs* (1980), evaluates the effectiveness of three operational programs: the World Food Program, UN control of traffic in narcotic drugs, and the "safeguards system" of the International Atomic Energy Agency. Kay compares the programs' impacts in terms of the objectives sought to be accomplished and the techniques used, but does not address the extent to which the regulatory regimes studied may have contributed to the development of international administrative law.

Leive's recent work, *International Regulatory Regimes: Case Studies in Health, Meteorology and Food* (1976), also done for the American Society of International Law, is a most noteworthy exception to the general lack of attention to international administrative law. With the support of the National Science Foundation, Leive studied the actual workings of three reg-

ulatory regimes: (1) the International Health Regulations adopted by the World Health Organization (WHO) for preventing the spread of communicable disease; (2) the regulatory instruments and structure used by the World Meteorological Organization (WMO) for coordinating and regulating international meteorological activities; and (3) the international food standards adopted by the Codex Alimentarius Commission established jointly by the UN Food and Agriculture Organization (FAO) and the World Health Organization.

Leive defines "international regulatory regime" broadly to include "the complex of regulatory instruments and the attendant legislative, administrative, and quasi-judicial procedures and organs, as they work in practice." As to each of these regimes, Leive asks three basic questions: (1) How are the regime's regulatory instruments developed? (2) What is the purpose, status, and content of each regime? (3) How are the regime's regulations implemented in practice? The practice referred to here is practice at the international level, not national practice giving effect to international standards. By "implementation" Leive means "the varied principles, procedures, and techniques employed to administer and interpret the regulatory instruments, promote compliance therewith, and settle disputes," all at the international level.

Leive's study thus shows in detail both how three complex regulatory regimes actually work and how measures are taken at the international level to give effect to international regulation. In so doing, Leive's work describes international administrative law in action, serving the needs of three of the four groups mentioned above: those potentially subject to the regulatory regime, architects of other regulatory regimes, and international lawyers handling matters governed by regulatory regimes.

Leive's work is admirably suited to the needs of persons, organizations, and governments whose interests are potentially affected by each regulatory regime. In each of the three case studies, great care has been taken to explain the history, development, and functioning of the regulatory regime with copious citations to official reports and documents, and references to the sparse secondary literature. A newcomer to any of the three subjects would be well-advised to begin with Leive's work, which in little more than 150 pages gives each regime an excellent working introduction in terms of his three basic questions: how the regulatory instruments are developed, the nature of those instruments, and how they are implemented in international practice.

A few examples will suffice. Leive nicely summarizes the origin of WHO's International Health Regulations (pages 3–42), including the "contracting-out" procedure, which makes the regulations applicable to all WHO members except those which notify their rejection or reservation within a specified period (pages 24–27), and the "maximum measures" provision, under which the measures provided in the regulations are the maximum that a state may apply to international traffic for protection against communicable diseases covered by the regulations (pages 35–37). Leive also succinctly describes the "footnotes" practice for informal but

authoritative interpretations of the International Health Regulations (pages 49–54), and the apparent success of WHO informal mediation or “good offices” dispute settlement procedures (pages 54–64).

Leive describes the regulatory regime for meteorology as having a “practical” orientation and approach: WMO’s concern is with “developing technical rules and procedures that members should follow in order that meteorological data of interest to many countries can be observed, collected, transmitted and analyzed in some standardized manner” (page 159). WMO has thus developed a wide variety of regulatory instruments to which Leive devotes considerable attention, describing the scope, purpose, and content of WMO Technical Regulations, Technical Decisions, Guides, and regional instruments (pages 217–84). Of these, only the Technical Regulations have mandatory character; Article 9(a) of the WMO Convention obligates WMO members to “do their utmost” to implement WMO Technical Regulations adopted by the WMO Congress. Leive comments that WMO’s approach to compliance has been “practical and not legalistic”; since WMO regulations are regarded as “practical operating instructions members should follow,” failure to do so is very often due to a lack of expertise, funds, or equipment and “not because of any willful refusal to comply” (page 161). For this reason, Leive observes that in WMO practice such compliance techniques as the “mobilization of shame” have no role, and should be replaced by technical assistance programs (page 285).

The FAO/WHO Joint Food Standards Program is the most elaborate of the three regulatory regimes studied. Leive describes the Codex Alimentarius Commission’s “ten step procedure” in detail, with examples showing the flexibility of that procedure (pages 435–59). Acceptance of a Codex standard obligates the accepting country (1) to permit products complying with the standard to be imported into and distributed within its jurisdiction, and (2) to ensure that products not complying with the Codex standard are not permitted to be so imported or distributed. Countries may accept Codex standards either in full or “with minor deviations,” but in the latter case the “deviations” must be recognized by the Codex Commission as “minor” (see “General Principles of the Codex Alimentarius” discussed at pages 461–81). These provisions have led to considerable controversy since any deviation, no matter how “minor,” will exclude products that conform to the Codex standard but not to the importing country’s “minor deviation” from that standard. Thus, the “minor deviation” procedure in effect amounts to partial acceptance of Codex standards. Whether or not the deviation is accepted by the Codex Commission, the result is the same: products that fail to conform to the deviation cannot be freely imported into the country despite its acceptance of the Codex standard.

The final part of Leive’s work compares the three regimes, offering guidance for the architects of other international regulatory regimes. The guidance is limited, however, since it has as its base only the experience of WHO, WMO, and the Codex Commission. Leive in fact disavows attempts to “enunciate . . . general theories concerning international regulation or

the varied circumstances under which it may or may not be effectively employed" (page xxviii). His study, he writes, is "pragmatic rather than theoretical," but nonetheless contains data and observations that may be of value in efforts to construct regulatory regimes in other areas.

One example is machinery for the implementation of regulatory instruments. Leive summarizes and compares WHO, WMO, and Codex experience, commenting upon procedures for governmental reporting of compliance, for promoting compliance, for interpreting the instruments, and for settling disputes (pages 569–78). Although only WHO has a highly developed reporting system (for outbreaks of communicable diseases covered by the Health Regulations), Leive calls it "essential that in each regime members be required to regularly provide" specified compliance information (page 571). Similarly, as a result of the different roles and purposes of the three regimes, only WHO has well-developed procedures for promoting compliance, for interpreting the Health Regulations, and for settling disputes. Leive nevertheless recommends that the three regimes, and perhaps others, be strengthened by providing both "techniques or mechanisms by which the regulatory instruments can be interpreted on the international level in a reasonably authoritative way" and "informal procedures by which questions or disputes concerning the application of the regulatory instruments can be resolved" (pages 590–92).

Another example is the representation of affected interests in the international regulatory process. Leive recommends that participation be open to the "broadest spectrum of interested parties," without indicating how this should be done except to say that the views of such parties should be "brought to bear and properly reflected" in the regime's decision-making process (page 590). This recommendation is inspired by the Codex committee structure in which industry spokesmen enjoy full participation together with representatives of the relevant government departments. This approach, Leive observes, "has the merit of affording the domestic ministry most intimately concerned with a particular regime direct access to, and principal local responsibility for, the regime; this is important since these ministries subsequently will be responsible for the actual implementation of the regime's regulatory instruments" (page 582). As with Leive's review of implementation practices, Leive's review of representation practices will provide guideposts for those designing other regimes.

International lawyers in search of precedents will also find much of value in Leive's book. For example, the practice of WHO with respect to reservations to the Health Regulations may have application to other regimes (see pages 133–52 and 556–60). The "minor deviations" standard of Codex might also be useful in this regard even though, as noted above, the application of that standard has tended to undercut the purposes of the Codex regime. Similarly, lawyers dealing with treaty interpretation may find useful precedents in WHO practice, though Leive's book is less detailed on this subject.

Leive's work on WHO, WMO, and Codex Alimentarius standards shows that international regulation can lead to generalized norms of international

administrative law. In this sense the work is a building block in a new structure of international administrative law. More such studies are needed, studies that will carefully review the regulatory practice of international agencies and distill from that practice legal norms to guide and unify the rapidly expanding field of international regulation.

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THE MANLEY O. HUDSON MEDAL

At its 75th anniversary meeting in Washington, D.C., the American Society of International Law awarded its gold medal to two distinguished Americans, the late Richard R. Baxter, and Oscar Schachter. Richard Young, Chairman of the Manley O. Hudson Medal Committee, presented citations to Mrs. Baxter and Professor Schachter at the Society's annual dinner on April 25, 1981. The medals, which commemorate the life work of Manley O. Hudson, are awarded from time to time, without regard to nationality, for preeminent scholarship and achievement in international law and for promoting the establishment and maintenance of international relations on the basis of law and justice.

The recipients need no introduction to the readers of this *Journal*. Both have served it as chief editor, Judge Baxter from 1970 to 1978, and Professor Schachter (as coeditor-in-chief) from 1978 to the present. The citations read as follows:

The Manley O. Hudson Medal . . . is awarded posthumously to Richard Reeve Baxter in recognition of his extraordinary services to international law as soldier, scholar, teacher, editor, author, and judge. Judge Baxter served his profession as an officer in the Judge Advocate General's Corps of the United States Army, as Manley O. Hudson Professor of International Law at Harvard Law School, as Editor-in-Chief of the American Journal of International Law, as Counselor on International Law in the Office of the Legal Adviser of the Department of State, as President of the American Society of International Law, as consultant to the Government of the United States on the Laws of War, on the Law of the Sea, and on many other aspects of international law, as a Member on the part of the United States of the Permanent Court of Arbitration, and finally as a Judge of the International Court of Justice, where his term of office was cut short by his untimely death on September 26, 1980. Judge Baxter's extraordinary zeal in championing the cause of international law and his tireless exertions in guiding younger colleagues in serving the same cause have had a remarkable influence throughout the world, where his writings and speeches demonstrated those qualities of mind and heart which won him the ungrudging esteem of his colleagues on the Court as well as in the broader, worldwide community of international lawyers.

The Manley O. Hudson Medal . . . is awarded to Oscar Schachter in recognition of his outstanding services to international law, as a

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