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USING ADMINISTRATIVE LAW TOOLS AND CONCEPTS TO STRENGTHEN USAID PROGRAMMING

A GUIDE FOR USAID DEMOCRACY AND GOVERNANCE OFFICERS

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About the IRIS Center

The IRIS Center at the University of Maryland is a policy research and advisory organization dedicated to facilitating economic growth and improving governance in developing and transition countries. In partnership with international donors, reformers, and scholars, IRIS conducts research, designs and implements programs, and promotes the sharing and application of innovative ideas about the impact of different types of governance on economic development and welfare. Based in economics but taking an interdisciplinary approach, IRIS focuses on the role of institutions—the formal and informal rules by which individuals organize economic, political, and social activity—in helping shape the role of governance in different contexts. IRIS's main areas of work include economic and institutional analysis, enterprise development and microfinance, governance and civil society development and cooperation, and legal and regulatory reform. IRIS has also devoted considerable effort to the development of sectoral and institutional anti-corruption analyses and strategies. Since its founding in 1990, IRIS has worked with USAID, the World Bank, the Asian Development Bank, the Inter-American Development Bank, the Bill and Melinda Gates Foundation, and many other clients on three critical fronts: to provide information, analysis, and diagnostics on key development issues; to present an innovative array of strategic development programming recommendations; and to assist with implementation of reforms. To date, the IRIS Center has implemented these efforts in over 70 countries.

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EXECUTIVE SUMMARY

The *Guide to Rule of Law Country Analysis*¹ points out that the rule of law is essential to democracy because laws are the means by which citizens authorize democratic governments to act on their behalf, and laws set limits on those actions. A government that acts inconsistently, without reference to a legal framework and predominantly to further the interests of individual office holders, is not democratic, even if elections have been held.

The term “administrative law” as generally used refers to the laws and associated procedures that govern the way government officials and agencies exercise their lawfully delegated powers. The term is sometimes used in a specific sense, particularly in many civil law countries, to refer to the delegation of authority and to substantive technical standards governing bureaucratic decision-making and the delivery of public services. In the U.S. and other common law countries, the term “administrative procedure,” which focuses on the procedural rights of citizens to be informed about and/or challenge bureaucratic decisions, is sometimes used interchangeably with “administrative law.” For ease of discussion, this guide uses the term “administrative law” to include the substantive laws and standards, as well as the procedures, although the emphasis will be on the latter.

Administrative law provides the legal framework governing both the standards for bureaucratic decision-making and the procedures by which the public can assert their rights in the regulatory process. It spans all sectors. Thus, it captures the legal relations between the people and the government bureaucracy because it channels and constrains the government processes that people regularly encounter in their daily lives. Typically, administrative law provides rules that give citizens, non-governmental organizations (NGOs), and businesses information and structured opportunities to obtain information, to make their views and evidence known in regulatory proceedings, to file appeals, and to seek court redress. This guide refers to these kinds of activities as administrative law “mechanisms” or “tools.” At some point, virtually all citizens come into contact with administrative law in various regulatory and service delivery contexts. By contrast, far fewer become involved in either civil or criminal law systems. Thus, improvements in administrative law can “make democracy relevant”² to large segments of the population and “help democracy deliver.” This guide introduces USAID democracy and governance (D/G) officers to administrative law mechanisms and concepts and shows how administrative law can strengthen USAID’s programming in developing and transition countries.³ Indeed, as the case studies in this Guide suggest, the successful design of administrative law mechanisms depends not simply on maximizing citizens’ voice and influence. Success also depends on support from reform-minded politicians, open-minded bureaucrats, and effective civil society organizations as well as the willingness/incentives for all parties to use these tools.

Examples of Administrative Law in Action

- A small business is denied a license and appeals to court.
- A new NGO applies to register and obtain its tax certificate.
- A public housing tenants’ association petitions for a public hearing to protest rent increases.
- A health ministry revising water quality standards is required by law to notify the public about the proposed changes.

¹ This is a forthcoming USAID publication. The guide offers a conceptual framework to USAID democracy and governance officers who are grappling with the problems inadequate legal systems pose to democracy.

² Ottoway, M., 2003. *Democracy Challenged: The Rise of Semi-Authoritarianism*, pp. 229-230. Washington, DC: Carnegie Endowment for International Peace

³ A developing country is one with a relatively low standard of living (low per capita gross domestic product and low capital formation), an underdeveloped industrial base, and a moderate to low score on the U.N. Human Development Index. A transition country is a country making a major political or economic transition, such as from a predominantly controlled economy to a market economy.

Scope of administrative law—Unlike banking or real property law, administrative law is not a discrete body of substantive or material law. Rather, it is a background system of procedural concepts and rules that cuts across substantive areas of state administration and regulation and is integrated within each of them. It deals with common elements of various government activities, specifying the standards and procedures by which they are carried out. For example, each government benefits program is different, but each likely has some kind of eligibility rules, procedures for filing applications, criteria for assessment, decision-making procedures, and opportunity for appeal. Administrative law defines these standards and procedures, thus furnishing practical mechanisms for fairly and transparently mediating these state-civil society interactions. Therefore, attention to administrative law can ground rule of law work in many sectoral regulatory arenas that affect significant constituencies, particularly large sectoral interest groups (e.g., businesses, farmers, and workers) and disadvantaged citizens such as pensioners. By making the often abstract principles of the rule of law more tangible, administrative law can address a wide range of practical problems at the sectoral and local levels, exploiting multiple entry points and galvanizing key constituencies in ways that national-level judicial or legislative reform may not. Finally, it can serve a complementary accountability function, empowering individuals, businesses, and other civil society actors, rather than legislators, audit agencies, or other checks-and-balances institutions, to call administrative agents to account.

Objectives, purposes, and mechanisms of administrative law—This guide uses three objectives as the framework for organizing the presentation of individual administrative law mechanisms. Not all administrative law systems contain all mechanisms (some appear under other rubrics), but most have at least some of these in place.

Objective	Purpose	Mechanisms
1. Limitation of discretion	To limit the exercise of discretion by government actors as to the authorities granted by law or regulation	<ul style="list-style-type: none"> • Review of agency decisions at a higher level within the agency • Ombudsman review of agency decisions • Judicial review of agency decisions • Review of general agency rules and regulations • Legal liability of agency to persons adversely affected by erroneous agency decision • Prevention of agency actions contrary to prior agency statements or decisions
2. Rights of the governed (due process)	To secure the rights of citizens against adverse government decisions or wrongdoing	<ul style="list-style-type: none"> • Notice of rules and standards that apply to government actions • Notice of proposed individual adverse government action • Opportunity to be heard (and to challenge opposing evidence or witnesses) prior to final adverse action • Impartial decision-maker • Explanation of decision • Opportunity to seek meaningful review of initial decision

3. Information	To ensure the adequate exchange of information between citizens and government	<ul style="list-style-type: none"> • Requiring public notice of <i>proposed</i> new government actions or initiatives affecting the public • Opportunity for the public to provide commentary or feedback prior to the final action or initiative • Use of advisory committees or special experts to provide better information to the agency for its decision-making • Requiring meetings to be advertised in advance and open to the public for observation and/or participation • Requiring government agencies to make certain basic information public (affirmative information provision) • Requiring government agencies to provide information when requested
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Collectively, these mechanisms can serve to legitimize and create greater “deliberative space” in government decision-making, create better legal and regulatory ‘fit,’ increase government responsiveness and service delivery quality, and ultimately improve public trust in government administration.

Considerations in introducing administrative law initiatives— Comprehensive administrative law reform generally requires three conditions that may not exist in most developing and transition countries: (1) a level of political competition and domestic or international pressure sufficient to lead politicians to open up bureaucratic decision-making; (2) a fairly well developed civil society, with segments of the public reasonably mobilized to use reformed mechanisms effectively; and (3) a bureaucracy reasonably sensitized to respond appropriately to citizen demands. Nevertheless, even where some of these conditions are lacking or underdeveloped, developing and transition environments may well permit the introduction of selected mechanisms through more limited initiatives, particularly at the sector, agency, or local levels. Ultimately, these efforts can have important demonstration effects at the national level.

Factors that may influence the receptivity to administrative law mechanisms include:

- Legal culture and traditions that influence the acceptability of certain mechanisms
- Potential resource demands, including time, money, and organizational commitments
- Coordination demands, within and among ministries and agencies
- Legal and organizational sophistication needed for implementation
- Visibility, which can often influence how quickly the mechanism gains acceptance

In general, mechanisms that have lower resource, coordination, and legal/organizational sophistication demands—combined with high visibility—are those most likely to be highly adaptable to countries with less well developed government institutions. Examples include open meetings, public hearings, notice-and-comment rulemaking, advisory councils, and affirmative provision of information.

Integrating administrative law concepts and mechanisms into USAID programming— Past experience of USAID and other donors shows that administrative law initiatives, either stand-alone or integrated within other projects, can enhance approaches to democracy promotion in developing and transition countries. While there are many programming opportunities for administrative law interventions—some of them in various kinds of local government projects--administrative law tools and concepts have the potential to strengthen five main types of programs in particular:

- Rule of law (where an administrative justice focus can spur greater constituency

- mobilization and demand-side pressures for law reform)
- Judicial reform (access to justice can be strengthened through a focus on administrative case processing in both the bureaucracy and the courts)
- Civil society strengthening (where citizens, businesses, and NGOs can become more knowledgeable about particular government agency processes and better able to use more durable, regular, and rule-based channels for participation, advocacy, and redress)
- Anti-corruption (focused and better informed preventive/watchdog activities can be targeted at specific government agencies, service functions, and types of corruption)
- Small and medium enterprise (SME) development and regulatory streamlining (where improved public-private dialogue, procedural regularity and fairness, and access to more plentiful government-held information can strengthen government regulatory credibility)

The legal and regulatory frameworks covered under the administrative law rubric are insufficient alone to generate such improvements. Other factors, including cultural, social, economic, and political influences, may critically affect whether such mechanisms are used, and if so, by whom, how, and with what impact.

In many contexts, informal or *ad hoc* mechanisms – from citizen juries to various kinds of participatory planning forums – may prove more equally or more effective in initiating greater government openness and accountability, or creating more meaningful public participation. However, there is evidence that these mechanisms are often more durable and better honored by governments when the fundamental processes in question are formalized, integrated into regular public administration functions, and tied to legal rights held by the public.⁴

⁴ See, e.g., Russell-Einhorn, M., 2007. “The Legal and Institutional Frameworks Supporting Accountability in Budgeting and Service Delivery Performance,” in A. Shah, ed., *Performance Accountability and Combating Corruption*, pp. 183-230 Public Sector Governance and Accountability Series. Washington: The World Bank.

I. WHAT ARE ADMINISTRATIVE LAW AND PROCEDURE, AND WHY ARE THEY IMPORTANT?

A. The Realm of Administrative Law and Procedure

Administrative law captures the legal relations between the people and the government bureaucracy. This is because administrative law addresses the government functions that people regularly encounter in their daily lives. Examples of functions include administering pensions and health benefits, licensing businesses, regulating public health and safety, and enforcing environmental regulations. The rules that control the legality, fairness, and effectiveness of these functions are classified as administrative law.

People form their most immediate impressions about the state's integrity and responsibility, and thus about the depth of democratization, through these administrative relations. By emphasizing procedural regularity, transparency, and accountability in settings that affect people's daily lives and livelihoods, administrative law brings otherwise abstract notions of the rule of law down to earth. It provides a framework to govern the exercise of authority by administrative agencies and officials. It is central to legitimacy, procedural fairness, and access to justice, which constitute essential elements of the rule of law defined in the *Guide to Rule of Law Country Analysis*.

Unlike real property law or banking law, for example, administrative law is not a discrete body of substantive law unto itself. Rather, it provides a system of procedural concepts and rules that is integrated into and disciplines these substantive legal areas. The pervasiveness of administrative law and procedure means that many development projects deal with administrative law in addressing functional citizen-government interactions, regardless of whether administrative law reform is a stated project objective. For this reason, it is important for D/G officers to understand what administrative law is, how and where it can come into play, and how it contributes to establishing the rule of law that is essential for genuine democracy.

The term “administrative law” as generally used refers to the laws and associated procedures that govern the way government officials and agencies exercise their lawfully delegated powers. The term is sometimes used in a specific sense, particularly in many civil law countries, to refer to the delegation of authority and to substantive technical standards governing bureaucratic decision-making and the delivery of public services. In the U.S. and other common law countries, the term “administrative procedure,” which focuses on the procedural rights of citizens to be informed about and/or challenge bureaucratic decisions, is sometimes used interchangeably with “administrative law.” For ease of discussion, this guide uses the term “administrative law” to include the substantive laws and standards, as well as the procedures.

Administrative law pertains to nearly the full range of government activities and includes a diverse group of basic processes and institutions. It encompasses a set of rules and a certain structure, as well as some assumptions about the functions and responsibilities of different parts of government. It deals directly with a common set of

Administrative Law and Procedure in Action

- A government agency denies the license application of a small business. The business appeals to a court, claiming that both the government agency's rules and a national code of procedure were violated by denying the business the opportunity to present evidence in support of its position.
- The law requires a health ministry revising water quality standards to notify the public about the proposed changes. The ministry must allow 60 days for comments, publish the comments, and then explain whether and how the comments were used in drafting final regulations.
- A labor union uses an access-to-information law to obtain Ministry of Labor inspection reports showing a pattern of hazardous work conditions at two major employers.
- A transportation safety board charges a bus company with operating unsafe vehicles. It schedules a hearing to determine if the company should pay significant fines.

elements that channel government activities—the standards and procedures by which they are carried out. For example, each government benefits program must have some kind of rules of eligibility, procedures for filing applications, criteria for assessment, and the opportunity to object or appeal if the benefit is denied. Administrative law provides the framework for these procedures. When designed and implemented effectively, it ensures basic fairness, transparency, and accountability.

B. Processes of Administrative Law

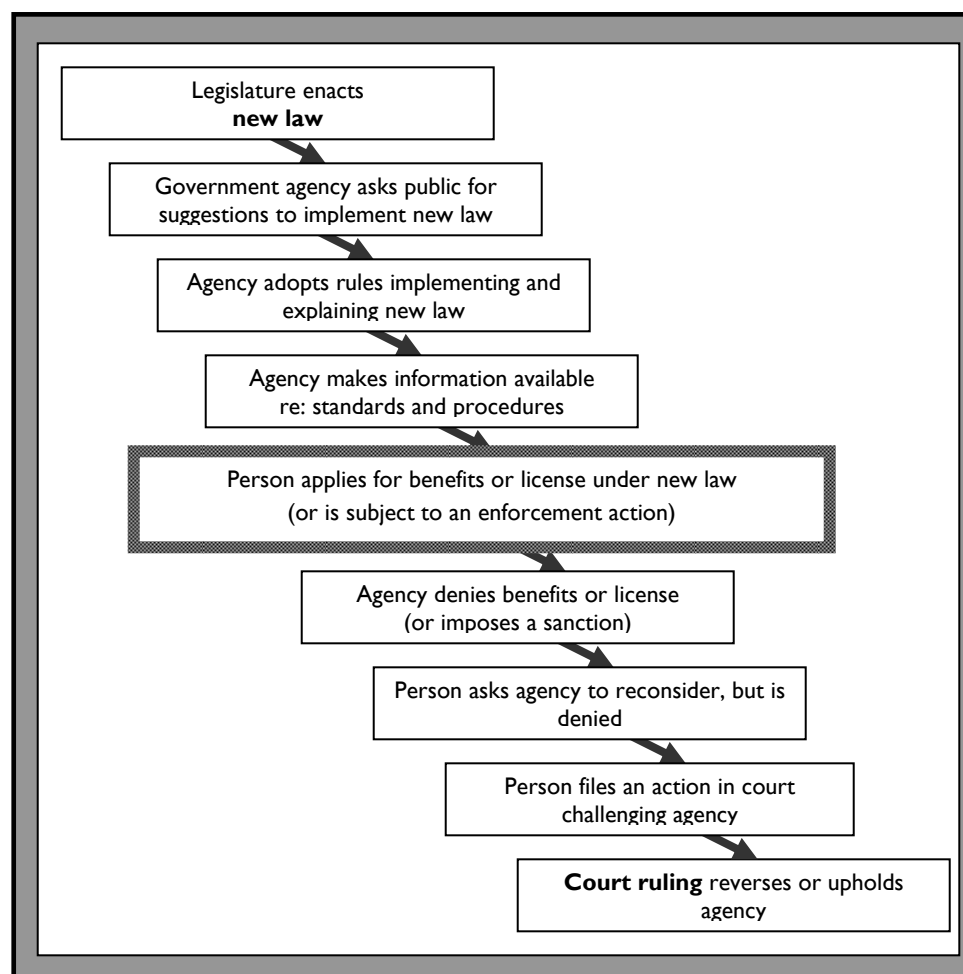
Every form of government, from the most democratic to the most authoritarian, must have procedures to transmit decisions to those affected by them. Procedures and processes called administrative law appear in every government system. However, they may differ greatly in their degree of openness and clarity as well as in the extent to which resulting decisions may be appealed to an impartial administrative and/or judicial decision-maker. They may also differ in the degree to which they are reliably enforced and observed. These factors can dramatically affect the extent to which a government administration is—or is perceived to be—rule-based and democratic. Reforming administrative law to enhance the democratic nature of governance can profoundly influence the public's perception of government and their rights under it.

Figure 1 shows the basic processes of administrative law. Administrative law involves the operations of the legislature and the courts as well as executive agencies. The legislature enacts broad statutes. The government bureaucracies must implement these statutes. To do so, they may have to develop more specific language and rules to make the statutes more precise and effective. Administrative law sets the basic standards for determining if the bureaucracy has used only the authority the legislature gave it under the law, or has expanded its power too far. Often such questions are posed to the courts in a judicial challenge to a government agency's action. The courts are then called upon to decide if the government agency followed the intent of the legislature. The courts may also be called upon by a citizen, group, or business to determine if an administrative agency properly followed its own procedures or substantive rules in making a decision or issuing regulations. Thus, judicial review of administrative agency decision-making constitutes a significant aspect of administrative law.

The processes described in Figure 1 can be found at virtually any level of government, and in varying degrees of complexity and sophistication. Whether it is local government ruling on a vendor's license or national decisions on regulating mobile telephone service providers, all government actions are normally supposed to follow a similar process defined by administrative law. The procedures covering such decision-making may be provided in particular laws and regulations that govern specific types of businesses or government benefits programs, or they may be set forth in a general statute governing all administrative procedures across the entire bureaucracy. In many cases, a national framework law governing administrative procedure defines basic standards with which more specific agency rules and regulations must conform.

Work on the administrative law of a developing or transition country relates to many distinct areas of substantive law. It also cuts across various levels of government, legislative, bureaucratic, and judicial interests, as well as individual, NGO, and business constituencies. This provides an array of possible entry points for reform, as well as options for more focused or comprehensive interventions (e.g., local government or sectoral reform work, and activities aimed at national framework laws or governmental agencies having audit, oversight, or information access responsibilities).

Figure 1. The Processes of Administrative Law



C. Differences Between U.S. and European Administrative Law Systems

USAID projects often work in cooperation with other donor projects. Implementers bring different perspectives to these projects, especially in law reform. Technical experts from different legal systems tend to have some predisposition towards their own system. Administrative law reform efforts—featuring German, Dutch, Japanese, and/or Council of Europe initiatives—are no different. However, variations in approaches tend to be ones of definition, application, or classification, not of principle. Thus, in discussing fundamental principles of administrative law and identifying areas for reform, U.S. development officers and their European counterparts generally meet on common ground. Similarly, local legal professionals will usually share common concepts and vocabulary regardless of the legal tradition of the host country.

The differences tend to play out in terms of implementation. For example, government contract law is regarded as a part of administrative law in much of Europe, but is treated as a discrete substantive topic in the U.S. Similarly, “administrative violations” under some European regimes are treated as minor criminal offenses under U.S. federal, state, or local laws. Further, administrative law systems of European states or developing and transition countries may appear more conservative or restrictive than the U.S. system in terms of mechanisms that enhance public consultation and transparency. A wide range of options may exist for organizing advisory or consultative councils, and for information provision schemes. As opposed to the U.S., administrative law systems in these countries may not prescribe standards or rules for organizing these mechanisms across the entire bureaucracy. Indeed, in most European countries, such mechanisms are not classified as administrative law (although they do

constitute parts of the broader field of “public law”) and are usually addressed strictly on an agency-by-agency basis.

Appendix A briefly summarizes significant differences between U.S. and European administrative law systems.

D. Using This Guide

This guide illustrates the operation of administrative law mechanisms in a variety of contexts and the benefits of understanding and potentially incorporating them into USAID programming. Some countries may not be appropriate targets for large-scale administrative law reform work. Particularly at the national level, if there is a lack of political competition and a poorly developed legal culture, efforts to develop administrative law frameworks have little chance of being implemented effectively. Yet even in these countries, opportunities may arise, in sectoral and local government contexts, to use administrative law concepts and tools to help create more open and participatory administrative processes. For example, a small business development initiative involving a licensing authority and various inspectorates may benefit from the creation or improvement of administrative law mechanisms. These mechanisms can support the provision of information on licensing and inspection standards and procedures, notice-and-comment procedures for the development of new regulations, and practical opportunities for businesses to be heard and lodge an appeal when a license is denied or revoked.

Indeed, wherever USAID is involved with government programs providing a license or benefit, regulating an activity, or enforcing rules and regulations, administrative law reforms can potentially enhance USAID’s impact. This guide brings these possibilities into focus and offers a new and complementary set of tools to achieve USAID’s program objectives.

Section II defines the three main objectives of administrative law and the mechanisms that collectively form the core of administrative law. The mechanisms are the individual parts that work together to make the overall process function legitimately and effectively. All are present in, and important to, a wide range of government activities, and they play a central role in advancing the quality and legitimacy of governance functions in a democratic state. Section III presents five case studies illustrating the application of selected mechanisms in a variety of sectors and contexts.

Section IV describes how administrative law concepts and mechanisms can be integrated into USAID programming, both directly and as part of other projects. It highlights opportunities in national, sectoral/agency, and local government reform contexts and illustrates the factors that affect the choice of mechanisms to be addressed. It also shows the benefits of using administrative law tools and concepts in projects focused on rule of law, judicial reform, civil society strengthening, anti-corruption, and SME development/regulatory reform.

II. OBJECTIVES AND MECHANISMS OF ADMINISTRATIVE LAW AND PROCEDURE

A. The Objectives of Administrative Law and Procedure

This guide uses three objectives as the framework for organizing the presentation of individual administrative law mechanisms. This section defines the objectives in a broad administrative law context. It also describes the mechanisms that operate under each objective and how they work.

All three objectives relate centrally to making governance democratic and accountable. Requiring agencies to act within the confines of their legal authority reinforces the rule of law (objective 1). Assuring a person's right to notice and a hearing (and the implied power to challenge an adverse government action) is a necessary corollary to limiting the agency's discretion, and critical to creating public confidence in the fairness of government actions (objective 2). Allowing the public access to knowledge about proposed government action is essential both to legitimizing that action and to enabling challenges to it (objective 3). Effective implementation of these objectives provides the public with a greater role and more confidence in the decisions of their government, and in the rule of law.

Objectives of Administrative Law

1. **Limitation of discretion**—Limiting the exercise of discretion by government actors to the authorities granted by the law and regulation
2. **Rights of the governed (due process)**—Securing the rights of citizens against adverse government decisions or wrongdoing
3. **Information**—Assuring the adequate exchange of information between citizens and government

1. The Limitation of Discretion Objective

Governments exist to carry out certain specific functions. Examples include national defense, infrastructure development, regulation of markets, police protection, provision of public services, preservation of natural resources, and protection of the environment. National constitutions generally spell out the broad framework for the reach of governmental authority, as well as methods for and limits on its exercise, but they provide little detail. Legislative bodies then enact specific laws creating new programs within their constitutional authority. These laws in turn delegate authority to the agencies and officials of the executive branch to implement the laws by establishing rules, procedures, and practices to achieve the purpose of the specific law.

This is where administrative law enters the scene. It provides a framework for the appropriate exercise of discretion by the government agency implementing the new law. Perhaps the most universally acknowledged principle of administrative law is that the power of government executives to act is limited to the authority specifically granted by the constitution or the legislative body. Thus, the first objective of administrative law is to define the limits of discretion that the constitution or legislature has given an agency to carry out its task. Actions taken within these limits are legitimate. Actions exceeding that authority are considered improper or illegal and are subject to review, restraint, and/or nullification. The mechanisms for achieving this objective include judicial, executive, and sometimes legislative restraints.

2. The Rights of the Governed (Due Process) Objective

Establishing administrative accountability begins with those affected by the government's action. Having legal rules that ensure accountability for abuse of discretion is meaningless without guaranteeing that those affected are able to use the rules to challenge a government decision. Therefore, this objective addresses the right of individuals and organizations to fair and open treatment in the administrative process. Requiring agencies to observe certain minimal standards of fairness and openness in dealing

with affected parties both provides better decision-making and establishes greater confidence in the legitimacy of decisions.

Administrative law regimes across the broad range of countries provide a fairly uniform body of rights to those affected by government actions. These rights are usually guaranteed by some combination of broad framework laws (such as administrative procedure codes) and individual or sectoral laws, further elaborated by agency rules and supported by judicial decisions. Administrative rights differ from rights in criminal proceedings, though there are some similarities. Under U.S. law, both derive from the same due process clause of the 5th and 14th Amendments to the Constitution.

3. The Information Objective

This objective has evolved relatively recently. Its purposes are to (1) compel the government to disclose the information it holds about those it governs and about its own activities, and (2) require the government to solicit and consider information from the governed about their preferences. For example, before adopting certain rules or regulations, many government agencies are required to publish proposed actions and consider public reactions to those proposals. Other laws require certain decision-making meetings of government bodies to be open to the public, and may also permit public participation in the discussion of proposed government actions. This objective also manifests itself through laws (often called “freedom of information” or “access to information” laws) that require the government both to routinely publish certain kinds of general information (ranging from annual agency reports to specialized data on, for instance, toxic emissions or water pollution), and to respond promptly to requests for specific information.

The specific rules relating to government information reside in many places, including separate framework laws dealing with government information; individual regulatory statutes mandating certain kinds of disclosures; agency regulations; judicial decisions; and even international agreements (such as The Convention on Access to Information, *Public Participation in Decisionmaking and Access to Justice in Environmental Matters* [Aarhus Convention], 25 June 1998).

B. Overview of Administrative Law Mechanisms

Breaking down administrative law into three objectives helps to illustrate the various applications of administrative law to government activity. This guide identifies 18 discrete mechanisms of administrative law that operate on the functions of government. It arranges them under the three objectives to provide a context for their application and use. It also highlights relevant differences between U.S. and European administrative law systems. Table 1 summarizes the mechanisms and their application.

The mechanisms have been collected from a range of national administrative law regimes, primarily from the U.S. and Europe. Not all of these mechanisms would typically fall under the heading of administrative law. The encompassing classification used in this guide reflects a more American orientation. This orientation sees administrative procedure, freedom of information, and rulemaking procedures as sharing fundamental characteristics. The purposes of this broader approach are to underscore gaps in development thinking about legal reform and to point out expanded opportunities to address popular concerns about transparency, accountability, and participation.

Collectively, these administrative law mechanisms reflect a well-developed administrative law system—one that is likely to be only ineffectively or partially implemented in most developing and transition countries. However, most of these countries have several mechanisms on the books, particularly those addressing the first two objectives. This offers the potential for reform projects to use legal rights to challenge administrative decisions and curb bureaucratic discretion. Reliance on, or championing of, these rights may appear highly legalistic in many developing and transition countries. However, raising them formally before the agencies and the courts, and publicly with the media and NGOs, reminds everyone that they exist and can lay the groundwork for more committed enforcement later on.

Perhaps more importantly, certain mechanisms—particularly those grouped under the information objective—may respond to simple and highly popular aspirations of the public for better access to information and a greater role in public administration. In this regard, administrative law can be immediately influential and can build on nascent informal patterns of state-civil society cooperation.

Table 1. Administrative Law Mechanisms and Applications

Mechanisms	Applications
Limitation of Discretion Objective	
<ul style="list-style-type: none"> • Review of agency decisions at a higher level within the agency 	<ul style="list-style-type: none"> • Corrects errors by staff before matter reaches the courts • Provides opportunity to educate lower level staff • Provides management overview of lower level staff • Maintains policy consistency
<ul style="list-style-type: none"> • Ombudsman review of agency decisions 	<ul style="list-style-type: none"> • Offers less formal, more accessible review for citizens • Provides oversight on how laws are applied • Provides for general study and assessment of process • Offers limited individual relief
<ul style="list-style-type: none"> • Judicial review of agency decisions 	<ul style="list-style-type: none"> • Permits disinterested review of executive action • Compares action with requirements of agency's own rules, applicable laws, and constitution • Controls arbitrary actions, such as absence of factual support, abuse of discretion, and violation of procedures
<ul style="list-style-type: none"> • Review of general agency rules and regulations 	<ul style="list-style-type: none"> • Is central element of separation of powers • Permits court review for consistency with statute and intent of legislature • May be provided by legislature or legislative committee and/or executive review body • Operates as restraint on executive branch exercise of arbitrary or unauthorized power
<ul style="list-style-type: none"> • Legal liability of agency to persons affected by erroneous agency decision (found only to a limited extent in U.S. system) 	<ul style="list-style-type: none"> • Makes agency financially liable for improper or illegal action damages • Is enforceable in court • May attach liability to individual officials making improper decisions
<ul style="list-style-type: none"> • Prevention of agency action contrary to prior agency statements or decisions (limited application in U.S. federal law) 	<ul style="list-style-type: none"> • Allows party to rely on government advice even when it turns out to be incorrect • Insulates party from legal liability, or allows party to retain benefits based on incorrect advice
Rights of the Governed (Due Process) Objective	
<ul style="list-style-type: none"> • Notice of rules and standards that apply to government actions 	<ul style="list-style-type: none"> • Provides public with knowledge of government rules • Prevents application of "secret" standards • Prevents enforcement of "secret" rules • Promotes consistency and predictability in government actions • Enhances credibility of government
<ul style="list-style-type: none"> • Notice of proposed individual adverse government action 	<ul style="list-style-type: none"> • Informs party of pending charges of violations • Informs party of pending denial or rejection of application for government benefit or permit • Allows more effective supporting presentation to official(s)
<ul style="list-style-type: none"> • Opportunity to be heard prior to final adverse action 	<ul style="list-style-type: none"> • Provides decision-maker with better, more balanced information • Provides fairness to individuals subjected to government coercive action • Allows individuals to challenge opposing evidence or witnesses • Validates party's position by submitting it in own words • Makes it more difficult for decision-maker to ignore party's position
<ul style="list-style-type: none"> • Impartial decision-maker 	<ul style="list-style-type: none"> • Does not necessarily require outside adjudicator (may be agency official uninvolved with preparing the agency's position in the dispute)

	<ul style="list-style-type: none"> • Provides for appearance as well as fact of impartiality • Significantly enhances credibility of decision process
<ul style="list-style-type: none"> • Explanation of decision 	<ul style="list-style-type: none"> • Requires agency to articulate rational, defensible justification for individual decision or collective decision (rulemaking) • Establishes basis for review or appeal of decision to higher level or court • Allows party to investigate and rebut reasons if possible • Enhances credibility of decision process
<ul style="list-style-type: none"> • Opportunity to seek meaningful review of initial decision 	<ul style="list-style-type: none"> • Enables parties affected to seek review of agency decisions or rules • Allows agency actions to be reviewed by an independent judge or court • Is important for review of general agency decisions like regulations or normative acts
Information Objective	
<ul style="list-style-type: none"> • Requiring public notice of <i>proposed new</i> government actions or initiatives affecting the public 	<ul style="list-style-type: none"> • Applies to actions such as regulations and normative acts • Applies at all levels of government (national to local) • Encourages public attention and participation • Enhances government credibility
<ul style="list-style-type: none"> • Opportunity for the public to provide commentary or feedback prior to the final action 	<ul style="list-style-type: none"> • Provides government with better information for decisions • Encourages public attention and participation • Improves quality of decision • Enhances credibility of the government
<ul style="list-style-type: none"> • Use of advisory committees or special experts to provide better information to the agency for its decision-making 	<ul style="list-style-type: none"> • Can prevent abuses by “insiders” through regulation • With adequate openness, avoids appearance of favoritism by making the process public
<ul style="list-style-type: none"> • Requiring meetings to be advertised in advance and open to the public for observation and/or participation 	<ul style="list-style-type: none"> • Governs activities of collegial bodies (such as boards and commissions, including advisory bodies) • Encourages media and public attention and participation • Enhances government credibility
<ul style="list-style-type: none"> • Requiring government agencies to make certain information public (affirmative information provision) 	<ul style="list-style-type: none"> • Meets growing global standard • Increases public awareness of government activities • Enhances government accountability • Enhances government credibility
<ul style="list-style-type: none"> • Requiring government agencies to provide information when requested 	<ul style="list-style-type: none"> • Meets growing global standard • Provides media and public opportunity to examine specific government practices • Enhances government credibility

C. Mechanisms for Implementing Objective I—Limitation of Discretion

Government agencies derive their authority from properly enacted laws, and have limited and clearly defined power to implement these laws. Making certain that agencies do not exceed or misuse this power is one of the essential roles of administrative law. The following mechanisms operate to control that exercise of power.

1. Review of Agency Decisions at a Higher Level within the Agency

Government agencies are primarily responsible for restraining themselves. Thus, a higher level within the agency is generally the first point of review of the agency action. Usually the party seeking the license or benefit, or subject to an adverse action following an inspection or investigation, seeks review by the higher authority within the agency. In larger agencies, there may be a higher level of appeal as well. Review within the agency can be more or less formal. It could fall to the official supervising the office making the initial decision. In other agencies, it could go to a higher tribunal or board. One of the greatest variations in systems of internal review of administrative acts is whether such review is essential before seeking review in the courts. This is called “exhaustion of administrative remedies.” Some developing countries with

a historic distrust of government agencies have sought to ensure immediate access to the courts for any adverse action, and therefore do not require exhaustion of remedies. Mature systems that provide for a full trial or rehearing by the first instance reviewing court may also not require exhaustion.

Objective I Implementation Mechanisms

- Review of agency decisions at a higher level within the agency
- Ombudsman review of agency decisions in individual matters
- Judicial review of agency decisions
- Review of general agency rules and regulations
- Legal liability of agency to persons adversely affected by erroneous agency decision
- Prevention of agency action contrary to prior agency statements or decisions

2. Ombudsman Review of Agency Decisions

An ombudsman, usually affiliated with the legislature, is generally charged with reviewing the legality, arbitrariness, consistency, or fundamental correctness of an agency’s exercise of authority granted by the parliament. The review typically focuses on the procedure that an agency used in reaching its decision rather than on the substantive decisions. Usually, the ombudsman has authority to investigate acts by government officials, and to publish reports and recommendations. In some countries the ombudsman may go to court to seek redress for a party. Actions by the ombudsman do not preclude judicial review, nor are they a precondition for such review.

3. Judicial Review of Agency Decisions

A fundamental element of every developed administrative law system is the ability of an individual to seek redress in the courts against an adverse bureaucratic decision in an individual matter affecting that person. Some form of judicial review of individual administrative acts or decisions exists in every legal system. Awareness of various systems and some familiarity with their elements is especially useful when considering reforms of judicial review mechanisms. There are two key differences in judicial review across countries:

- **Whether specialized administrative courts exist**—Most European countries have specialized administrative courts to review agency decisions. There is no appeal beyond the highest administrative court in most circumstances. In contrast, most administrative appeals in the U.S. go to courts of general jurisdiction, but there are a few specialized courts that hear certain kinds of administrative cases.
- **Scope and nature of the court’s review**—The issues here are whether the courts have the authority to review the agency’s substantive as well as procedural decisions, the amount of

discretion or respect given to the agency's decision in a "gray" area, and whether the judicial proceeding is an appellate- or trial-type review. In an appellate-type review, legal arguments are based on the pleadings. In a trial-type review, evidence is introduced to the court. U.S. federal and state administrative law embodies these distinctions, as do other developed nations' legal regimes. To a large extent, the nature of the judicial review proceeding depends on whether the administrative decision is based on an administrative record (as are decisions issued by administrative law judges after a formal hearing in the U.S.) or is made more informally by the agency. Standards of judicial review prepared by the Council of Europe acknowledge that different systems may provide either for a complete, substantive review of the agency decision, or a review limited to its legality. All of these questions significantly affect the degree of freedom the administrative agency has to make decisions in administering its programs.

The nature of appellate hearings differs in the U.S. and European legal systems. Courts conducting judicial review in the U.S. seldom engage in fact-finding, very rarely taking in evidence or hearing testimony from witnesses. In most European jurisdictions on the other hand, the first-level appellate court engages in a *de novo* (new) rehearing of the original case. Thus, European lawyers are used to appellate courts reconsidering almost all of the elements of a case, with much less regard for the results of the original trial or hearing. Where courts are independent, *de novo* review can provide a safeguard for litigants. There are also relevant differences between the civil law inquisitorial system and the common law adversarial system. The U.S. model of the agency defending its position against a private party generally does not exist at the first instance court in civil law systems.

4. Review of General Agency Rules and Regulations

Rules and regulations determine decisions that agencies make that apply to a broad class of persons. European legal systems also use these terms, as well as "sub-legislative acts" or "normative acts." There is relatively little consistency among legal systems about control over these kinds of agency actions. However, most systems allow for some possibility of judicial review. The route to review varies greatly, but the nature of the review—to the extent it focuses on proper process—does not. Courts will ask whether the agency followed proper procedures in adopting the rules and whether the rules exceed the authority granted the agency under the appropriate law. In the U.S. and some other countries, the review will address the factual and policy justifications for the rule.

In the U.S., federal administrative law contemplates judicial challenges to agency rules or regulations, either at the time of adoption or when the agency uses them in an enforcement proceeding. Some state administrative procedure laws also provide for review of the regulations by a special committee of the state legislature to assure consistency with the enabling laws. In these states, judicial review may be precluded except for extraordinary challenges in enforcement proceedings. Moreover, in the U.S., federal rules of most agencies are subject to White House substantive review, although this does not affect judicial review. States have a variety of systems for centralized executive review of rules as well.

European systems are quite varied. Some countries treat review of individual actions and general regulations the same way for purposes of judicial review. Others provide for very limited review, or only parliamentary review. These variations are reflected in developing or transitional states as well.

5. Legal Liability of Agency to Persons Adversely Affected by Erroneous Agency Decision

One of the sharpest differences between U.S. and European administrative law is the concept of public or administrative liability to individuals who were adversely affected by administrative action or inaction. Under U.S. law, government agencies and officials are generally insulated from claims for damages caused by carrying out their responsibilities, even when a court determines that they were wrong. However, certain mechanisms are available for damage recovery in special cases. In contrast, under most European

systems, liability of government agencies for damages or reparations is considered a key mechanism for ensuring administrative accountability.

6. Prevention of Agency Action Contrary to Prior Agency Statements or Decisions

European administrative law systems differ from the U.S. system in the extent to which people can rely upon actions or information from the government. Under U.S. law, the federal government usually cannot be bound by its previous acts or representations. An American who acts on advice from a government agency may still be penalized or denied a benefit by a later contrary pronouncement of that agency, although he or she may have a legitimate defense to a civil or criminal enforcement action. In European law, a party that has “legitimate trust” or “expectation” based on a government representation is protected against contrary acts of the agency. This imposes a control for consistency on the government that is, at least in theory, more limited in U.S. law. However, in practice, U.S. administrative agencies often recognize a person’s justified reliance on the agency’s advice or actions and try to ameliorate the adverse effect of later, contrary positions.

D. Mechanisms for Implementing Objective 2—Rights of the Governed (Due Process)

Individuals dealing with the government are at an inherent disadvantage because of the huge power wielded by the government agencies that affect them. Every system of administrative law provides a set of procedural rights for the governed that attempts to provide a fair process for interaction with the government. There is a marked similarity among the systems with respect to the rights deemed to be important, and the guarantees provided.

1. Notice of Rules and Standards That Apply to Government Actions

In countries with well-developed legal systems, publication of standards and criteria for government actions is automatic, and there is little difference in how the systems operate. Examples include criteria for licenses or benefits and elements of administrative violations. However, in transition countries, the simple act of recording and publishing the basis for granting benefits, licenses, and other administrative law instruments can be a major contribution to transparency and accountability. The internet and electronic publication of government rules and requirements (e-government) has significantly expanded access to this information in both developed and developing systems, though in some developing and transition countries, access remains limited.

Objective 2 Implementation Mechanisms

- Notice of rules and standards that apply to government actions
- Notice of proposed individual adverse government action
- Opportunity to be heard prior to final adverse action
- Impartial decision-maker
- Explanation of decision
- Opportunity to seek meaningful review of initial decision

2. Notice of Proposed Individual Adverse Government Action

Central to protecting the rights of the governed is the requirement that individuals be notified of any adverse action an agency proposes to take against them. This requirement is the foundation of hearing rights. It may be found in constitutions, general procedure codes, or subject matter statutes. The notice must be more than a summary statement of possible adverse action. It must also include sufficient information to allow the affected person to understand the nature of the problem, and prepare a response to the proposed action.

3. Opportunity to Be Heard Prior to Final Adverse Action

Administrative agencies are obligated to give the adversely affected individual the opportunity to present his or her version of the story. Article 38 of the Council of Europe principles states: “Persons concerned have the right to submit facts, arguments or evidence.” While this key premise is widely accepted, the nature of the hearing required is not always well defined. Indeed, much of the due process case law in the U.S. is devoted to determining what kind of hearing is required before an agency can take an adverse action. In the European systems, there is similar uncertainty about the nature of hearings required, with the agencies having a great deal of discretion. There are three general types of hearings. They appear in the American and European systems in varying degrees of statutory detail. Individual regulatory laws often specify the nature of the hearing required for their operation.

Types of Hearings

- Allowing the submission in writing of a response to the charges and evidence
- Informal presentation before a decision-maker
- Formal, trial-type proceeding

4. Impartial Decision-maker

Administrative law anticipates an impartial decision-maker, and an unbiased decision based on all of the material submitted. A major objective is to prohibit agency officials with a personal stake in a matter (or who have friends or family with a personal stake) from making the decision. In the context of administrative adjudication, U.S. laws include very specific provisions to insulate decision-makers from improper contacts and assure the impartiality of decision-makers. Demonstrable bias by the decision-maker is a near universal basis for judicial nullification of an administrative act. Administrative law also tries to separate agency decision-makers from those within the agency who serve as investigators and prosecutors for the agency.

5. Explanation of Decision

Consistent with the focus of administrative law on transparency, adversely affected parties should be notified of the decision following a hearing, and provided with reasons for the decision. This is particularly important if the party is to have a meaningful review at the next higher level within the agency, since he or she will need to decide whether to challenge the decision and, if so, what aspect of the decision to challenge.

6. Opportunity to Seek Meaningful Review of Initial Decision

Whether the matter is to be reviewed at a higher level within the agency, by an ombudsman, by the courts, or by some combination of the three, the affected parties must have the right to bring the matter to the attention of these entities. Who is considered an affected party, however, is not always clear. Certainly any party that has been the subject of an adverse decision—e.g., penalized for a violation, denied a license, or had benefits terminated—can seek review of the matter at another level. But in administrative decisions that have general application, or where a third party has been incidentally affected by an individual decision, it is not always clear who may seek review of the decision. This can be an important determination when NGOs or certain kinds of associations seek to advocate or litigate on behalf of members or other interested parties who may be indirectly or partially affected by a regulatory decision.

In U.S. law this decision is described as “standing,” and the question of whether or not a party has standing is ultimately determined by the body hearing the appeal (e.g., court or government agency). Questions of standing relate to constitutional as well as statutory issues and are often contentious and controversial. European systems tend to have broader rules allowing appeals, focusing on “concerned” or “interested” parties.

E. Mechanisms for Implementing Objective 3—Information

These mechanisms cover three significant areas of administrative law: (1) the process that agencies use in developing, adopting, and publishing implementing regulations; (2) standards regarding access to information held by the government; and (3) the obligation to hold meetings that are open to the public. One common thread is transparency. Another is the opportunity to participate in government decision-making based on this information gained through transparency. The U.S. has been a leader in adopting laws and procedures allowing broad access to government information and participation in government decisions. Other countries have joined this trend, and some have taken measures beyond those adopted in the U.S.

In general, however, most developing and transition countries, and even most of the developed European democracies, have not adopted general requirements on government information access or on the drafting of new regulations. Only circumscribed areas of government activity are the subject of public information. The adoption of new regulations, like the drafting of new legislation, is usually a tightly controlled process led by a small group of experts. In many countries, this reflects a greater deference to government leadership and expertise that is common to various European or European-inspired parliamentary systems. Where more transparency is present, it tends to be on an agency-by-agency basis or is specific to a particular government process rather than the subject of an across-the-board administrative procedural requirement. There also may be an informal practice to share drafts of proposed regulations with key NGOs, associations, or independent experts, rather than a legal obligation to publish and receive comments from the general public on such proposed rules. Among the transition countries, only Hungary has required all new regulations to be vetted with the public.

Objective 3 Implementation Mechanisms

- Requiring public notice of *proposed new* government agency actions or initiatives affecting the public
- Opportunity for the public to provide commentary or feedback prior to the final action
- Use of advisory committees or special experts to provide better information to the agency for its decision-making
- Requiring meetings to be advertised in advance and open to the public for observation and/or participation
- Requiring government agencies to make certain basic information public (affirmative duty provision)
- Requiring government agencies to provide information when requested

I. Requiring Public Notice of Proposed New Government Agency Actions or Initiatives Affecting the Public

Executive branch actions that affect policy toward a broad range of people are called rulemaking in the U.S. Different administrative law systems treat these actions differently. For example, the opportunity for and timing of judicial review of rules or regulations vary a great deal, including among U.S. states. American requirements for rulemaking make public notification of proposed rules mandatory in all but emergency and other expressly exempted situations. Thus, individuals or groups affected by new rules have the opportunity to learn about them and comment on them before they become effective. In major European systems, however, only the Dutch, Hungarians, and Norwegians have adopted a similar process, while individual laws in some other countries specify public participation. In many countries, the promulgation of these general administrative decisions is outside the scope of what is considered administrative law. However, adoption of general administrative decisions is a key part of governance, and the principles that apply to review of individual decisions have critical application to rulemaking as well. Greater access to government proposals and actions through e-government and the internet has increased opportunities for knowledge and awareness in some developing and transition countries.

2. Opportunity for the Public to Provide Commentary or Feedback Prior to the Final Action

Directly linked to the obligation to provide public notice of proposed rules or regulations is the opportunity for interested individuals to give their ideas and suggestions to the government. U.S. law

provides for written submissions for most rulemaking as well as opportunities to participate in public hearings for rules issued by certain agencies. Council of Europe principles allow for written or oral presentations as national law dictates, but acknowledge the need to limit general participation to written submissions or participation by representative groups. Electronic notices and submission of comments are becoming more common in countries that encourage and solicit participation.

3. Use of Advisory Committees or Special Experts to Provide Better Information to the Agency for its Decision-making

Governments often look to experts or panels of experts to assist them in administering highly technical programs. There may also be a wide range of consultative councils or other bodies that provide policy input on less technical subjects. There can be problems when these experts have connections to businesses subject to the government regulatory program, or when the information and advice they provide is not made public. The U.S. Federal Advisory Committee Act regulates these groups and assures openness in their processes. Among the European countries, Germany has laws addressing expert groups. However, these laws focus on the administration of the groups rather than on openness.

4. Requiring Meetings to be Advertised in Advance and Open to the Public for Observation and/or Participation

Open meetings laws generally apply to local government councils, boards, or other multi-member bodies. These laws can be especially important tools in enhancing the accountability of local officials. They may have less value applied at the national level. This is because most administrative agency decisions made at that level are not made by multi-member bodies, with the exception of U.S. independent regulatory agencies. Instead, the decisions are made within ministries by individual officials. Meetings that may lead up to decisions are internal staff meetings and seldom, if ever, made the subject of open meetings laws.

U.S. and European jurisdictions have a variety of laws requiring local bodies to hold open meetings. The U.S. Sunshine Act, applying to multi-member federal boards or commissions, and similar U.S. state laws provide useful models. These laws usually require advance notice and an accessible location. Certain topics may generally be treated in closed session, so long as the subject matter is disclosed. The effect of not holding an open meeting on decisions varies. In some jurisdictions, the decision reached at a closed meeting is void, while in others it is merely suspect, and the body must defend its action in court.

The extent to which the public—if permitted to attend a meeting of a board or agency—is allowed to participate varies widely depending on the nature of the body and the purpose of the meeting. Local government bodies such as city councils often provide opportunities for citizen input on proposed laws.

5. Requiring Government Agencies to Make Certain Information Public (Affirmative Duty Provision)

This mechanism is addressed by what are commonly called Freedom of Information (FOI) laws. Almost 60 nations have adopted some kind of comprehensive FOI law, while another 30 or so are considering such laws. Most of these laws oblige governments to make publicly available a wide range of information about their policies and practices, including personnel and budgets. Increasingly, this information is required to be made available over the internet. This is called affirmative information provision, where agencies are proactive in making information available rather than reactive to requests for information (see #6 below).

U.S. law requires publication of certain basic agency documents and maintenance of many others in agency reading rooms (or online). The European Union (EU) has broad requirements for making governmental information publicly available, while the Council of Europe openness principle is couched

only in terms of requested materials, not mandated public access materials. Many national FOI laws include categories for required public availability. In mature or actively reforming democracies, there is a practical incentive for governments to take an affirmative approach, making many kinds of key information as accessible as is feasible. The more information that can be obtained without a specific request, the fewer such requests will be received and require processing. The government is free to refer the requester to the public data rather than respond individually.

6. Requiring Government Agencies to Provide Information When Requested

The second aspect of FOI laws, and usually the most controversial, is the requirement that governments respond to individual requests for information. The U.S. Freedom of Information Act has become one of the primary models for other countries. However, the Council of Europe openness principles reflect the general standard. Any person may request information, without giving a reason, and receive the information in a reasonable time and at a reasonable cost (ordinarily copying charges). The state may restrict access to information in only limited circumstances, such as national security, or with regard to confidential personal or commercial information. If the state is going to deny the information, it must give a reason, and the party must have the right to appeal. Variations in the statutes generally relate to the nature of the exceptions to disclosure, including the breadth of the national security exception, extent of the commercial or proprietary exemption, and which party has the burden of proving that the material is or is not exempt.

III. CASE STUDIES ILLUSTRATING THE APPLICATION OF ADMINISTRATIVE LAW

This section contains five case studies. It shows development officers how administrative law can affect their projects—and how improving the quality of administrative justice within a country can enhance a wide range of development objectives. The case studies are composites, based on the experiences of the authors and others involved in administrative law reform efforts. They incorporate contextual information from a variety of countries and legal cultures but are not intended to be blueprints for projects or reforms. Rather, they are illustrative scenarios that show a range of typical legal, political, and social influences in a concrete factual setting. Following each case is a brief summary of key factors and lessons learned.

Case Studies

Anna and Her Unemployment Benefits—Helping a government benefits agency become more transparent and accountable to the public

Fast Food and the Bureaucracy—Working with small businesses to achieve deregulation and greater participation in government policymaking

Parents and Local School Authorities—Aiding a parents' organization to improve public participation, access to information, and legal recourse against local authorities

Mobile Telephone Licenses—Seeking transparency and fairness in high-stakes licensing

Changing the Legal Framework—Working within a broad public-private initiative to draft and implement a new comprehensive administrative code

A. Case Study I: Anna and Her Unemployment Benefits

Case Highlights

- A young mother loses her job in the midst of an economic crisis. She is arbitrarily denied unemployment benefits, as the government agency tries to save money by abruptly changing eligibility rules and is engulfed in controversy.
- A local NGO and a USAID project work with the government's social welfare agency to improve its procedures, enhance its relationship with the public, and make better policy and individual benefit decisions through a more transparent process.
- Administrative law mechanisms used include notice of adverse decisions and appeal rights within the agency in individual cases, effective communication of government benefit eligibility and application standards to the public, and greater public involvement in agency decision-making.

Precipitating event: Anna, a recently divorced mother of two young children, lost her job when the shoe factory in Country A where she worked shut down during a severe economic downturn. Within a week, Anna visited the regional office of the Social Security Administration (SSA) under the Ministry of Labor to apply for unemployment benefits. A month later, when she received her first payment, the amount was much smaller than she expected. There was no explanation for the amount, which differed from what other single mothers she knew with two children were receiving. She returned to the regional office where, one day a week, a sullen clerk was assigned to answer questions. When Anna questioned the amount and asked if she could see her file, the clerk replied that Anna's only recourse was to appeal the decision to an appeals unit at the Ministry of Labor. The clerk gave her some vague verbal instructions about how to file the appeal.

Initial appeal: Anna sought advice from a local labor union-sponsored (and USAID-funded) legal aid group called Pro Justicia. She followed their guidance and lodged an appeal. Five months later she had heard nothing. Pro Justicia then recommended that she personally go to the Ministry of Labor to seek

information about her appeal. There, she was told that they had found something wrong with the SSA's original decision and had sent the case back to the SSA a few weeks earlier to decide the matter again. Anna was then told that it might take several more months for the SSA to take up her case again and rectify the problem. Only later did she learn that the SSA had applied incorrect employment dates for her in calculating her benefits.

Challenge to new regulations: About the same time, the SSA abruptly announced new regulations that severely limited the number of people eligible for benefits by raising the qualifying period of employment from 26 to 36 weeks. The change was to take effect immediately, and was interpreted to apply not only to new applicants but also to those, like Anna, whose applications were still pending. Because of the economic crisis, the number of people affected by the new rules was significant, making the regulations tremendously unpopular and leading to street protests and highly critical press coverage. There was particular outrage at the way the new regulations were announced and at the magnitude of the change. Embarrassed by the controversy, the Minister of Labor sacked the head of the SSA and installed a new chief who vowed not to make the same mistakes. Thanks to the combined pressures of public opinion, the minority opposition party, and trade unions, revised regulations were soon issued that increased the qualifying period from 26 to 30 (rather than 36) weeks. Anna met these revised eligibility standards, and after a few more weeks her benefits were restored at the correct level.

Engagement of USAID: After this episode, the three-year USAID civil society strengthening project—which in its first 15 months had been exclusively focused on grant-making, organizational training, and general advocacy training for NGOs—began to turn its attention to administrative justice, aware of the potential impact such an initiative could have on a significant segment of the population. The unemployment compensation issue was chosen as a focal point.

Administrative procedures improvement: The main partner for this new project component was Pro Justitia. Pro Justitia was focused on workplace justice issues and had been funded in its advocacy and strategic litigation work for several years by USAID, Open Society, and other foundations. In addition to undertaking continued advocacy and litigation activities—including publicizing systemic administrative procedural violations by SSA offices around the country (such as the improper treatment Anna had initially suffered)—Pro Justitia proposed to try to work with the SSA's new, apparently more open-minded leadership to develop simpler and more transparent administrative procedures. The SSA's leadership cautiously agreed to cooperate. Over 18 months, in coordination with World Bank consultants working on agency organizational processes and financial solvency, USAID project experts helped the SSA to streamline and publish the standards and procedures governing unemployment, pension, and child welfare benefits applications, as well as procedures governing appeals of SSA decisions. These were written up in brochures and placed on placards in SSA offices.

Project personnel also worked with the SSA to adopt clear rules ensuring that citizens received advance notification of any denial, termination, or curtailment of a benefit with a written explanation and an opportunity to challenge such decisions at the SSA. Finally, they addressed internal rules to allow people like Anna to review their files, correct errors, and forestall unnecessary appeals. In addition, civil servants began to take related training.

The project also worked on three other important initiatives: (1) persuading the SSA that it might avoid further public embarrassment by adopting regulations requiring advance notification of, and public comment on, all newly proposed rules; (2) amending the Ministry of Labor's internal appeal rules, directing the Ministry's appeal unit to decide cases such as Anna's on the merits, if possible, rather than sending cases back to the SSA and causing further delays to citizens; and (3) cooperation with the Danish International Development Agency to help expand and train staff of the newly-established ombudsman's office to consider and act on complaints with systemic features relating to unemployment and other welfare benefit claims.

Follow-on: By the end of the project, the SSA seemed to have gained greater public respect. In a survey commissioned by the project, 77% of citizens with dealings with the agency said the SSA had “improved” its interaction with them. That in turn encouraged the USAID mission to launch a smaller, second-generation civil society strengthening project, as well as a three-year administrative justice project that focused on further supporting the administrative advocacy efforts of Pro Justicia and other organizations relative to the bureaucracy (in the unemployment/pension area and two new pilot areas) and on strengthening judicial handling of administrative cases.

Key Factors and Lessons Learned

- Political and bureaucratic crises, large and small, may produce important direct and indirect constituencies for change. In this case, these constituencies included not only the unemployed and trade union members, but also citizens simply upset at the government’s handling of the situation. The project was ultimately able to rely on high-level cooperation from the SSA, without which many of the project’s accomplishments could not have been realized. At the same time, the extent to which such high-level cooperation can continue—and filter down to the bureaucratic rank-and-file—is a key factor in the overall sustainability of such reforms. The professionalism of the civil service will always have an impact on the ability to implement many of the administrative law reforms, and ongoing work with mid-level management and staff is important.
- A project focused on improvements in administrative agency functioning can move a civil society strengthening program in a more activist, problem-solving direction. With the right political dynamics in place, civil society organizations may prove capable of spearheading additional participatory initiatives with government agencies, with positive impacts on other public sector management reform, rule of law, and anti-corruption efforts. A successful outcome can in turn give rise to a still more activist agenda.
- Coordination issues may arise with other civil society strengthening initiatives. However, donors have generally focused on public participation or state-civil society interaction at the local government level or vis-à-vis parliaments. That leaves a relatively wide open field for USAID and other donors seeking to support such work on a sectoral basis with appropriate central government agencies. Consequently, the more critical forms of coordination may involve smooth working relationships with technical sectoral specialists or public sector management experts.

B. Case Study 2: Fast Food and the Bureaucracy

Case Highlights

- Flourishing new carry-out food shops, encouraged by deregulation, are confronted by old-style bureaucracies seeking to assert control. The shops turn to the local city council and courts for relief.
- A USAID business development and deregulation project expands its focus to include training and advocacy work on licensing procedures as well as reform of regulatory policy-making, and assists with both immediate concerns and structural improvements.
- Administrative law mechanisms used include internal agency and judicial appeals of regulatory decisions, development of notice-and-comment participation of businesses in adopting new regulations, and creation of a business advisory council to assist in creating regulatory policy.

Setting: Metropolis, a provincial capital, has recently experienced a small boom in entrepreneurship. Following partial decentralization and deregulation initiatives by the central government, the larger cities began to loosen certain barriers to entry for smaller businesses over which they had some regulatory authority. In the past year, one new kind of business has taken advantage of these developments in the larger municipalities: small take-out restaurants serving local delicacies. Combining low prices, innovative packaging, and fast window and counter service, a variety of establishments have sprung up and thrived. However, this success has triggered various kinds of resistance from regular restaurants as well as from

local and regional bureaucrats. Several of the take-out shops in Metropolis, including an especially popular one with multiple locations called Primo, soon found themselves subject to pressure from Metropolis municipal licensing officials, and from regionally-based health inspectors representing Country B's Public Health Inspectorate.

Precipitating event: Initially, the Metropolis Commercial Licensing Department approached Primo and other take-out establishments with an order giving them 60 days to make a choice: they could either restrict their menu to much more limited categories of food as required by the freshly-adopted Light Refreshment Eating Establishment regulations—reaffirming the minimal inspections and permitting requirements to which they had previously been subjected; or they could become licensed as regular restaurants, requiring compliance with a much more onerous set of health, safety, building, and other obligations. Meanwhile, Public Health inspectors, which had overlapping food safety jurisdiction, conducted inspections of the take-out shops, alleging health violations relating to the use of heat lamps. The inspectors levied fines and ordered the shops closed until supposedly higher intensity, more expensive lamps were installed. Several inspectors offered to remove the fines and “accelerate” the shops’ reopening if certain payments were made.

Repeal of new regulations: These actions drew the attention of local media in Metropolis and other cities, and generated significant public disapproval of the apparent regulatory assault on these popular shops. The shop owners formed an *ad hoc* offshoot of the Retailers Association (which was divided on this and other issues, between smaller and larger businesses) and sought to lobby central and local government officials, including certain Metropolis City Council members. With several Council members behind him, the Metropolis Mayor saw an opportunity to broaden political support beyond his narrow majority in the Council by condemning the unpopular actions against the shops and demanding the repeal of the new permitting regulations. He also perceived an opportunity to rein in the established bureaucracy left over from prior administrations. Within three weeks, the Council had adopted a new ordinance rescinding the new regulations. The inspectors from the national government, however, held their ground on the heating lamps— leading many shops to pay the fines (or make the “other” payments) and to purchase the more expensive heat lamps in order to reopen.

Engagement of USAID: During this period, USAID’s Business Development and Regulatory Reform Project, which had focused on both national and provincial initiatives, was closely watching developments, looking for opportunities to expand government-business cooperation and to increase regulatory transparency in Country B. Now at its midpoint, the project had focused its resources on establishing business information centers, a form of one-stop registration shops (piloted in a few provinces), business mentoring programs, and association development and advocacy training. The take-out shop episode opened up possibilities for the project to expand its horizons.

Internal ministry appeal: The USAID project’s advocacy and media relations training for SMEs and business associations was expanded to include a component on using licensing rules and administrative procedure to render licensing procedures more fair and transparent, and employing administrative litigation led by local legal experts to ensure better compliance. This spurred Primo and six other take-out shops to pool resources and challenge the Public Health Inspectorate’s decision with an appeal to the Ministry of Health. The challenge raised both procedural and substantive issues, arguing that the alleged heat lamp standards were misapplied to them, and that they had not been given formal notice or an opportunity to present their views prior to imposition of fines and closure of the businesses.

Appeal to the court: The Ministry rejected this internal appeal, so the group appealed that decision to the Regional Administrative Court. The court found legal liability on the part of the Inspectorate, citing specific violations of the Inspectorate’s regulations and Country B’s Administrative Procedure Code. The court ordered the Ministry to pay damages to the shops. The specialized donor-funded judicial and administrative law training the judges had received from another project, together with the media attention the case had received, made the decision legally and politically feasible for the court.

New mechanisms established: The USAID project saw a chance to try to institutionalize fairer, more transparent business policymaking procedures on a pilot basis in Metropolis. Working with the Mayor and allies in the City Council, the project helped the Council draft and pass two important innovations. The first was a notice-and-comment rulemaking mechanism with specific requirements. These include public posting of proposed rules or amendments; newspaper, radio, and TV announcements thereof; a defined comment period (with public hearings in special cases); and published summaries of all comments received and how they were or were not used in preparing the final drafts. The second innovation was creation and support of an official business advisory council with members drawn from diverse business elements and a small staff required to organize agendas and report back to the business community. Both innovations were supported by project training, and were being used by the business community and reported on by the media as the project drew to a close. Both were also later replicated by a USAID local government project in four other cities.

Key factors and lessons learned

- Adding a democratization/regulatory fairness dimension to a business development project can forge linkages between USAID D/G and Economic Growth, Agriculture, and Trade (EGAT) initiatives. The political circumstances in Metropolis created the opportunity for significant improvement in business-government relations using administrative law mechanisms.
- While most businesses prefer to deal with governments in quiet, cooperative ways, here the political and legal dynamic forced the new businesses into a more confrontational mode. The public support that the new businesses had generated enabled the local political leaders to challenge the bureaucracy on a specific case, and impose some controls over them in the longer term by enhancing awareness and participation by businesses in the regulatory processes.
- The two major constraints imposed on the bureaucracy—the advisory council and the notice-and-comment provisions—represented the product of real political negotiation, with a large degree of small business and popular support coming from the bottom up. The mechanisms differ from the usual sort of weak participatory processes that are often suggested from above (such as discretionary public hearings with few clear obligations) and that frequently serve as a fig leaf for the cozy business-as-usual relations between governments and powerful firms. By contrast, these requirements are reasonably specific—from notification provisions to the obligation to report out the results of participation.
- The opportunistic introduction and use of administrative law mechanisms can contribute to the establishment of a more transparent and responsive relationship between business and government by: (1) helping to legalize and institutionalize more democratic control over the bureaucracy; (2) forging linkages between democratization and economic growth objectives and advancing the rule of law in the highly visible business sector; and (3) helping reduce the lack of transparency conducive to corruption.

C. Case Study 3: Parents and Local School Authorities

Case Highlights

- A parents' group in a community long dominated by a powerful clan seeks a greater role in local school policies, and sees its children arbitrarily dismissed from school in retaliation.
- Foreign donors, USAID projects, a lawyers' NGO, and local media provide a range of support to leverage fairer treatment for the children, and to establish open meetings and open records to allow the parents' group to participate in the development of school policies.
- Administrative law mechanisms include use of the country's access to information and open meetings law, strategic litigation, and judicial review of the school administration and first instance judges by better-trained appellate judges.

Setting: Principia is a mid-sized farming and business center in a remote part of Country C. It has long been dominated by a local clan and its four wealthiest families. Recently, Country C embarked on an aggressive campaign to upgrade local education. With the help of foreign donors, significant resources have been made available for building and modernizing school buildings, purchasing equipment, and improving the curriculum. However, project implementation has been plagued by criticism about favoritism and outright corruption. Members of the Principia school management committee (appointed by the town's mayor and almost all drawn from members of powerful families) met repeatedly with the donors to discuss special local projects for funding. Early discussions involved assistance totaling almost \$250,000.

Precipitating event: Two years ago, a group of parents concerned about how school policy was made in Principia formed a group that became known as Principia Parents for Change (PPC) to gather information about the administration of the schools, and to have their voice heard by the school committee. PPC and a number of other citizens' groups in the region are being advised by a local NGO funded by a multi-year USAID citizens' advocacy project. The groups have also been in touch with USAID's local government project contractor. That project has been focusing on fiscal reforms in local governments and their impact on many areas of spending, including schools. The contractor was also monitoring compliance with Country C's new Access to Information and Open Meetings Law, and advised PPC that its provisions might provide them with tools to address some of their concerns. Working with a Ford Foundation-funded local lawyers' group, PPC filed a request with the school management committee to make public the time and place of its meetings, and to open them up to the public under the terms of the new law. PPC also requested the committee to provide details of its current budget as well as information about proposals it had discussed with the donors.

School committee response: The committee never responded to the requests, but a week after it received them, 15 children of PPC members were suspended from school for the balance of the school year for alleged "disrespectful" behavior. The school's headmaster (the brother of a member of the school management committee) told the parents that the students had been disruptive, and that some had accused the school committee of stealing the school's money and using it for themselves. The children denied the accusations, and the parents demanded a forum at which to defend them. The headmaster said that he would hold a hearing himself to decide if the suspensions were appropriate. The parents and children appeared before the headmaster, who badgered them with questions and accused them of trying to disrupt the school system. At the end of the hearing he announced that the suspensions would remain, without any explanation. Within days of the hearing, two of the children were badly beaten at night while walking home from a party. With the help of the NGO, the parents contacted the local and regional media about the case. Although the local TV station and newspaper were owned by members of the extended ruling families, a regional paper and a provincial radio station had long been mildly critical of the clan's control of Principia's government. They closely followed the school suspensions and assaults, and stories on the recent controversy generated strong public interest.

Appeal to the courts: The lawyers' group told the parents that under the country's administrative procedure law their children were entitled to a fair hearing by the school authorities and had the right to appeal the suspensions to the courts. The group then helped them appeal to the local court, seeking to have the suspensions overturned under the administrative procedure law. PPC filed a separate request with the court to participate in the case, arguing that it possessed information about the bias of the headmaster and a pattern of harassment of students whose parents were PPC members. The local court permitted PPC to join the case and held a hearing at which all of the parties appeared. PPC and the parents argued that the headmaster should not have heard the case due to bias, and that in any event, he was required to explain his decision. Nevertheless, the judge ruled that the headmaster had conducted an impartial hearing and under the terms of the law was not required to explain his decision.

Reinstatement: The press following the case gave intensive coverage to this decision, and a number of groups organized protests at the school and at city hall. The parents and PPC announced that they would appeal the decision to the Court of Appeals, but shortly after that, the headmaster announced that the children would be reinstated and their records cleared since, as he put it, "they had learned their lesson." The provincial radio station reported that the headmaster had been told by the school management committee to clear the matter up because the donors were upset at the situation.

Enforcement of access to information and open meetings law: Meanwhile, PPC and the lawyers' group had discussed a strategy with the USAID local government project contractor for enforcing the Access to Information and Open Meetings Law, and filed a request with the mayor's office to have him order the school management committee to open up its meetings and provide the information requested. The mayor responded that such committees were exempt from the law. PPC then filed a lawsuit in the local court, with the help of the local lawyers' group, to enforce the law. The court agreed with the mayor, finding no basis in the law to require the school management committee to open its meetings or records. PPC next filed an appeal with the provincial Court of Appeals, some of whose judges had been exposed to a six-month series of training programs funded by the United Nations Development Programme (UNDP) on human rights topics as well as the new Access to Information and Open Meetings Law. After the hearing, the appeals court ruled that the school management committee was a public body and was obligated to hold its meetings in public, with adequate notice. It was further required to furnish information about its expenditure of public funds, not just when requested, but to make it generally available at the Principia government's offices, pursuant to the information access law.

Donor influence on new policy: The mayor and school management committee grudgingly agreed to provide the records that were requested and to create a public information file at the city's offices. They resisted the open meetings rules, however, and challenged the court to enforce its decision against them. However, when the donors learned that the school committee had not allowed any public input into its proposals for the funds, they notified the committee that unless there was evidence of public meetings and public participation taking place not only in the planning process, but in project implementation as well, they would not proceed with the funding. Following these statements, which were widely reported even in the local press, the school management committee adopted a new policy, with regularly scheduled meetings, agendas posted in advance, and adequate opportunity for public comment and discussion. PPC began actively participating and monitoring the committee's compliance with its new procedures.

Key Factors and Lessons Learned

- Despite the adoption of progressive national laws on fair and transparent procedures, access to information, and open meetings, localities isolated from the central government and subject to clan-type politics are likely to be slow in responding to law reforms that threaten an existing political dynamic. Reforms need to identify leverage points that will push local authorities into compliance. In this case, these points included the parents group, the media, and foreign donors.

- Enforcement of judicial decisions may be uneven in a society that is in transition to a law-based system. It was only economic pressure from foreign donors that ultimately caused the school board to open up its meetings and publish its agenda. However, once the board established the precedent, it raised public expectations. It became harder for municipal authorities to backslide later, even though external pressures diminished.
- The local court gave “standing” to PPC, enabling PPC to participate along with the individual parents. This helped establish a key legal principle and created an opening for advancing further legal reforms.
- Of the three primary actors in this case (the public, the courts, and the bureaucracy), the bureaucracy was not the direct beneficiary of any interventions. Although municipal government was resistant, this may have been a missed opportunity to bring selected officials on board.

D. Case Study 4: Mobile Telephone Licenses

Case Highlights

- The government denies a multimillion dollar license application. The applicant company unsuccessfully appeals the decision through multiple internal agency and court proceedings. It also tries to verify rumors of nepotism and corruption involving the successful license applicants, which are ultimately verified by aggressive journalists.
- The high stakes business venture plays out in the context of a confused regulatory regime that is in part the result of donor telecom experts not focusing on the broader legal and governance picture.
- Administrative law mechanisms used include formal and informal agency practices, various aspects of the judicial review process in re-examining agency decisions, and access to information laws.

Setting: The parliament of Country D recently enacted a new law to license companies to provide mobile telephone service. The market for mobile phones is significant, and the licenses could be worth millions of dollars. The new law was drafted with the assistance of international telecommunications experts provided by the World Bank and USAID, under a special infrastructure development project focused on energy and communications policy. The law contains relatively detailed procedures for issuing mobile licenses (which are expressly exempted from Country D’s general Law on Licensing). The requirements include public announcements about the application period and the licensing process, a list of qualifications that applicants must meet, and criteria that the Ministry of Communications will apply in considering the applications.

Precipitating event: National Mobile Company filed a license application with the Deputy Minister for Mobile Communications. The Ministry staff informed National that it was fully qualified under the new rules, and would probably receive a license in a matter of weeks. Following further review, the staff requested additional information from National, assuring the company that these were minor matters and that it could still expect its license in a matter of weeks. Based on this, and on a meeting that the president of National had with the Deputy Minister to confirm the status of its application, National committed over \$750,000 to begin construction of its transmission system. After six weeks National had still heard nothing. Neither the staff nor the Deputy Minister would return phone calls, and finally after eight weeks, National received a letter from the Ministry denying its application. The letter did not include the reasons for the denial, as required by the new law, but did include a statement about the opportunity to have the decision reviewed by the Ministry’s Communications Licensing Review Board.

Appeal to review board: National executives requested an explanation of why its application was denied, and tried unsuccessfully to get a meeting with the Deputy Minister. The Ministry staff responded that it was not obligated to explain its decisions, and again referred National to the Review Board. National filed an appeal with the Board and suspended its building efforts pending a decision.

Pursuit of access to information rights: The Ministry meanwhile announced that three companies had been awarded mobile telephone licenses. National executives knew nothing about any of the companies, but had heard rumors that one was owned by the Minister's daughter, and another by a prominent organized crime figure. National wanted to verify the ownership of the three successful applicants, so it filed official requests under the Access to Information Law with the Ministry of Communications and with the Corporation Registration Office. The Ministry of Communications refused to provide the information, citing the law's exception for business secrets, while the Registration Office simply never responded. National filed a lawsuit in the local court, which had jurisdiction under this law, claiming that this conduct violated the law. The court found for the government, erroneously upholding the business secrets exception. After National complained bitterly to the press and minority parties in the government, the Ministry and the Registration Office relented. The records, which may or may not have been complete, disclosed only names of individuals whom National did not know.

Appeal to court of appeals: At this point, due to adverse publicity and key investors backing out, National was flirting with insolvency when it received a one-line letter from the Review Board saying its license denial appeal had been rejected. Having lost its chief asset—the promised license—its only recourse was through the courts. Consistent with the Law on Judicial Review of Administrative Actions, the company filed a lawsuit in the administrative chamber of the Court of Appeals seeking to have its license denial overturned. The Ministry asked the court to dismiss the case, as the new mobile telephone licensing law contained no explicit provisions for judicial review. National countered that the judicial review law applied to *all* government actions, entitling it to a court hearing. The administrative chamber of the court held a hearing on the matter and affirmed the decision of the Ministry, agreeing with the latter's argument that while the general Law on Licensing was covered by the Judicial Review Act, the telephone licensing law was not.

Appeal to Supreme Court: The Ministry appealed the order to the Supreme Court, which ruled that every administrative agency action was subject to some kind of judicial review under the Constitution, and that the judicial review statute established the procedures. The Court further held that the Ministry had violated its own rules by not providing an explanation of the denial, and that National had met all of the public criteria for selection for the license. It also agreed with National's argument that it had a legitimate expectation of receiving the license, in light of the repeated assurances from the licensing body that it would indeed receive one. However, the Court said that it did not have the power to force issuance of the license itself. The Supreme Court accordingly sent the case back to the Ministry to reconsider National's application, following proper procedures.

Reapplication denied: National promptly filed additional information pursuant to its application and requested further Ministry review. The Ministry issued a rejection two weeks after receiving the updated request. The rejection included a brief statement that National lacked the necessary financial and technical qualifications. National again appealed to the Review Board, but was summarily denied. It filed an appeal in the Court of Appeals again, which the Ministry actively opposed. The court this time also ruled for the Ministry, citing the Ministry's technical decision. National's efforts to appeal to the Supreme Court were unsuccessful. At this point, with its funding exhausted, National filed for bankruptcy, while shareholders began looking for other business opportunities.

Exposure of corruption: Meanwhile, a journalist and the local NGO affiliate of Transparency International pursued the company ownership information that National had provided. Through their own investigation and additional access to information requests, the journalist and NGO established that one of the licensees was in fact a sham corporation, whose real owner was the daughter of the Minister of Communications. After the NGO made the information public and the media reported it, the resulting scandal contributed to the resignation of the Minister several months later; the daughter's license, however, was not revoked.

Key Factors and Lessons Learned

- The USAID technical assistance project had a mandate to structure a licensing process with sufficient accountability and transparency to reduce the risk of corruption. However, the contractor may not have paid close enough attention to the administrative law processes already in place, so as to integrate its recommendations into effective laws already enacted. Drafters of the telephone license law ignored general licensing and judicial review laws, creating unnecessary confusion regarding the appeals procedure. While the mobile telephone law included an express acknowledgement that it was exempt from the general licensing law, which was intended to avoid at least some of the potential confusion, the failure to provide for judicial review was the kind of oversight that can occur when experts in a particular subject matter (here, telecommunications law) are tasked to draft provisions that involve administrative procedures.
- National's efforts to obtain corporate data through the Access to Information Law met with mixed results. Although the court erred in applying proprietary information standards to simple business ownership data, political pressure and media attention generated by the court case forced the government to act, as is often the case, and provoked further public interest and journalistic inquiries.
- The courts played a potentially critical role in view of the extensive (and expensive) litigation resulting from the stakes of the dispute. Yet the results of the litigation suggest that courts may not fully understand the laws, and that they may be highly influenced by executive bodies and/or by the political atmosphere. Judicial training may help in some instances, but in most cases, just and technically correct case outcomes will depend on structural changes in judicial organization or political shifts that make it safer and easier for judges to exercise genuine judicial independence.

E. Case Study 5: Changing the Legal Framework

Case Highlights

- The frustration of small businesses and foreign investors with a country's regulatory arbitrariness coincides with a progressive government's attempts to overhaul the country's archaic and inefficient administrative law regime while acknowledging political realities by excluding two significant financial regulatory bodies from the reform effort.
- The Ministry of Justice, a USAID-supported legal reform NGO, and a democracy and governance rule of law project, along with significant donor support from GTZ, the World Bank, and others, achieve a comprehensive re-writing of the various administrative framework statutes defining the interaction of the government and the people.
- Administrative law mechanisms used include the full range of tools. This case illustrates an effective, coordinated, and politically astute approach to reforms that seeks to involve most of the key stakeholders in the drafting process, thereby increasing the chances for acceptance and implementation.

Setting: Country E is a medium size nation with a legal system loosely based on civil law traditions. A progressive president was elected two years ago with a relatively narrow majority in parliament, and began a new program to encourage more entrepreneurship and solicit foreign investment. This effort began to have some success, with many small businesses flourishing and a number of Western companies actively considering capital investment projects. Over the past several years, law reform has been limited to adoption of a new civil code and limited restructuring of the judiciary, including a Law on The Judiciary establishing a new system of judicial selection and advancement. USAID decided a year ago to begin a four-year judicial sector development project, focused on judicial training, judicial administration, and court management. There are also small components devoted to strengthening civil legal assistance and legal information dissemination. A legal NGO, called Lawyers for Reform (LR), has attracted several hundred young lawyers around the country and, in addition to supporting ongoing efforts, has begun to argue for broader legal reforms.

Precipitating event: Recently, some small business owners began meeting with the Ministry of Justice, complaining about government agencies making it difficult for them to run their businesses. Their complaints included multiple agencies claiming jurisdiction over them, layers of confusing (and often secret) regulations, arbitrary decision-making, and the lack of meaningful legal recourse from adverse decisions. At the same time, several potential foreign investors abandoned pending projects and voiced similar complaints to the Ministry of Trade. Certain LR members who represent small businesses focused on another aspect of the problem: the absence of any judicial standards or procedures for dealing with administrative agency decisions. Also, without a clear exhaustion of administrative remedies requirement, a huge number of cases were being appealed to the courts without the benefit of higher agency review or expertise. The courts were predictably over-burdened. LR formed a working group to prepare recommendations to address this problem, and began soliciting funding from donors. The USAID judicial reform contractor and Gemeinschaft für Technische Zusammenarbeit (GTZ) indicated they would lend their support.

Rationale for reform: The Minister of Justice knew that while Country E had a barebones Decree on Appealing the Decisions of Executive Agencies to the courts, the decree said virtually nothing about procedure, the standing of parties, or the effect of court judgments. She also knew that there was no Law on Administrative Procedure supplying basic standards for initial agency decision-making or for appealing agency decisions to a higher administrative organ; each agency was left to its own devices. The Minister knew that a number of other countries in transition to a more market-based economy had adopted new or significantly revised legislation addressing “administrative law,” including court appeals of administrative decisions. The Minister also understood that in addition to benefiting the business community, such legislation could address key aspects of how the government handled public assistance benefits, pensions, police fines, and a host of other actions. Finally, she anticipated that an effective administrative law reform effort would allow her to assert some influence over her fellow ministers, while establishing her reputation as a genuine reformer with LR, other local NGOs, and foreign donors. The President and key parliamentary leaders seemed predisposed to the idea and gave the Minister their tacit approval for such a project. USAID and GTZ indicated their willingness to provide foreign experts on administrative law to help conceptualize various aspects of the proposed reform legislation.

Planning and negotiation: The Minister laid out a comprehensive, detailed plan for drafting and implementation that envisioned giving enough groups a stake in a positive outcome to overcome opposition from those perceiving themselves as possible net losers in the process. As the drafting process progressed, the Bank Supervision Agency in charge of regulating financial institutions decided that it should not be subject to the provisions of the draft law. It argued that in light of the special concerns it had about confidentiality, the need for summary proceedings to prevent theft or fraud, and certain other issues, it was justified in preserving its own procedural rules. The agency regulating the securities markets raised similar objections and insisted that its existing procedures were as fair and objective as any general rules that the new law might adopt. The largest businesses regulated by these regulatory agencies were very comfortable with the existing rules and the relationships they had established, and were equally uninterested in any changes. Because the largest outside support for the reforms came from SMEs and their legal advisers, the Minister of Justice had relatively little leverage to extend the reform efforts to these two financial regulatory agencies, and agreed to leave them out rather than explore harmonization. While a few other ministries also tried to exclude their procedures from coverage of the draft law, they lacked the political clout to do so.

Donor support for implementation: With passage of the law appearing highly likely, the World Bank incorporated the administrative law drafting and implementation effort into its ongoing Public Sector Adjustment Loan implementation matrix for Country E. The Bank also informally pledged to seek internal grant funds to help support various aspects of eventual implementation, including (1) legal harmonization work with covered agencies on their internal appeals systems, (2) a study tour for agency legal department chiefs to a country with an administrative law framework similar to the one to be adopted by Country E, and (3) a public education effort, possibly led by LR.

Meanwhile, the USAID contractor, in addition to working with GTZ on the drafting and public comment process, pledged to work with the Minister of Justice and Prime Minister on implementation. For the duration of the USAID project, the contractor would provide: (1) assistance to the judiciary in determining whether and how to support the creation of a separate chamber or collegium of judges to handle administrative cases; (2) support for training judges on administrative law matters; and (3) support for LR to take on public education, litigation, and advocacy activities related to administrative procedure.

In addition, the USAID D/G office discussed with its EGAT Bureau counterparts the possibility of having the latter's new Business Environment Reform Project incorporate a discrete administrative procedure law implementation component into its workplan. The D/G office suggested covering the implementation of the new law in at least two of the agencies with which EGAT planned to work—the Ministries of Trade and Finance—and facilitating continued consultative participation by the SME community in government policy-making.

Key Factors and Lessons Learned

- A comprehensive administrative law reform effort may require convergence of a number of political, legal, and social factors. Three critical groups of participants may need to come together in circumstances such as this in order to create a viable opportunity for introducing a new framework administrative law: (1) senior government officials with the requisite political motivation to make the changes; (2) constituent groups who have identified administrative law reform as a means of achieving a variety of legal and public administration objectives that will directly benefit their interests; and (3) donor programs, with the significant experience and understanding they bring to administrative law reforms.
- While aspects of licensing are sometimes treated separately from general administrative law reform, the primary focus of the reform effort here reflects a practical and flexible approach to addressing the entire process of initial government administrative decision-making, internal or second instance agency review, and judicial appeal in a broad spectrum of contexts. The Minister of Justice did not attempt to incorporate rulemaking, access to information, or open meetings provisions into this otherwise very comprehensive administrative legislation. This could easily have changed the existing political dynamic and created new sources of opposition. In other countries, failing to pursue these measures in a new framework law may be a missed opportunity.
- USAID judicial reform and business environment reform projects grasped the synergies generated by devoting some of their energies to administrative law-related activities. Regardless of how well this kind of coordination (or inter-donor coordination) functions, implementing a new administrative procedure system and harmonizing it with hundreds of agency-specific rules and standards is a huge undertaking. Thus, it is sensible to start with pilot implementation efforts in a few agencies, and to train civil services to use the system's provisions to more service-oriented ends.

IV. INTEGRATING ADMINISTRATIVE LAW CONCEPTS AND MECHANISMS INTO USAID PROGRAMMING

Most countries have some administrative law mechanisms. A key question is whether they operate as intended, or are instead undermined by gaps or loopholes in the law, by untutored citizens and bureaucrats, or by informal influence and/or unwritten rules or practices. A full-scale administrative law reform effort generally requires several baseline conditions to be met related to politics, civil society, and the bureaucracy. While a few developing and transition countries reflect these conditions, many more offer opportunities for more modest initiatives involving particular mechanisms and jurisdictions. Examples include introducing or fostering the use of administrative law mechanisms in regional or local governments or in sectoral agencies and processes.

Baseline Conditions for Comprehensive Administrative Law Reform

- A level of political competition and domestic or international pressure sufficient to lead politicians to open up bureaucratic decision-making
- A fairly well developed civil society, with a segment of the public reasonably mobilized to use reformed mechanisms
- A bureaucracy adequately sensitized to respond appropriately to increased citizen demands

A. Administrative Law and Procedures in Developing and Transition Countries: Opportunities and Obstacles

In Western democracies, the past several decades have seen enormous growth of the bureaucratic state. Accompanying this growth, administrative law has become more open and responsive to the interests of individuals and organizations. This reflects deference to public pressure and the interest of politicians in better monitoring the activities of public servants. In many developing and transition countries, administrative law can play a similar and potentially even more vital role based on the weaker accountability of elected officials in those environments. Traditional forms of accountability may be largely ineffective due to patronage and weak parliamentary oversight, excessive executive control over appointments and agenda-setting (in certain presidential systems), and/or poor internal controls over civil servants. Administrative law mechanisms offer the possibility of opening up some alternative channels through which private actors can directly influence and constrain bureaucratic actors. (See Appendix B on how “diagonal accountability” complements traditional “vertical accountability” [elections] and “horizontal accountability” [governmental institutions].)

Administrative law mechanisms are subject to many of the same pressures and weaknesses affecting more traditional forms of accountability in developing and transition countries. These same factors affect receptivity to law and governance reforms in general, including anti-corruption efforts. Because administrative law mechanisms are formal, they require some kind of endorsement by politicians or senior political appointees. These actors are part of a larger political dynamic that may be hostile or apathetic toward more openness in government. Reforming administrative law or strengthening mechanisms runs counter to the interests of many bureaucrats, and to those of politicians who seek to capture some of the administrative apparatus for their own purposes. Patronage and corruption may be relatively entrenched. Where mechanisms depend on the courts for ultimate enforcement, their utility can be compromised by problems with judicial independence and expertise. Mid- and lower-level bureaucrats, meanwhile, may not be properly educated or controlled by their superiors, resulting in disuse or subversion of mechanisms. Further, if businesses and citizens do not trust or understand the mechanisms and favor other informal means of influence (ranging from mediation to bribes), the mechanisms may not be used.

Therefore, as demonstrated by major administrative law reform in Taiwan, Japan, and Korea in the past 15 years, a robust national administrative law framework is most likely to emerge in countries with reasonably competitive political cultures and a significant degree of democratization. This puts

administrative law in a curious position in most developing and transition countries. On the one hand, it provides the basic architecture for administrative openness and accountability. On the other, it cannot easily gain traction in environments lacking a rudimentary degree of such openness and accountability.

Administrative law fundamentally requires political parties to cede at least some degree of power to interest groups, businesses, and citizens in the latter's interaction with the bureaucracy; in return, these participants can monitor bureaucratic actors over whom the parties may lack some degree of control. Politicians may turn to such tools for populist advantage or when they believe that competitive politics may force them out of power. This same phenomenon can occur when presidents or prime ministers face problems of bureaucratic control in a coalition government, encounter strong intra-party rivalries, and/or have difficulties managing an entrenched or wayward civil service. In general, however, countries with low rankings according to the relevant World Bank and Freedom House governance indicators feature social and political environments that may prove indifferent or hostile to the introduction and use of processes empowering the public in the administrative arena.

Nevertheless, even if framework administrative laws can be adopted or improved, opening up possibilities for “diagonal” accountability, countries still face the substantial challenge of implementing the legislation across dozens of ministries and agencies and harmonizing the legislation with enormous numbers of agency-specific procedures. Over the past several years, of the countries adopting (or in the process of adopting) new or substantially revised administrative procedure codes, only a few—such as Bulgaria, Estonia, Georgia, Latvia, Poland, and Thailand—are classifiable as developing or transition countries. Of these, most have not only exhibited reasonably competitive political systems, but also regional economic integration pressures (e.g., EU or Association of Southeast Asian Nations [ASEAN] Free Trade Area accession) to help spur a government-wide commitment to more openness in government policy-making and decision-making.

However, despite the fundamental challenges to broad-scale administrative law reform in developing and transition countries, special political or other circumstances may enable the introduction or strengthening of individual administrative law mechanisms that support increased transparency and public participation in administrative decision-making. These opportunities may arise in particular agencies or sectors, or in particular local or regional governments (See Subsection IV.C below). They allow reformers wide latitude to introduce more progressive mechanisms as long as they do not conflict with national mandates.

B. USAID and Other Donor Experience with Administrative Law Reform in Developing and Transition Countries

USAID and other donors have supported administrative law-related initiatives in various countries over the past decade. This support has been fairly limited relative to other kinds of law and governance assistance. This is most likely due to donors' relative unfamiliarity with administrative law and their tendency to split many programs into those focused on supply-side assistance to state entities and those focused on demand-side help to NGOs and civil society. This split is often artificial. Administrative law crosses this divide. It is concerned with procedure and the *interaction* of the public with administrative bodies.

Types of Projects That Often Contain Administrative Law Components

- Conceptual and drafting assistance
- Rule of law
- Public management reform
- Special administrative law institutions
- Administrative justice
- Sectoral/regulatory reform
- Local government reform
- Civil society strengthening/access to justice

At the implementation level, administrative law reform often blends seamlessly into sectoral or substantive reform efforts—whether involving business registration, welfare benefits, or environmental policy. Administrative law reform fundamentally involves improvements to the functioning of key agency or local government procedures. Many projects support at least partial procedural regulatory

This subsection summarizes recent donor-supported projects with noteworthy administrative law-oriented components. The purpose is to familiarize USAID D/G officers with the design, implementation, and apparent impact of these types of initiatives. The following describes eight types of donor projects that may feature administrative law components, either directly or indirectly.

Assistance with conceptualizing and drafting administrative framework laws represents perhaps the narrowest form of donor-funded involvement. The U.S. and other governments provided assistance to China in drafting its new comprehensive Administrative Procedure Law. Also, GTZ has undertaken extensive administrative law drafting assistance work in Eastern Europe and the former Soviet republics. Similarly, in the context of EU accession activities, the Council of Europe has sent European administrative law experts all over Central and Eastern Europe to consult on administrative law reform and the harmonization of new and existing legislation with Council standards on issues ranging from citizen hearing rights to a right to access case information. This kind of assistance reaches influential academics and government officials and thus frequently enriches the dialogue on administrative law reform. However, particularly if there is inadequate public consultation in the process, such assistance can frequently end up as a technocratic, top-down activity that fails to connect with the practical implementation concerns of both bureaucrats and citizens.

Revision of Administrative Laws in Georgia

USAID, GTZ, and the Council of Europe supported the drafting and adoption of new codes to deal with administrative procedures and court review of administrative appeals. The focus was on two high-impact areas: administrative decision-making and how government agencies interact with the public. Freedom of information provisions had immediate impact and were widely used by NGOs, and court procedures have begun to be followed. Implementation of the provisions governing agency behaviors has lagged behind.

China's rudimentary administrative litigation statute adopted in 1989 did not adequately serve the needs of citizens and businesses. The government initiated the drafting of a wide-ranging administrative procedure law that would also address rulemaking. Since 1999, the U.S. Government has provided limited funding to The Asia Foundation to support the drafting process. The support has included creating an Administrative Law Advisory Committee comprised of prominent U.S. administrative law experts. These experts have engaged in a critical review of concept papers and legislative drafts while furnishing comparative law materials to Chinese administrative law specialists in the Administrative Law Research Group.

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on the part of several ministries was suspect. On projects requiring significant implementation work at the agency level, donors and contractors need to work intensively with a limited number of bureaucracies and to map out careful coordination plans with substantive regulatory reform and process engineering experts.

3. Public Management Reform

An administrative law reform initiative may accompany or complement broader public administration or public management reform programs. Such programs may address the proper authority to be delegated to public entities, the role of certain audit institutions, anti-corruption initiatives, civil service reform, and the role of certain inspectorates.

One example is the World Bank-supported efforts in Latvia to draft and implement a new administrative procedure law in the context of a broad Public Sector Adjustment Loan. This project was innovative in its holistic approach to administrative law implementation, recognizing that many different components had to be developed and to function smoothly together to facilitate effective implementation. Such an initiative requires a strong central coordinating entity to maintain implementation momentum. It also requires strategic choices as to what agencies among the dozens in a typical government will receive special implementation attention so as to ensure certain successful pilot efforts and potential demonstration effects. However, this kind of program may tend to be overly technocratic and top-down. Therefore, it is unlikely to be a promising reform vehicle for countries with weak democratic potential.

Administrative Law Implementation in Latvia

Latvia passed a new comprehensive Administrative Procedure Law in 2002 but delayed implementation for over a year to allow for adequate preparation. The Ministry of Justice formed an interagency working group under the aegis of the Cabinet of Ministers. The group's role was to create a clearinghouse for information on the new law and its implementation, particularly regarding revamping and harmonizing internal review and appeal systems with the framework legislation. Working group members included the heads of the legal departments in each of Latvia's ministries. The group commissioned a survey on ministry preparedness to implement the law. Survey results caused the Minister of Justice to consider the possibility of amendments to the law as well as additional training for civil servants. After a very promising start, there are indications that the Ministry of Justice has not shouldered its coordinating role as effectively as was hoped and that efforts to focus strategically on implementation in a few key ministries have not materialized. On the other hand, public consciousness about the law is relatively high, and the promise of damages and costs being awarded to individuals and businesses for administrative delays and abuses has provided the private bar with significant incentives to litigate using the law.

4. Judicial Reform and Special Administrative Law Institutions

Within an existing or new administrative law framework, donors may focus on strengthening nationwide institutions critical to the proper functioning of the administrative state. These could include administrative courts or administrative chambers of the regular court system, ombudsman offices, administrative inspectorates, and entities responsible for coordinating policies and investigations relating to access to information. For example, the Millennium Challenge Account Threshold Country Program for Ukraine features a judicial reform and anti-corruption project that focuses in part on strengthening administrative courts. The Ombudsman in Peru, meanwhile, has received significant institutional support from the World Bank and the Canadian International Development Agency and greatly expanded its activities on behalf of citizens seeking administrative justice. Ombudsman officials use a strategic mix of education, investigation, and advocacy to attain their objectives. Resolution of formal administrative and/or court challenges to administrative actions can take months or even years, but the Ombudsman typically obtains some kind of resolution within a week or two. In Bulgaria, UNDP's Administrative Justice System Project (2003-2005) focused on developing a new administrative court system as part of a larger national judicial anti-corruption initiative. It supported organizational and strategic management efforts in the new court system, as well as the training of judges. The impact is still unclear, but this kind

of intervention might be useful where the potential for leadership of reform is high and bureaucratic culture is relatively open in a particular institution or branch of government.

5. Administrative Justice

A few projects have addressed several dimensions of administrative justice simultaneously. For example, the USAID-funded Administrative Law and Procedural Systems (ALPS) Reform Project (2003-2006) in Bosnia-Herzegovina took a broader perspective on administrative law reform than did the UNDP project in Bulgaria. It worked on a wide range of smaller model initiatives to attack administrative injustice holistically in key areas affecting disadvantaged citizens (e.g., unemployment, pensions, civilian victims of war benefits, and property return). This integrated approach included work with relevant municipal officials responsible for front-line information dissemination about benefits standards and policies; government ministries responsible for setting standards and enforcing policy as well as issuing decisions on administrative appeals; courts issuing decisions and guidance on judicial appeals of administrative decisions; and a nation-wide legal aid organization engaged in public education and media work, training of and lobbying with government officials, and strategic advocacy and litigation activities (including seeking disciplinary sanctions against public officials). The project also included a participatory governance component featuring notice-and-comment mechanisms introduced into 20 municipalities. It is too early to gauge the ultimate impact of this project, but it has been quite successful thus far in serving as a catalyst for key parts of the administrative justice system to work together more cooperatively to serve the public. This type of project is best suited to a limited number of sectors or regions of a country based on a clear appraisal of political and resource constraints. Also, insofar as it addresses issues that may not be addressed by other donors working on sectoral reforms involving public benefits, it is a potentially fruitful way for projects to expand into more grassroots directions under the rubric of administrative justice.

6. Sectoral and Regulatory Reform

These projects (including those involving business licensing, public benefits provision, and SME development) offer rich opportunities for undertaking various kinds of administrative law reform activities—from improving internal decision-making and appeals systems to making rules and policies more transparent and available to the public. Many such projects typically touch on issues of concern to administrative law, but rarely devote sufficient energy and resources to ensure improvement of the procedural dimension of decision-making (as opposed merely to removing administrative barriers).

Otherwise focused on removing obstacles to SME development in municipalities and regions throughout the country and promoting the development of one-stop shops for business registration, the USAID-funded Legal, Regulatory, and Bureaucratic Reform Project (1999-2003) in Romania experienced its great success in the launching of a local Transparency Initiative in several municipalities. Under this initiative, Romanian municipalities competed to adopt a number of pro-business reform measures in return for investor recognition and access to trade delegations. The initiative had five provisions designed

Transparency Initiative Provisions

- Notice-and-comment rulemaking, requiring the municipality to consider and publish summaries of comments submitted by individuals, associations, and businesses
- Public hearings to be held upon request of 25 individuals or an association with at least 25 members
- Conduct of regulatory impact analysis for any new official local act
- Allowing an individual or organization to petition the municipality to adopt, amend, or repeal a normative act
- Reform of administrative appeals, requiring the government to prove that it followed applicable rules and procedures, rather than requiring the complainant to prove that the government did not

primarily to reduce or eliminate the secrecy and unpredictability surrounding the adoption of new rules and procedures. The project paired these provisions with two business regulatory reform provisions

related to business licensing. The success of the competition ultimately led to the passage of a national Decisional Transparency Law. Often it is the improved legitimacy and quality of administrative decision-making (due to enhanced transparency and participation) that ultimately ensures acceptance of efficiency-enhancing standards and processes. One advantage of linking administrative law to sectoral and regulatory reform projects is the opening it provides for economic growth officers as well as D/G officers to explore which sectors and government agencies offer the best opportunities for more democratic governance and demonstration effects. One challenge is ensuring that technical approaches to sectoral issues, such as pension reform or energy regulation, reflect a broad understanding of administrative law concepts and mechanisms rather than only those that apply in particular U.S. or European legal environments.

7. Local Government Reform

Because municipal governments are usually responsible for large numbers of public services and are also subject to national administrative framework laws, they can serve as a focal point for administrative law reform. Like their national-level counterparts, municipal service departments can have their decision-making and appeals processes not only streamlined, but also made more fair and transparent. At the same time, pursuant to the information objective of administrative law, rulemaking and government meetings related to municipal administration can be made more open and participatory through notice-and-comment-type mechanisms and citizen advisory boards. Quite a few USAID-supported local government projects have incorporated one or more of these mechanisms, including recent Macedonian and Serbian local government reform projects and the Bolivian Democratic Decentralization and Citizen Participation Project. These initiatives are often accompanied by various kinds of media and public education activities designed to help citizens use such new procedures. Most have made very significant headway despite initial resistance from those governments and CSOs accustomed to dealing in a more informal fashion with local governments and despite significant public apathy. These kinds of projects offer important opportunities to introduce the more durable kinds of legal mechanisms characteristic of administrative law in developed democracies.

8. Civil Society Strengthening/Access to Justice

USAID and other donors—especially foundations—have supported a wide range of activities by NGOs that involve administrative advocacy and litigation. These activities have had tangible impact in particular countries and localities. One of the most notable examples is the wide range of advocacy activities undertaken by Philippine NGOs with Ford Foundation funding—particularly the Alternative Law Groups (ALGs) working in the agrarian and environmental reform areas. One ALG, Saligan, reportedly trained almost 500 paralegals to guide farmers' land reform applications through Department of Agrarian Reform administrative processes. The organization also played a key role in getting the Naga City Government to institutionalize a People's Council—a permanent official advisory channel for NGO input into the functioning of municipal services. These kinds of activities can feature active use and reform of various administrative law mechanisms, and there are diverse ways in which fundamental administrative law concepts can take shape in different administrative and cultural settings. The strength of these projects lies in taking full advantage of modest local opportunities for reform based on special NGO capacities and abundant social capital in particular regulatory settings.

C. Situating Administrative Law Reform in Various National, Sectoral, and Local Government Contexts

Each type of potential reform context—national, sectoral, and local—presents different opportunities for, and obstacles to, administrative law reform. Each is subject to different political and social dynamics. The common denominator is that adoption of administrative law mechanisms is likely to occur in

response to a new or emerging political equilibrium that allows such mechanisms to be supplied in response to demand by certain constituencies and politicians whose needs are aligned. Donors need to understand and exploit these entry points. Table 2 shows opportunities and obstacles in various contexts.

Table 2. Administrative Law Reform Opportunities and Obstacles by Context

Context	Opportunities	Obstacles
National reform—national law drafting and implementation	<ul style="list-style-type: none"> • Defuse opposition by packaging framework laws as progressive, popular, and/or technocratic • Appeal to parties and politicians vis-à-vis the bureaucracy • Capitalize on strong economic integration or geopolitical/donor leverage • Look for strong reform leadership from cabinet or key ministers 	<ul style="list-style-type: none"> • Difficulty in gaining consensus on government-wide legislative provisions • Potential for lack of coordination, training, or resources to weaken implementation • Potential for abstract, technical legislation to fail to engage key constituencies or the public • Potential resistance by politicians and the bureaucracy to information- and participation-enhancing laws
National reform—creating or strengthening special institutions (courts, ombudsman, audit bodies)	<ul style="list-style-type: none"> • Easy to sell when sheer numbers of administrative complaints and appeals are high, creating need for efficiencies • Institutional popularity and symbolism that may aid reform efforts 	<ul style="list-style-type: none"> • Weakness or diffusion of public and politicians' support • Lack of clout resulting from underfunding and capacity problems
Individual agencies or sectors	<ul style="list-style-type: none"> • Capitalize on technocratic and populist opportunities by weaving procedural mechanisms into substantive regulatory reform • Concentrate reform in sectors or agencies where politicians and bureaucrats need practical support and “pocketbook” issues are at stake 	<ul style="list-style-type: none"> • Ministry/agency resistance to opening regulatory processes and changing work routines • Potential resistance to framework laws, requiring more training as well as development of agency-specific rules
Local government	<ul style="list-style-type: none"> • Often easier to promote public participation closer to people's homes and livelihoods • Use as “laboratories” for introducing particular administrative law mechanisms 	<ul style="list-style-type: none"> • Resistance of municipal personnel to opening up regulatory processes and changing work routines • Potential resistance to abstract framework laws, requiring more training as well as development of municipality-specific rules

I. National Reform Contexts

Significant reform in the form of new administrative procedure and access to information laws has occurred in places like Latvia, Korea, and Taiwan where politics are vibrant. A progressive freedom of information act in Mexico was adopted only after politics became more competitive with the election of President Fox. External pressures can also influence the adoption of such laws, including regional integration incentives (e.g., EU accession in the case of Latvia). In some cases, such pressure may result

in adoption of a technically sound law, but one that cannot be properly implemented. For example, Georgia's Administrative Code, which may have been adopted to impress the U.S. and other donors, lacked serious support for execution of many of its provisions. On the other hand, even administrative laws having major practical significance may be adopted with relatively little disagreement where a law is simultaneously viewed as popular and progressive *and* highly technical in nature (as was the case in Latvia and several East Asian countries) and/or where legislators and bureaucrats fail to appreciate its progressive import. For example, Romania's Decisional Transparency Law was pushed through parliament by a small circle of political leaders with little resistance. Unlike substantive legislation, such process-oriented enactments are not necessarily viewed as having clear winners and losers and thus generate less organized opposition.

Creating or strengthening special system-wide institutions involves national-level initiatives featuring somewhat different political dynamics. Examples of such institutions include administrative courts or chambers to handle judicial appeals from administrative decisions; an ombudsman's office; and a central information access office or agency to set policy and preliminarily handle disputes arising from operation of a FOI law. These kinds of initiatives can easily suffer from insufficient political support as well as insufficient power or influence over bureaucratic actors. The bureaucracy as a whole can also close ranks and sabotage efforts at control. On the other hand, institutional strengthening initiatives can provide a useful focus for donors and reformers if they include or are complemented by (1) appropriate demand-side stimulus from CSOs and politicians and (2) coordinated cross-training and technical assistance with agencies that interact often with such institutions (e.g., agencies sending a high volume of cases to the courts). This type of cross-training and technical assistance for courts, agencies, and civil society organizations was part of the Bosnian ALPS project.

2. Sectoral or Agency Reform Contexts

Significant administrative law reform can take place at the sectoral level, even in countries where major changes to framework legislation are not feasible. Such reforms may include introducing a wide range of administrative law mechanisms to improve transparency and public participation in decision-making, as well as challenges to such decision-making. With special sets of political, social, and economic circumstances prevailing in a given sector, politicians and key interest groups can often find common ground in strengthening certain mechanisms. Indeed, linking the issue of procedural fairness to the vast power of the bureaucracy over daily life on a particular topic (e.g., welfare benefits or construction permitting) has potent appeal to various constituencies and is often unexploited in many reform programs. Also, the relatively technical, process-oriented nature of most administrative law mechanisms often makes them less threatening to certain administrative agency players than other targets of reform.

To an extent, the general dynamics favoring the adoption and use of such mechanisms in these sectoral and agency contexts are the same as at the national level. The difference is that at the individual agency level, there may be subtler and more frequent political shifts that provide openings for the introduction or strengthening of such mechanisms. Moreover, an agency may face more focused pressures for transparency and participation from business interests or citizen groups (e.g., workers, farmers, and pensioners) than does the central government as a whole. Indeed, the influence of certain groups (e.g., environmental groups or trade unions) may make participation- or transparency-enhancing mechanisms very appealing to an agency that already has some experience with civil society partnerships. External players (e.g., key politicians, foreign investors, and donors) may also have more leverage in a specific sector, where there may be more plentiful opportunities to attach procedural openness mechanisms to otherwise technical regulatory frameworks or provisions.

These sectoral arenas of opportunity may be widespread. For example, throughout Central and Eastern Europe, the strength of the environmental movement and responsive government bureaucrats in that sector have prompted many environmental ministries to adopt more transparent and participatory processes concerning policymaking and rulemaking – processes that are neither mandated on a government-wide basis nor found in sectors with less vigorous civil society activism. Thus, while

Hungary has lacked an overarching notice-and-comment requirement for rulemaking, the Ministry of Environment has for many years required public notification about legislative and regulatory enactments and NGO participation therein, pursuant to Ministry decree. Efforts throughout Europe to implement the Aarhus Convention, requiring information provision and participation in environmental policymaking, provide another example. It is important to recognize the help that key constituencies can provide in the adoption or strengthening of more far-reaching agency- and subject-specific mechanisms (e.g., special information disclosure rules, public hearings, and advisory councils).

3. Municipal/Regional Government Reform Contexts

In these contexts, the relative independence of some local politicians and their proximity to certain constituencies may provide very fertile soil for many kinds of administrative law mechanisms. These could include foundational mechanisms established by national framework laws—many of which explicitly apply to local governments—as well as potentially more innovative and expansive local rules pertaining to public participation or municipal administrative decision-making.

Though local governments by no means guarantee more responsive administration and service delivery, they can in fact support many kinds of participation and transparency procedures that may be more difficult to implement at the national level. This has been the case in China, with Shanghai and Guangzhou being “early adopters” of procedures for local rulemaking. Indeed, there are many examples of effective administrative law-type mechanisms being introduced locally and winning such respect and attention that they are replicated in other jurisdictions or even, ultimately, at the national level. For example, in India, several states passed right to information laws or executive orders based on favorable political circumstances, leading the Indian government to pass a national Freedom of Information Act in 2002. The right-to-information work of the group Mazdoor Kisan Shakti Sangathan has won a number of victories in different state contexts, using the laws to spotlight corruption and poor service delivery. Events in Japan followed a similar pattern, where prefectural freedom of information laws set the stage for adoption of a national law in 2002. In Romania, publicity about the municipalities’ experience with participation and transparency provisions in 2001–2002 spurred the Parliament to adopt a nationwide Decisional Transparency Law in January 2003.

D. Determining Which Administrative Mechanisms May Be Most Useful and Feasible to Implement

Administrative law mechanisms allow citizens to press their individual rights in the administrative area using defined procedural rules documented in law and regulation. These are generally more effective and durable than informal transparency, participation, and redress-enhancing processes, although they demand more capacity on the part of civil society and governments, and can be undercut by cultural, social, political, and resource constraints. While all of the administrative law mechanisms identified in this Guide generally contribute to improved democratic governance, the question of which mechanisms to pursue in a reform program is obviously related to both the target objectives and the external environment.

For example, if administrative decision-making and appeals in an agency are perceived to lack sufficient clarity and regularity, more explicit and better publicized administrative procedure regulations addressing the taking of evidence and the rendering and explanation of decisions may be implemented, assuming social and political dynamics favor such adoption.

Key Considerations in Introducing Administrative Law Mechanisms

- Legal culture and traditions
- Potential resource demands
- Coordination demands
- Legal and organizational sophistication
- Visibility

Thus, in addition to the influence of the political and social environment at different levels of government described in Subsection C, at least five other considerations may enter into decisions to introduce or strengthen particular mechanisms.

1. Legal Culture and Traditions

Different administrative law traditions around the world may affect whether and in what form a particular mechanism operates in a country. While it may appear objectively helpful to introduce a new mechanism to increase administrative openness, participation, and/or accountability, that mechanism may face resistance from the local governing community—including even its progressive members—if it is perceived as a foreign transplant that does not mesh well with local legal and governance conventions. Reformers must keep legal culture and traditions in mind when considering administrative law innovations.

2. Potential Resource Demands

The “implementation gap” that so often plagues legal and other reform programs derives from several sources: inadequate elaboration of implementing regulations and operational guidelines; insufficient attention to organizational and operational systems modifications; inadequate training and reference materials for bureaucrats; and poor public information and education efforts. Tackling some or all of these potential impediments may require considerable time and money. Certain administrative law mechanisms may be more time-consuming and costly than others to implement effectively.

One obvious example is administrative decision-making procedures, including mechanisms governing citizens’ right to notice and standards governing decisions, notice of proposed individual decisions, the opportunity to be heard prior to action being taken, and the right to obtain an explanation of a decision. Even in a single agency, getting government officials to adhere to these kinds of processes is a massive undertaking that substantially overlaps with major features of public sector management reform. By contrast, many mechanisms supporting greater public participation (e.g., advisory committees and public hearings) may be relatively inexpensive to implement. Costs in time and money need to be factored into implementation choices.

3. Coordination Demands

Certain administrative law mechanisms may place considerable coordination demands on a project. These demands may apply within a ministry or among ministries and agencies. For example, the modification of administrative procedures in an agency can entail significant changes in how official decision-makers communicate with citizens, handle documentation and recordkeeping, and interact with legal and appeals units. Proper coordination is necessary so that reform efforts in one dimension of an agency’s decision-making process avoid obstacles elsewhere in the agency.

A different but equally important kind of coordination across agencies (or between courts and agencies) is needed if a framework law or other national legislation addressing administrative law mechanisms is being implemented. Thus, in addition to other features associated with implementing the new Administrative Procedure Law, the Latvian Government created an interagency working group to discuss common implementation problems across different agencies and the courts. This is a time-consuming and politically sensitive endeavor.

4. Legal and Organizational Sophistication Needed for Implementation

Certain mechanisms may put legal and organizational demands on administrative and judicial actors, as well as lawyers and ordinary citizens and businesspeople. This can make the tools hard to understand and use. Even if the rules governing the use of mechanisms are purposefully streamlined and simplified, certain mechanisms are by nature quite complex.

Access to information laws represent a good example. Reformers reflexively gravitate to such laws, which promise so much in the way of governmental transparency. However, ensuring that government

documents are provided to the public on demand (*responsive information provision*) is exceedingly complicated in practice. It involves all kinds of legal and organizational judgments about recordkeeping and indexing, about privacy, confidentiality, secrecy, and appropriate non-disclosure rules, and about the time, place, and manner in which the documentation is actually made available. Introducing *affirmative* provision of information with respect to the most important and frequently requested kinds of documentation and information may be more cost-effective and appropriate in the near term. Similar questions of legal and organizational sophistication may accompany the overhaul of administrative appeals or judicial review processes, as suggested by the discussion of resource and coordination demands above. By contrast, a public hearing requirement or introduction of an advisory committee can entail fewer significant legal and organizational demands.

5. Visibility

The degree of visibility of a mechanism or its potential outputs can influence how quickly the mechanism gains acceptance. The more a mechanism either relies on highly visible processes or generates results evident to large numbers of people, the more it may inspire public confidence, encourage group mobilization, generate demonstration effects, and attract media attention. All of these features are important for empowering constituencies and ultimately affecting government policy.

At one end of the spectrum are those mechanisms that facilitate open public participation— open meetings, public hearings, deliberative councils, and the like—and whose results are potentially highly visible, affecting large numbers of people. Affirmative information disclosure mechanisms can also be characterized as high visibility. At the other end of the spectrum, administrative appeals systems and advisory committees may involve activities that are largely shielded from public view, even though the results of such procedures may prove significant and ultimately gain wide public attention. Reformers should be aware of opportunities to design mechanisms that operate as visibly as possible.

* * * * *

The context and interventions are different for the five considerations discussed above, so it is impossible to generalize about what kind of administrative law initiative will work best. However, reformers and donors are often concerned with getting the “biggest bang for the buck,” and experience provides some guidance in this regard. Some mechanisms, such as open meetings, public hearings, notice-and-comment rulemaking, advisory or consultative councils, and affirmative provision of government information, including expanded internet use and e-government, can have relatively low demands in terms of resources, coordination, and legal or organizational sophistication, yet have relatively high visibility impacts. These mechanisms are likely to be highly adaptable to and compatible with a wide range of social and cultural environments. Without the most formalistic legal trappings, and perhaps taking advantage of preexisting informal practices, they are the one class of administrative law mechanisms that may be appropriate for countries with truly rudimentary institutions and systems, including some of those contending with post-conflict environments.

E. Looking Ahead: Using Administrative Law Mechanisms to Achieve USAID Objectives

Almost any USAID or other donor program can benefit from greater attention to administrative law concepts, and most individual projects can be improved through greater reliance on administrative law mechanisms. Based on its central concern with governance and accountability, administrative law tends to be associated with the democracy and governance portfolio of USAID and other donors. In particular, it is closely identified with rule of law and other legal reform initiatives. Yet, at the level of individual concepts and mechanisms, administrative law is relevant and valuable to a wide range of sectoral reform activities. Wherever there is public administration, administrative law mechanisms have a potential role to play in supporting the announcement of regulatory standards and procedures, opening up policymaking and rulemaking to public input, and ensuring proper review of administrative

decisions. In all of these different contexts, administrative law mechanisms can help democratize a particular regulatory environment.

The following demonstrates how greater integration of administrative law and procedure can strengthen five types of programs: (1) rule of law; (2) judicial reform; (3) civil society strengthening; (4) anti-corruption; and (5) SME development/regulatory reform. Many administrative law tools are already being used on local government projects, such as open meetings, public hearings, and advisory councils.

- **Rule of Law Projects.** Rule of law projects have tended to focus on judicial system reform, court management, prosecutorial reform, and/or legal education reform. Some projects also become involved in major law drafting and implementation initiatives concerning the judiciary or criminal or civil procedure. They rarely target work on administrative law issues. Focusing on certain dimensions of administrative law and procedure could, however, make legal reform more relevant to the public and create a tangible connection to broader reform constituencies, something often missing from rule of law programs. Whereas most citizens experience the failings of the legal system through administrative processes, most rule of law projects have traditionally focused on criminal justice or, in the context of civil justice, on courts and legal aid capacity-building.

Potential Benefits of Integration

- Greater impact on citizens' lives
- Greater balance in legal reform
- More tangible focus on and tools for NGO activism and monitoring
- Greater constituency mobilization and demand-side pressures for law reform

What is striking about moving a rule of law project more in the direction of *administrative* justice is the opportunity to take advantage of existing and newly-developing reform pressures and fault lines in a transition or developing country—not necessarily at the national level, but perhaps in more plentiful sectoral and agency arenas. These can serve as laboratories for the application of legal mechanisms, training, and the development of social capital that is often an essential precondition for the broader legal reform initiatives that USAID and other donors aspire to support. Thus, while some rule of law projects may currently get involved in comprehensive procedural code drafting, a new breed of rule of law projects may want to move more towards strengthening administrative law mechanisms and access to justice by working with courts, agencies, ombudsmen, and legal and other NGOs in areas like social welfare benefits reform or other initiatives assisting large numbers of citizens, particularly those who are disadvantaged.

- **Judicial Reform Projects.** Most judicial reform projects have tended to focus on judicial governance and structural reform, judicial training, and court management. These projects may pay insufficient attention to certain kinds of administrative cases (e.g., tax or customs) that may be clogging court dockets, as well as to other kinds of administrative litigants who are hindered in appealing to the courts due to inadequate information or resources (e.g., those with employment or pension disputes). Ultimately, many judicial reform projects need to be more analytical in looking at systemic caseload issues and barriers to access.

Potential Benefits of Integration

- Better access to justice for more citizens and businesses
- Better understanding of societal needs and judicial caseload issues
- Better judicial resource allocation in caseload management

If certain kinds of administrative cases are unduly taxing judicial resources, or are a fertile source of corruption or injustice, or if court fees or informational barriers are otherwise preventing the taking of court appeals from certain administrative decisions, a judicial reform project could address these problems through an administrative justice focus that complements, or substitutes for, work with the general court system. This was the intent of the UNDP Bulgaria project. A judicial reform project moving in this direction could support additional training and resources for judges handling administrative cases. Training could focus on especially new, complex, or burdensome types of cases

(including management of these cases). In addition, depending on the specific circumstances, such a project could address administrative access to justice impediments through a variety of court management, policy, and organization improvements. It might also revisit procedural rules governing standing. Any of these efforts could broaden the focus of the project and possibly move it in a more socially responsive direction. At the same time, the project might provide training and technical assistance to selected lawyers' groups or legal aid societies to enable them to better represent underserved clients in administrative cases. All of these activities could lead to a different, more equitable demand for judicial services.

- **Civil Society Strengthening Projects.** Most civil society strengthening projects focus on information-sharing and capacity- and coalition-building. Some civil society organizations receive assistance in developing their advocacy and presentation skills. Yet such advocacy assistance is often more circumscribed than necessary, and does not help civil society organizations understand, promote, and use informal and formal administrative channels to make their views known. This may miss the opportunity to develop more law-based processes to mediate state-civil society interactions. Valuable opportunities for building social capital through new kinds of relationships with state officials may not be fully exploited.

Therefore, civil society strengthening projects could focus more attention on administrative justice. These projects could not only provide general support to legal and other advocacy organizations, but also focus on selected substantive policy issues (e.g., unemployment benefits or education) as a basis for improving administrative justice mechanisms and thereby placing advocacy efforts on a stronger, more durable (less personalized) footing. Specifically, they could promote the adoption and use, in appropriate local or sectoral agencies, of mechanisms providing for information disclosure, advisory councils, public participation, and clear notice of standards and procedures for agency decision-making. This will prove most effective in areas where state officials are most in need of civil society expertise and resources. In the end, civil society strengthening projects that promote the use of administrative law mechanisms can empower civil society organizations to become better, more responsible, and more effective actors in society.

Potential Benefits of Integration

- Preventive efforts better targeted at specific agency processes and types of corruption
- Better mobilization of knowledgeable constituency watchdogs

- **Anti-corruption Projects.** Administrative law mechanisms offer key tools on the preventive side of the ledger. Because these mechanisms are specifically designed to bring greater transparency, participation, and accountability to administrative decision-making, they empower the public to serve as direct or indirect monitors of the bureaucracy. Adapting these preventive tools to a particular administrative arena could increase the likelihood that these public monitors are alert and mobilized as members of key sectoral constituencies. As with the Metropolis take-out shops, dissatisfaction with corruption can serve as one of the key drivers of enhanced administrative law mechanisms, and such mechanisms can in turn reduce the likelihood of corruption in particular administrative environments.

Potential Benefits of Integration

- Better protection of individual rights and procedural fairness

Potential Benefits of Integration

- Better mobilized constituencies for tangible reform
- More empowered citizens and civil society organizations knowledgeable about agency processes and able to use more durable and regular rule-based channels for participation and advocacy

- **SME Development/Regulatory Reform Projects.** Most SME development projects focus on business support activities and removal or simplification of administrative and regulatory barriers. The emphasis is on cutting red tape and increasing efficiency. Less attention is paid to administrative procedures that deal with due process with respect to obtaining information about regulatory procedures or seeking recourse in the event of adverse

decisions on permits, licenses, and other applications or regulatory actions. In the context of deregulation, such procedures may need to be preserved or even expanded in order to ensure that a businessperson has clearly defined and adequate opportunities to present his or her views, receive a clear explanation for the ultimate decision, and lodge an appeal. At the same time, projects focused on business association development and advocacy could pay more attention to the potential role that information and consultation mechanisms can play in providing such associations with more sustainable policymaking access and influence. SME development and regulatory reform projects may be strengthened by including components that address individual administrative procedural rights and the notice-and-comment/public hearings package and advisory council concept illustrated in Case Study 2.

APPENDIX A. THE CONTEXT OF ADMINISTRATIVE LAW IN THE U.S. & EUROPE

Nations with a historic commitment to the rule of law share commonalities in administrative law. Differences in approach tend to be ones of definition or of nuance and detail. Thus, U.S. development officers and their European counterparts meet on common ground in discussing principles of administrative law and identifying areas for reform. The same is true of legal professionals in host countries. Nevertheless, there are some differences, and an understanding of these differences will help development officers in designing reform programs.

This appendix describes the context of administrative law in the U.S., selected European countries, and Europe-wide systems. The context includes the constitutional and statutory setting, the judicial environment, and the extent to which international or supranational legal norms apply. Context is important because it affects the way donors and consultants from other countries approach administrative law matters. For example, a development officer familiar with a system that includes statutes precisely spelling out detailed rights and obligations is likely to include such a system in his or her approach to reform. This contrasts sharply with the more generally worded U.S. Administrative Procedure Act, which applies to virtually all federal executive branch administrative agencies, or the decisional basis of French administrative law. Knowledge of the broader context for administrative law among key countries will help U.S. development officers maintain perspective on administrative law reforms.

U.S.

The broad outline of the U.S. administrative law system is as follows. The constitutional separation of the three branches of government and their attendant powers provides the basic structure. Congress enacts laws that direct the executive branch to implement certain actions. The legitimacy of the exercise of this authority is subject to review first within the agency and then in the courts. The Constitution, the specific enactments by Congress, and the Administrative Procedure Act define the limits on executive branch action. Judicial review is ordinarily available in the federal courts of general jurisdiction.

This simple outline masks some significant issues that influence working with legal professionals from other countries in establishing effective models for developing states. Two key examples illustrate this point. First, given the federal nature of the U.S. government, there are 50 different administrative law regimes in the various states (and in the District of Columbia). The scale of many state governments is much more relevant to developing states than a national system addressing the concerns of nearly 300 million people. The states have a variety of approaches to exercising controls on administrative agency action that offer different models for legislative and judicial oversight and restraints.

The second example is the existence of certain specialized courts in the U.S. dealing with administrative law matters. While judicial review by courts of general jurisdiction is often cited as a major difference between the U.S. and European systems, the U.S. federal government has increasingly turned to specialized courts to handle high volume or specialized claims. These include the Tax Court and the Court of International Trade, federal district court level tribunals engaging in the review of administrative decisions made by particular government agencies, and the Court of Appeals for the Federal Circuit and Court of Veterans Appeals—specialized courts created to handle second instance court review of particular administrative cases.

Thus, there are effectively several U.S. models rather than one, providing more common ground with European systems than might first be assumed, and offering a range of experiences that could be valuable to developing and transition states looking for help in developing their own unique systems.

U.K.

Administrative law in the U.K. comes out of a very different context from the U.S., and indeed from most of Europe. U.K. law is part of the foundation of legal systems in former British colonies and, in application, closely resembles administrative law regimes grounded in other contexts. In the U.K., there is no constitution to provide a baseline for government authority. At least in theory, there is no formal separation of powers, because the Parliament is the ultimate authority on legal and governmental matters. Parliament has the authority to change any law it has enacted, including those rules that in other countries might require special procedures, including constitutional amendments. The “executive” branch in this parliamentary system consists of ministers who are members of the ruling majority of Parliament. This has particular significance for the adoption of sub-legislative enactments such as rules or regulations, where the delegation by Parliament to a minister is simultaneously to a member of that body, providing broader discretion than is the norm in states with a firmer division between the executive and legislative branches.

Notwithstanding parliamentary supremacy, the U.K. also has a historic tradition of the courts exercising supervisory jurisdiction over government actions taken in excess of authority. In theory, the courts’ exercise of restraint over governmental actions is enforcing the will of Parliament by declaring that an action is beyond the government’s power based on a particular legislative mandate. Thus, the courts are separate from the executive function of the government, but in administrative law are enforcing the supremacy of Parliament.

These conceptual differences are blurred, especially vis-à-vis other European countries, by their practical applications to governance. Parliament has adopted general laws defining administrative procedures, particular laws that provide specific procedures, including agency appeals, and created a variety of administrative agencies and tribunals. In addition, as a member of the EU, the U.K. is subject to decisions from the various component bodies of the EU that impose external limitations on parliamentary supremacy in a number of areas relating to administrative law.

France

The domain of administrative law in France is the broadest of any of the countries described here. Historically, there has been a sharp divide between public and private law. An expansive and largely undifferentiated definition of “public law” dominates the legal landscape. The *Conseil d’Etat*, created in 1799, has provided judicial guidance (as well as legal counsel and advice to the governments) on the limits of public authority through the course of a variety of governmental systems and constitutions. The *Conseil*’s body of decisional law is the source of much of the administrative law of France. This approach is quite familiar to common law attorneys from the U.S. or U.K. There are currently subordinate first and second instance administrative courts, and a *Tribunal des Conflits* that determines whether disputes should be pursued through the private law courts or the administrative or public law courts.

The current French constitution provides a somewhat different context for administrative law, because it does not limit law-making to the Parliament. Instead, the President of France is empowered to issue decrees or regulations in those areas of governance not specially designated for the Parliament. Thus, unlike most other systems, the legislative branch is not the exclusive source of legal instruments that the executive administers or implements.

The constitutional framework for the *Conseil d'Etat* and its power to rule that government actions exceed the legal authority of the government is somewhat different as well. While the primary authority is the 1958 Constitution, it also incorporates the revolutionary 1789 Declaration on the Rights of Man and of the Citizen and the preamble to the 1946 Constitution. In addition, the fundamental principles recognized by the laws of the Republic, as referenced in the 1946 Constitution, provide a basis for annulling government acts. As with all members of the EU, EU law now provides an additional layer of controlling authority over government actions.

Germany

In structure, the context for German administrative law is more similar to the American model than to either France or the U.K. While specialized administrative courts with the power to annul government acts have existed in Germany since the nineteenth century, the existing structure is hierarchical, flowing from constitutional provisions down through general administrative statutes and specific agency or subject matter legislation. There is a separation of powers within the Constitution that provides for legislative, executive, and judicial branches. The judicial branch is empowered to determine the constitutionality of legislation, and whether executive action is consistent with legislative intent. The federal nature of the German government, with the *laender* (states) exercising substantial administrative power, resembles the American model. However, the German states have less autonomy since much of their authority is to execute federal legislative enactments rather than their own legislation.

Administrative acts in Germany require specific statutory foundation. Two principles govern administration. The first is that no administrative act can contravene a statute. The second is that there must be a statutory basis for any affirmative exercise of administrative power. Thus, there is exceedingly little room for government action not firmly grounded in a specific law. Determining the “legality” of administrative actions is the primary focus of the review process. The 1976 Code of Administrative Procedure provides the strongest underpinning for determining legality, but other statutes, including the 1949 Basic Law (constitution), provide the full framework for administrative law determinations. EU laws and decisions also provide a basis for determining administrative legality.

Netherlands and Belgium

The Netherlands has recently engaged in a sweeping revision of its administrative law, adopting a comprehensive new code in 1994 that has already served as a model for reform in some developing states. This code acknowledged the relevance of both written and unwritten principles of law in determining the “legality” of administrative actions, but brought in to the code previously unwritten elements of what is called “proper administration.” The code further established uniform procedures across government functions for rendering administrative acts, eliminating a range of special administrative laws.

Belgium has the strongest continental tradition of judicial review of administrative actions by regular courts, but it too has also developed administrative tribunals as part of the executive branch, including a council of state with the power to annul administrative acts. Both the Netherlands and Belgium are subject to the EU constraints as well.

General European Standards

Three sources of general administrative law for European countries provide some broad standards and guidelines: (1) the European Community (EC) mandatory rules for members of the European Union; (2) the decisions of the European Court of Human Rights applying to parties to the European Convention on Human Rights; and (3) the recommendations of the Council of Europe.

Of the three, the ones with the most force are the EC rules because they are binding on members and have become a part of their legal systems. The principles embodied in the EC standards include legality (government acts authorized by appropriate laws), proportionality (the adverse affects of an action will not exceed its benefits), equality (persons being treated alike), legitimate expectation (agencies must act consistent with the expectations they have created), and the right of defense (right to be heard before adverse action is taken). Under EC supremacy principles, to the extent the EC standards provide more protection than national laws in matters subject to EC rules, the higher EC standards apply. The standards have also begun to be integrated into national legal systems as national courts become more familiar and comfortable in their application.

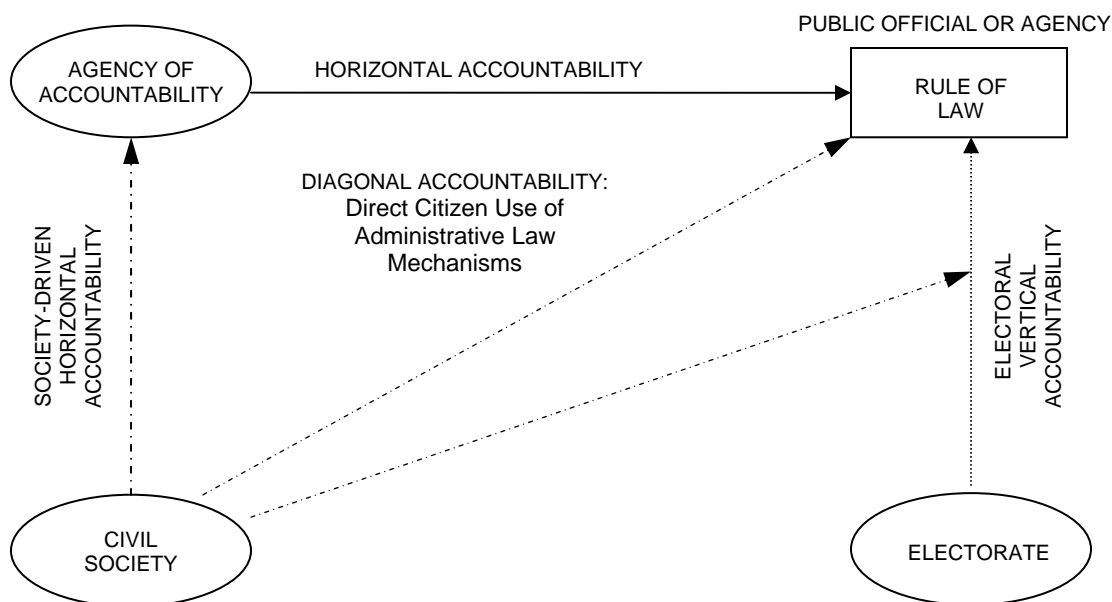
The primary contribution of the European Court of Human Rights to administrative law is a series of decisions holding that Article 6 of the European Convention on Human Rights (requiring a hearing before adverse criminal or civil consequences can attach to government action) applies to administrative decisions as well. The Council of Europe, meanwhile, has adopted a detailed set of substantive and procedural administrative law principles as recommendations for member states and others. These include the EC principles, as well as more detailed provisions dealing with open government, hearing rights, and judicial remedies. Both the European Court of Human Rights decisions and the Council of Europe standards provide an important backdrop to law reform efforts in the transition countries of Central and Eastern Europe and the former Soviet republics that aspire to European Union accession.

APPENDIX B. FORMS OF GOVERNMENTAL ACCOUNTABILITY

Administrative law mechanisms provide an invaluable accountability supplement to elections, parliaments, and high courts. They serve as a collateral arena for democracy and governance activities that embrace the everyday accountability of administrative agencies, including accountability to nongovernmental actors. This complementary form of governmental accountability is direct, tangible, and comprehensible to most of the public. It can also flow from the use of administrative law mechanisms, applied at all levels of the executive branch of government and with direct citizen involvement and oversight.

Accountability is often conceptualized in terms of *vertical accountability* and *horizontal accountability*. Vertical accountability is the accountability of chief executives and legislatures to the public and civil society via elections. Horizontal accountability is the accountability of various government bodies to one another, including courts and legislatures. Administrative law mechanisms occupy a special position, marshaling *hybrid* forms of accountability. They rely principally on the *public* (as “vertical” actors) to hold administrative agency officials accountable, either indirectly through use of “horizontal” institutions (e.g., courts, ombudsmen) or directly through special state-sanctioned laws, rules, and forums, such as administrative procedures, public hearings, and consultative bodies attached to such agencies. Figure 2 illustrates both of these hybrid channels of accountability, sometimes referred to as “diagonal accountability.”

**Figure 2. Accountability and Civil Society
Relative to the Use of Administrative Law Mechanisms**



Adapted from Ackerman, J. , 2004. *State-Society Synergy for Accountability*, World Bank Working Paper No. 30, 2004 (Washington: The World Bank), p. 11.

Note that the term “diagonal accountability” can be used to refer to both kinds of public participation, oversight, and redress – where the public seeks to influence administrative agencies through wholly external (horizontal) mechanisms, as well as through mechanisms within or attached to such agencies (e.g., public hearings, citizen advisory councils). See Goetz, A., and R. Jenkins, 2001. “Hybrid Forms of Accountability: Citizen Engagement in Institutions of Public-Sector Oversight in India,” *Public Management Review* 3(3): 363-83. However, it is more accurately applied to the latter circumstance, as depicted by the above diagram.

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