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Global Governance Programme

GLOBAL ADMINISTRATIVE LAW:  
AN ITALIAN PERSPECTIVE

Sabino Cassese, Stefano Battini, Elisa D'Alterio, Giulio Napolitano,  
Maurizia De Bellis, Hilde Caroli Casavola, Elisabetta Morlino,  
Lorenzo Casini, Edoardo Chiti, and Mario Savino



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES**  
**GLOBAL GOVERNANCE PROGRAMME**

*Global Administrative Law:  
An Italian Perspective*

**SABINO CASSESE, STEFANO BATTINI, ELISA D'ALTERIO,  
GIULIO NAPOLITANO, MAURIZIA DE BELLIS,  
HILDE CAROLI CASAVOLA, ELISABETTA MORLINO, LORENZO CASINI,  
EDOARDO CHITI, AND MARIO SAVINO**

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## **Abstract**

This Policy Paper collects a set of contributions given and discussed at the Conference on “Global Administrative Law: an Italian Perspective”, European University Institute, Global Governance Programme, 24 February 2012.

The purpose of the conference was to present the work of a group of Italian scholars who have, to date, written more than a hundred articles or books on Global Administrative Law (GAL), and have been or are engaged in around ten collective enterprises on the subject.

After a brief introduction by Sabino Cassese, in which the main features of GAL and its significance are examined, nine contributions deal with a high number of legal issues raised by globalization and global governance. All of them adopt a GAL approach in order to tame and frame relevant topics such as the role of administrative law beyond the State (Stefano Battini), courts acting as global regulators (Elisa D’Alterio), the global governance after the financial crisis (Giulio Napolitano), the global financial regulation (Maurizia De Bellis), global rules of public procurement (Hilde Caroli Casavola) and procurement regimes of international organizations (Elisabetta Morlino), global sports law (Lorenzo Casini), the relationships between GAL and EU administrative law (Edoardo Chiti) the transgovernmental power at the European and global level (Mario Savino).

This Policy Paper aims at contributing to one of the most significant intellectual enterprise of 21st century, i.e. framing, understanding and explaining the legal implications of globalization. From this perspective, works here presented clearly show that public and administrative law can be very useful, but they must be studied solely in their usual paradigms. These latter were developed in national contexts as a set of values, principles, and rules necessary to the proper functioning of domestic institutions: they cannot be transposed mechanically to the global legal space and they must be adapted to such a different endeavor.

## **Keywords**

Globalization; global governance; global administrative law; global polity, EU law; Transgovernmental Networks; Financial Regulation; Public Procurement; Courts; Sports Law



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# What is Global Administrative Law and why study it?

Sabino Cassese\*

## I. Contents

The purpose of this conference is to present the work of a group of about thirty Italian scholars (ten of whom are present today)<sup>1</sup>. These scholars have, to date, written more than a hundred articles or books on Global Administrative Law (GAL) (refer to the list of the works published by the participants and to the IRPA website), have been or are engaged in around ten collective enterprises on the subject, have organized, from 2005 to 2012, eight GAL international seminars (seven in Viterbo and one in Rome) and have published a “GAL Casebook” (first edition 2006; second edition 2008; third edition 2012).

By way of introduction, I shall address the following questions:

- Why study Global Administrative Law?
- What is the Global Polity?
- What are the main features of the Global Legal Space?
- What role does the law play in the Global Space?
- How is the problem of legitimacy in the Global Legal Space solved?
- What are the main characteristics of Global Administrative Law?
- Why is the study of Global Administrative Law an important intellectual exercise?

## II. Why study Global Administrative Law?

Why did so many Italian legal scholars start to study Global Administrative Law in the early days of this century? Some reasons are peculiar to Italy, while others are common to European and American scholars.

1. Global Administrative Law is the major development in the field of public law in the second half of the 20<sup>th</sup> century:
  - a. Global Administrative Law has evolved according to an incremental pattern: first, it was applied to peace and human rights (the UN); then, to areas such as the sea, nuclear waste, health, labor, the environment; subsequently, to trade; finally, to global terrorism and global crises;
  - b. the process of globalization has been piecemeal, and globalization has developed through crises and unbalances, by accretion and accumulation;
2. the study of Global Administrative Law is the logical sequel to the study of EU law, in order to integrate EU law in the larger world context and to understand what there is beyond the State;
3. there is a strong need to break with cultural nationalism, according to which public law is connected to the State and, therefore, each State has its own public law and there is no link between the different national legal environments. It is necessary to expose each national legal culture or scholarship to international evaluation and to let cross-national fertilization develop.

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\* Judge of the Italian Constitutional Court.

<sup>1</sup> They are: Alessandra Battaglia, Stefano Battini, Mariangela Benedetti, Giulia Bertezolo, Dario Bevilacqua, Hilde Caroli Casavola, Bruno Carotti, Lorenzo Casini, Sabino Cassese, Eleonora Cavalieri, Edoardo Chiti, Martina Conticelli, Elisa D’Alterio, Maurizia De Bellis, Giacinto della Cananea, Marco Macchia, Bernardo Giorgio Mattarella, Elisabetta Morlino, Giulio Napolitano, Marco Pacini, Lorenzo Saltari, Aldo Sandulli, Mario Savino, Gianluca Sgueo, Giulio Vesperini.

National scholarship should be less parochial and more outward-looking. It is, thus, necessary to substitute the global paradigm to the statist paradigm and let institutions and ideas migrate from one area (and level) to the other;

4. international law does not fully capture the peculiarities of globalization (it is focused on relations between States), whilst GAL is better capable of analysing both transnational and transgovernmental relations and civil societies acting as global actors, on the premise that States are fragmented.

### III. What is the Global Polity?

I shall now examine the process of globalization from a political science point of view and then review the main features of the global legal space.

The main features of the Global Polity are the following:

1. There is no global government, but rather several global regulatory regimes (from health to labor, to trade, to sea, to banking), without one single hierarchically superior regulatory system. The Global Polity is the empire of “ad-hoc-cracy”: global regulatory regimes do not follow a common pattern. This highly a-systematic system has been nicely encapsulated in the formulation “governance without government” (a formulation which already dates back twenty years<sup>2</sup>). What unifies this mosaic of legal orders is the “wechselseitige Eigennutz” (“reciprocal interest”)<sup>3</sup>.

Vertically, there is continuity and no clear dividing line between global and national levels. “Global” does not mean that the State is excluded. National civil societies, national bureaucracies, national executives are all important actors in the global arena, where they accept to lose some of their autonomy (sovereignty) in exchange for getting influence in a much larger area than that of the national State. The bazaar replaces the cathedral<sup>4</sup>.

“Global” does not mean intergovernmental: in the global space, there are transnational networks and links among civil societies that are as important as International Governmental Organizations (IGOs). While global regulatory regimes are approximately two thousand, Non Governmental Organizations (NGO) number more than forty thousand<sup>5</sup>.

2. There is no representative democracy and there are no periodic elections at the global level; but deliberative democracy can work as a valid surrogate, granting participation in the decision making processes.

Global regulatory regimes impose democratic principles on national governments. In particular, some democratic principles (free elections, freedom of association, free speech) are imposed by global actors (such as the European Union and the Council of Europe) on national governments. An example is the conditionality for accession to the European Union (EU). Another example of this phenomenon is provided by the European Convention on Human Rights, which provides for individual complaints to be brought before the European Court of Human Rights, which in turn has compulsory jurisdiction over its Member States<sup>6</sup>.

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<sup>2</sup> J. N. Rosenau, E.-O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge, 1992.

<sup>3</sup> I. Kant, *Perpetual Peace and Other Essays on Politics, History and Morals* (English transl.), Indianapolis, 1983.

<sup>4</sup> The metaphor is taken from E. S. Raymond, *The Cathedral and the Bazaar*, Sebastopol, 1999.

<sup>5</sup> Union of International Associations, *Yearbook of International Organizations*, München, Saur, 2005.

<sup>6</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocol No. 11, art. 34.

3. The global polity is porous and open: national governments, other global regulatory regimes and civil societies can interfere with and influence the global institutions.

#### IV. The Global Legal Space

I shall now turn to the legal aspects of my analysis and examine the Global Legal Space, the role that the law plays in such space and the issue of legitimacy that has been raised in this context.

The area beyond the State is not only “global” from an economic point of view; rather, also a global legal space exists, encompassing a vast number of different regulatory bodies, a mass of rules, a great quantity of procedures, and a complex array of links both to national bureaucracies and civil society.

What is missing is a single general and unitary body of global law. Instead, there are numerous global regimes. However, both the administrative actors and the judicial bodies (where these exist) within each individual regime establish links to, and rules of engagement with, other regimes. Cooperation, division of labor and dialogue are common among global regimes and their constituent institutions. Cooperative dialogue between regimes means that the principles of each regime should not be interpreted and applied in a vacuum. It is in this process that some have recognized the emergence of a general body of law at the global level<sup>7</sup>.

Moreover, each national legal order has developed a certain number of common rules, and these now provide core standards that can be shared and even codified at a supranational level (take, for example, the Council of Europe’s codification of rules on administrative procedure<sup>8</sup>).

Given that the global legal order is fragmented, there are no general legal principles common to all. But some common understandings are developing: the duty to respect human rights and the rule of law; the obligation to inform and to hear interested parties before a decision is taken (as held, for example, in the *Juno Trader* case before the International Tribunal of the Law of the Sea);<sup>9</sup> a number of due process obligations; and substantive duties relating to the principles of fairness and reasonableness, amongst others.

The widely-used expression “multilevel governance” is misleading, insofar as there is no clear-cut separation of competences between national governments and global institutions, structured within a definite hierarchy, of the type that this expression seems to suggest. Rather, the global arena is characterized by the spread of powers between the global and the national levels of government. For instance, environmental protection is at once a global and a national task, and competencies in this

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<sup>7</sup> “The current range of international legal obligations benefits from a process of accretion and cumulation” in Arbitral Tribunal, *Southern Bluefin Tuna case*, n. 52, 14 August 2000. “[...] the principles underlying the Convention [on Human Rights] cannot be interpreted and applied in a vacuum”, in European Court of Human Rights, *Bankovic v. Belgium and others*, 12 December 2001, para. 51. See also European Court of Human Rights, *Loizidou v. Turkey*, II, 18 December 1996, para. 43. “The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply”, from UN Study Group on the Fragmentation of International Law, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, 2006, in *The Work of the International Law Commission*, ed. by UN Secretariat, New York, 2007, vol. 1, 399.

<sup>8</sup> Council of Europe, *The administration and you: principles of administrative law concerning the relations between administrative authorities and private persons*, Strasbourg, 1996.

<sup>9</sup> International Tribunal of the Law of the Sea, *Saint Vincent and the Grenadines v. Guinea-Bissau*, case no. 13, December 18, 2004 ([www.itlos.org/cgi-bin/cases/case\\_detail.pl?id=13&lang=en](http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=13&lang=en)). On the case, see D. Agus, M. Conticelli, “The International Tribunal for the Law of the Sea (ITLOS): The Juno Trader Case”, in *Global Administrative Law: Cases, Materials, Issues*, II ed., ed. by S. Cassese, B. Carotti, L. Casini, M. Macchia, E. MacDonald, M. Savino, Rome/ New York, 2008, 124-128, also available at <http://www.iilj.org/GAL/documents/GALCasebook 2008.pdf>.

field are not merely shared by global and national bodies; areas of jurisdiction overlap and compete with each other. The line between the national and the international is becoming increasingly blurred (see, for example, the Cybersquatting cases before the World Intellectual Property Organization<sup>10</sup> dispute resolution panels). In the case of shared powers of this kind, the rule is not strict separation and rigid hierarchy, but permeability, intermingling, interpenetration.

Global institutions derive their jurisdiction and their powers from national governments. It does not necessarily follow, however, that all of their powers originate in direct delegation from States. For example, there are international institutions that were not established by national governments, but by other international bodies (for example, the Codex Alimentarius Commission)<sup>11</sup>.

Moreover, cooperation in the global arena does not occur only between international institutions and national governments, but also between international institutions themselves. The global order can be illustrated by the well-known metaphor of the marble cake, as there are no clear dividing lines between layers (national and global) and (global) sectoral regimes; rather, the two worlds are linked both vertically and horizontally through a complex array of relations and networks.

## V. The law in the Global Space

In domestic legal orders, there is a clear-cut dichotomy between legal and non-legal prescriptions, because there is a higher authority that establishes the dividing line between what is and what is not law. This picture, however, changes as we move into the global arena. There, we are confronted by a world that is highly formalized, but not in strictly legal terms. For example, many World Bank “legal” instruments are simply referred to as “policy” documents; yet in many cases these can scarcely be considered less important than statutes passed by national parliaments. They regulate important aspects of the Bank’s activity, such as the duty to perform an environmental impact assessment, and all relevant procedural requirements<sup>12</sup>. Private parties in India or South Africa can appeal to these standards, and ask that global and national governance bodies comply with them. Must we concede that anything that is not binding is, *ipso facto*, not law? If there is an area of law in which the Latin motto “ubi societas, ibi ius” holds true, then surely this must be the global arena.

At this point, a second dichotomy emerges, related to the first: that between binding (“hard”) and non-binding (“soft”) law. The basic question that we might pose in this regard is as follows: is a formally binding commitment to obey a rule the only means of producing rule-conforming behavior?

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<sup>10</sup> See, for example, World Intellectual Property Organization, Arbitration and Mediation Center, Administrative Panel Decision, decision of 22 July 2003 *Casio Keisanki Kabushki Kaisha, dba Casio Computer Co., Ltd v. Fulviu Mihai Fodoreanu*, case No. DRO2003-0002; decision of 4 August 2000 *Excelentissimo Ayuntamiento de Barcelona v. Barcelona.com Inc.*, case No. D2000-0505. Decisions are available at <http://arbiter.wipo.int/domains/decisions/index-ctld.html>.

<sup>11</sup> See M.D. Masson-Matthee, *The Codex Alimentarius Commission and Its Standards*, The Hague, 2007. Further information is available in J.A. Bobo, *The Role of International Agreements in Achieving Food Security: How Many Lawyers Does It Take to Feed a Village?*, 40 *Vand. J. Transnat'l L.* 937 (2007).

<sup>12</sup> Elsewhere, I have defined the WB’s operative policies as “*ad hoc* international administrative norms”: see S. Cassese, “Global Standards for National Administrative Procedures”, 68 *L. & Cont. Prob.*, 109 (2005). Moreover, NGOs and local communities have been increasingly addressing the WB’s policies within the context of global compliance mechanisms, see, for instance, M. Circi, “The World Bank Inspection Panel: the Indian Mumbai Urban Transport Project Case”, in *Global Administrative Law: Cases, Materials, Issues*, *supra*, note 7, 129-133. A broader analysis of the WB social policies can be found in A. Vetterlein, “Economic Growth, Poverty Reduction, and the Role of Social Policies: The Evolution of the World Bank’s Social Development Approach”, 13 *Global Gov.* 513 (2007). See also K. Tomasevski, “The Influence of the World Bank and IMF on Economic and Social Rights”, 64 *Nordic J. of Int. L.* 385 (1995), M. Nesbitt, “The World Bank and de facto Governments: A Call for Transparency in the Bank’s Operational Policy”, 32 *Queens L.J.* 641 (2006-2007), K.W. Simon, “World Bank Wants a New Approach to Consultations with Civil Society”, 1 *Int. J. of Civ. Soc. L.* 41 (2003).

Even in domestic legal orders, not all rules are binding or compulsory. National legislation also establishes incentives and issues guidelines; it seeks not only to compel, but also to promote, to correct, to educate, and so on.

An example from the global arena is provided by the standards generated by the Codex Alimentarius Commission. These are not, in and of themselves, compulsory; they are, however, in effect given binding force by the World Trade Organization<sup>13</sup>. One authority produces rules, another endows them with binding force. The rule is not binding from its inception, rather only becoming so because another authority imposes conformity upon those under its jurisdiction. Therefore, in this case the rule is binding in the field of global trade, but not in other areas, giving rise to a “dédoublement”.

A third point, also related, concerns the concept of authority. Power, not authority, is central in the global arena. Power can be exercised through authoritative means (such as the “command and control” models familiar to domestic administrative systems), but also through agreements, contracts, incentives, standards and guidelines.

Finally, while in the national legal orders a law which did not emanate from the State (Hans Kelsen) was (once) not conceivable, globalization breaks the link between sovereignty, territoriality and legislation, and opens the way to private legislation (for example, ICANN). In a system with a multiplicity of sources of law, law and the State are not the same thing, and the rule of law does not mean the rule of (State) law.

## VI. Legitimacy in the Global Legal Space

There exists no cosmopolitan democracy, no planetary constitution, no global Parliament. Is this cause for concern?

Here again it is necessary to return to certain basic questions. Why do we want national governments to be legitimate? Simply put, the answer might consist of something as follows. National governments exercise their power through authority: they oblige and impose. Therefore, they must be run on the basis of the consent of the governed. Through recurrent elections, politicians are chosen and kept under control by the people.

A number of differences emerge, however, when we move from the national to the global context. First, global bodies do not normally exercise power through authority: they seek not to simply impose their will, but rather to influence the behavior of national bureaucracies and private parties through a variety of different mechanisms.

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<sup>13</sup> See, for a general overview of the Codex Alimentarius Commission within the World Trade Organization, J. Vapnek, “Legislative Implementation of the Food Chain Approach”, 40 *Vand. J. Transnat'l L.* 987 (2007); J. Kurtz, “A Look behind the Mirror: Standardisation, Institutions and the WTO SPS and TBT Agreements”, 30 *U.N.S.W.L.J.* 504 (2007), also available at <http://www.austlii.edu.au/au/journals/UNSWLJ/2007/31.pdf>; T.P. Stewart, D.S. Johanson, “The SPS Agreement of the World Trade Organization and International Organizations. The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics”, 26 *Syracuse J. Int'l L & Com.* 27 (1998-1999). An analysis of the complex relationship between the global standards of the Codex Alimentarius Commission and domestic States is provided by D. Livshiz, “Updating American Administrative Law: WTO, International Standards, Domestic Implementation and Public Participation”, 24 *Wis. Int'l L.J.* 961 (2006-2007), also available at <http://hosted.law.wisc.edu/wilj/issues/24/4/livshiz.pdf>. A more general overview is provided by K. Claire, “Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes”, 24 *Berkeley J. Int'l L.* 79 (2006). A further analysis of the Codex Alimentarius standards and their connection to the FAO and WTO is given by M. D. Masson-Matthee, *supra*, note 9. It is worth noting that the standards can also diverge. See, for instance, E. D'Alterio, “Relations between Global Law and EU Law”, in *Global Administrative Law: Cases, Materials, Issues, supra*, note 7, 199-208; H.S. Shapiro, “The Rules That Swallowed Exceptions: The WTO SPS Agreement and Its Relationship to GATT Articles XX and XXI – The Threat of the EU-GMO Dispute”, 24 *Ariz. J. Int'l & Comp. L.* 199 (2007).

Secondly, global bodies are usually established in order to keep national governments under control, or to provide services or pursue goals that governments alone are unable to. Therefore, they place limits on the activities of national executives. In this regard, we might suggest, they are on the same “side” as the people, formally speaking at least.

Thirdly, national governments and infra-national agencies keep each other and global institutions under control (horizontal accountability).

Fourthly, periodic elections are not the only means of legitimizing public power. Global institutions seek to forge their legitimacy through ensuring openness, dialogue and the participation of private parties (“Legitimation durch Verfahren”)<sup>14</sup> in the decision-making process. Examples of this abound within global regimes: consider, for instance, the International Preliminary Examination procedure for the protection of inventions, established by the Patent Cooperation Treaty; or the complaints procedure before the World Bank Inspection Panel.

Judicial protection is not guaranteed by every global regulatory regime. However, many do establish mechanisms that can act as a surrogate for formal judicial protection, for example granting “ex ante” participation rights to affected private parties or national governments, establishing quasi-judicial procedures and ensuring some degree of independence to decision-making bodies.

Finally, there are now around one hundred and ten extra-national courts around the world (most of them with jurisdiction in criminal matters)<sup>15</sup>. Technical and scientific expertise often play an important role in the controversies brought before these courts (see, for example, the *Apples and Fire Blight* case before the World Trade Organization Dispute Settlement Body<sup>16</sup> and the *Southern Bluefin Tuna* case before the Arbitral Tribunal of the United Nations Convention on the Law of the Sea<sup>17</sup>). Some internationalized forms of administrative review of domestic agencies also exist (for example, the NAFTA Chapter 19 Panels<sup>18</sup>); and there are many more bodies that provide some sort of judicial review by acting as quasi-independent courts, open to petitions from the affected citizens, and following adversarial or quasi-adversarial procedures. These are often referred to as, for example,

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<sup>14</sup> N. Luhmann, *Legitimation durch Verfahren*, Frankfurt am Main, 1969.

<sup>15</sup> See the Project on International Courts and Tribunal International (PICT) and the synoptic chart available at [http://www.pict-pcti.org/publications/synoptic\\_chart/synop\\_c4.pdf](http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf)

<sup>16</sup> The relevant decisions in this case are Panel Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/R, 15 July 2003 and Report of Appellate Body, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, AB-2003-4, 26 November 2003. On the case, see A. Albanesi, “The WTO ‘Science-Fest’: Japan Measures Affecting the Importation of Apples”, in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 45-50.

<sup>17</sup> Arbitral Tribunal established under Annex VII of the United Nations Convention on the Law of the Sea, *Australia and New Zealand v. Japan*, Award on Jurisdiction and Admissibility, 4 August 2000. See also B. Carotti, M. Conticelli, “Settling Global Disputes: The Southern Bluefin Tuna Case”, in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 145-149.

<sup>18</sup> NAFTA Article 1904 establishes a mechanism that provides an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases: the binational panel system. This system uses panels consisting of US and Canadian or Mexican panelists to review antidumping and countervailing duty decisions taken by national administrative authorities. The Panel may uphold or remand the national administrative action, and its decisions are binding. The binational panel system represents an internationalized form of administrative judicial review of domestic agencies: it reviews decisions of domestic agencies; its decisions are based on domestic law, not international trade rules; and the private parties involved (e.g. firms) have a right to initiate the panel review. For an overview on this topic, see G.R. Winham, A. Heather, “Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and beyond”, 3 *Minn. J. Global Trade* 1 (1994); G.R. Winham, G.C. Vega, “The Role of NAFTA Dispute Settlement in the Management of Canadian, Mexican and U.S. Trade and Investment Relations”, 28 *Ohio N.U. L. Rev.* 651 (2001-2002); E.J. Pan, “Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication”, 40 *Harv. Int'l. L. J.* 379 (1999). See also M. Macchia, “Reasonableness and Proportionality: The NAFTA Binational Panel and the Extension of Administrative Justice to International Relations”, in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 86-91.

“compliance committees”<sup>19</sup> or “inspection panels”<sup>20</sup>. In many regards, these latter bodies resemble the French *Conseil d’État* in the period between 1800 and 1872, when the Council was not legally recognized as a judicial body despite the fact that it exercised *de facto* judicial review.

## VII. The main features of Global Administrative Law

I return to the question: is there a global administrative law? This question must be answered in the affirmative. This law has the following features:

1. Notwithstanding some areas of overlap, global administrative law should be distinguished from traditional international law. “*Ius gentium*”, “*Ius inter gentes*” and the law of the nations refer to the law established between the governments of States to regulate relations between States as legal

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<sup>19</sup> The term “compliance committee” is used in multilateral environmental agreements (MEAs). See Convention on Biological Diversity, COP-MOP 1, *Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety*, Decision BS-I/7, Kuala Lumpur, 23 - 27 February 2004, also available at <http://bch.cbd.int/protocol/decisions/decision.shtml?decisionID=8289>; Economic Commission for Europe, *Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the First Meeting of the Parties, Addendum, Decision I/7 Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002*, ECE/MP.PP/2/Add.8, 2 April 2004, also available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>; Commission for Environmental Cooperation, Council, *Adoption of the Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Council Resolution 99-06, C/99-00/RES/07/Rev.3, 28 June 1999, also available at <http://www.cec.org/Page.asp?PageID=122&ContentID=1150&SiteNodeID=276>.

<sup>20</sup> The term “inspection panel” is used by the Multilateral Development Banks (MDBs, consisting of the World Bank Group and the four Regional Development Banks: the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group). See International Bank of Reconstruction and Development, I.B.R.D. Res. 93-10 (Sept. 22, 1993); International Development Association, IDA Res. 93-6, Sept. 22, 1993 (the two Resolutions are identical and are reprinted in World Bank, *World Bank Operational Manual: Bank Procedures*, 17.55, annex A, 1999, also available at <http://siteresources.worldbank.org/EXTOPMANUAL/Resources/EntireOpManualExternal.pdf?resourceurlname=EntireOpManualExternal.pdf>); Asian Development Bank, *Establishment of an Inspection Function*, ADB Doc. R225-95 (Nov. 10, 1995); *id.*, *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism*, May 2003, also available at [http://www.adb.org/documents/policies/adb\\_accountability\\_mechanism/ADB\\_accountability\\_mechanism.pdf](http://www.adb.org/documents/policies/adb_accountability_mechanism/ADB_accountability_mechanism.pdf). And for an Executive Summary of the reform undergone by the ADB Accountability Mechanism see [http://www.adb.org/Documents/Policies/ADB\\_Accountability\\_Mechanism/acnt000.asp?p=policies](http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/acnt000.asp?p=policies); IFC/MIGA’s Office of the Compliance Advisor/Ombudsman, (see Compliance Advisor/Ombudsman- CAO, *Operational Guidelines*, April 2004 (revised April 2007), also available at [http://www.cao-ombudsman.org/howwework/filecomplaint/documents/English\\_CAOGuidelines06.08.07Web.pdf](http://www.cao-ombudsman.org/howwework/filecomplaint/documents/English_CAOGuidelines06.08.07Web.pdf)); European Bank for Reconstruction and Development, *Independent Recourse Mechanism: As Approved by the Board of Directors on 29 April 2003* (2003), available at <http://www.ebrd.com/downloads/research/policies/irmback.pdf> (see also *id.*, *Independent Recourse Mechanism Rules of Procedure: As Approved by the Board on 6 April 2004*, available at <http://www.ebrd.com/downloads/research/policies/procedur.pdf>); Inter-American Development Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism*, 4 February 2010, available at <http://www.iadb.org/en/mici/publications,1768.html>; African Development Bank, African Development Fund, Board of Directors, *Enabling Resolution*, B/BD/2004/9- F/BD/2004/7- B/BD/2004/10, 30 June 2004, as amended pursuant to Resolution B/BD/2010/10 – F/BD/2010/04, 16 June 2010, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/Boards%20Resolution%2016%20June%202010.pdf>; African Development Bank Group, *The Independent Review Mechanism. Operating Rules and Procedures*, 16 June 2010, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM%20Operating%20Rules%20and%20Procedures%20-%2016%20June%202010.pdf>]. For an overview, see E. Suzuki, S. Nanwani, “Responsibility of International Organizations: the Accountability Mechanisms of Multilateral Development Banks”, 27 *Mich. J. Int’l L.* 177 (2006); W. Namita, “Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability”, 12 *U. C. Davis J. Int’l L. & Pol’y* 331 (2005-2006).

entities. Despite displaying some features to the contrary, this law is still largely non-hierarchical, arises on a voluntary basis and contractual in nature. Global law, on the other hand, consists largely of the rules produced by international organizations of different kinds.

2. International law is mainly based on transactions, while global law has developed a more robust hierarchy of norms. This hierarchy has developed within each individual regulatory regime; it is now emerging among the different regulatory regimes as well (for example, the European Court of Justice, in the *Kadi* and *Yusuf* cases<sup>21</sup>, recognized the primacy of United Nations law over European law).
3. International organizations currently are often capable of reproducing other such organizations (in fact, many of them were themselves established by other global bodies). They conclude treaties and make rules, and can no longer be considered to be the mere agents of States. Indeed, they can even create standards that are aimed at transforming national governments' internal structure.
4. Perhaps the most important global bodies are those that carry out a standard-setting function. These standards are generally addressed to national governments; but this does not mean that private parties are not affected by them. For example, the food that we eat is subject worldwide to the standards of the already mentioned Codex Alimentarius Commission<sup>22</sup>. The standards established by the Forced Labour Convention (1930) are addressed to national governments, but affect private individuals (see, for example, the case of Myanmar and the International Labour Organization<sup>23</sup>).
5. Such bodies are at the top of many sectoral regimes. These regimes – as already noticed - do not, however, exist entirely independently of each other, but rather are linked in myriad different ways – either in relatively structured “regime complexes”,<sup>24</sup> or simply through the significant areas of overlap in their respective fields of jurisdiction (e.g., trade and labor; trade and human rights; environmental protection and human rights; etc.<sup>25</sup>).

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<sup>21</sup> European Court of First Instance, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 21 September 2005, case 315/01, in Rec., 2005, pp. II-3649; European Court of First Instance, *Ahmed Ali Yusuf e Ali Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 21 September 2005, case 306/01, in Rec., 2005, pp. II-3533. For an overview, see A. Bainham, “Is it Really for the European Community to Implement Antiterrorism UN Security Council Resolutions?”, *Camb. L. J.* 281 (2006); E. Cannizzaro, “Machiavelli, the UN Security Council and the Rule of Law”, 3 *Int'l Org. L. Rev.* 189 (2006); M.M. Winkler, “When legal systems collide: the judicial review of freezing measures in the fight against international terrorism”, 40 *Yale Law School Student Scholarship Series* 1 (2007), also available at <http://digitalcommons.law.yale.edu>.

<sup>22</sup> See J. Kurtz, *supra* note 11; D. Livshiz, *supra* note 11. See, with particular reference to the interactions with the US system, D.M. Strauss, “International Regulation of Genetically Modified Organisms: Importing Caution into the U.S. Food Supply”, 61 *Food & Drug L.J.* 167 (2006) or, also, S. Keane, “Can a Consumer’s Right to Know Survive the WTO: The Case of Food Labelling”, 16 *Transnat'l L. & Contemp. Probs.* 291 (2006-2007).

<sup>23</sup> Commission of Inquiry, ILO, *Forced labour in Myanmar (Burma), Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930* (No. 29), Geneva, 2 July 1998, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>. See also E. Morlino, “Labour Standards: Forced Labour in Myanmar”, in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 1-9.

<sup>24</sup> A ‘regime complex’ can be defined as “an array of partially overlapping and non hierarchical institutions governing a particular issue-area [...] [R]egime complexes are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors. The rules in these elemental regimes functionally overlap, yet there is no agreed upon hierarchy for resolving conflicts between rules. Disaggregated decision making in the international legal system means that agreements reached in one forum do not automatically extend to, or clearly trump, agreements developed in other forums”: see K. Raustiala, V. David, “The Regime Complex for Plan Genetic Resources”, 2 *Int'l Org.* 279 (2004).

<sup>25</sup> The many linkages between protection of human rights and protection of the environment have long been recognized. Principle 1 of the 1972 United Nations Conference on the Human Environment (Stockholm Declaration) stated that man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a

6. The global and the national levels interact in a number of different ways: for example, national governments act as law-makers at the global level, but are also the addressees of global substantive and procedural standards.
7. A global administrative law has thus developed, in terms of which global regimes are encouraged, and sometimes compelled, to ensure and promote the rule of law and procedural fairness, transparency, participation, and the duty to give reasons throughout all areas of their activity.
8. The public-private divide is blurred (there exist many significant cases of “hybridization”: see, for instance, the ICANN, WADA, IUCN, WIPO, ISO, etc.) and does not follow their domestic paradigm of government regulating business.
9. Dispute settlement by mandatory adjudication remains, as yet, the exception rather than the rule within the global legal order. Traditional diplomatic relationships and negotiations survive and operate side by side with compulsory and binding adjudication by supranational courts and the non-binding decisions of different quasi-judicial bodies.
10. Compliance in the global space is “induced”. Global regulatory regimes become effective through various means. Global bodies use surrogates to implement their standards: retaliation, authorizing controlled self-enforcement (in particular, the certification and accreditation mechanisms applied to the implementation of global food standards, forestry rules, ISO standards, etc.); introduction of incentives for compliance. Implementation and enforcement may also be left to national governments acting as instruments of global institutions<sup>26</sup>.
11. While there is a well-developed administration, governed by a well-developed set of administrative laws, in the global space there is no constitutional law because constitutionalization applies mainly to national legal systems.

(Contd.) \_\_\_\_\_

life of dignity and well-being. It also recognized the responsibility of each person to protect and improve the environment for present and future generations. Almost twenty years later, in Resolution 45/94, the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts towards ensuring a better and healthier environment. In contrast to the earlier documents, the 1992 Rio de Janeiro Conference on Environment and Development formulated the link between human rights and environmental protection largely in procedural terms (see Principle 10). This angle was further developed in 1998, with the conclusion of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). The Convention focused on the same issues as Principle 10 of the Rio Declaration and Principle 1 of the Stockholm Declaration, but in a more concrete manner, which strengthens the areas of overlap between human rights and environmental issues. For a comment on the Aarhus Convention, see M. Macchia, “Legality: The Aarhus Convention and the Compliance Committee”, in *Global Administrative Law: Cases, Materials, Issues*, supra note 7, 71-76.

<sup>26</sup> For example, within the WTO, a number of different mechanisms are used to ensure that the rules of the regime are enforced: mutual support, dumping/antidumping, subsidies/countervailing measures, non-implementation of WTO judicial decisions/retaliation, etc. On the retaliation principle and on countervailing measures, see K. Anderson, “Peculiarities of Retaliation in WTO Dispute Settlement”, 2 *World Trade Rev.* 123 (2002); T. Giannakopoulos, “Safeguarding Companies’ rights in competition and antidumping/antisubsidies proceedings”, 43 *Common Mkt. L. Rev.* 268 (2006); T. Jurgensen, “Crime and punishment: retaliation under the World Trade Organization Dispute Settlement System”, 39 *J. World Trade* 327 (2005); Y.H. Ngangjoh, R.R. Herran, “WTO Dispute Settlement System and the Issue of Compliance: Multilateralizing the Enforcement Mechanism”, 1 *Manchester J. Int’l Econ. Law* 15 (2004); J. Pauwelyn, “Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach”, 94 *Amer. J. Int’l L.* 335 (2000). In this regard, an important case arose before the WTO Appellate Body with reference to the reactions of WTO member States against the Continued Dumping and Subsidy Offset Act of 2000 (also known as the “Byrd Amendment”) approved by the US Senate. See WTO Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 (“Byrd amendment”)*, WT/DS217/AB/R, WT/D234/AB/R, 16 January 2003, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/217\\_234\\_abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/217_234_abr_e.pdf) and Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/217/R, WT/DS234/R, 16 September 2002, available at [http://www.sice.oas.org/dispute/wto/ds217\\_234/ds217r\\_5e.asp](http://www.sice.oas.org/dispute/wto/ds217_234/ds217r_5e.asp). For an analysis of the case, see M. Benedetti, “EU Countermeasures against the US Byrd Amendment”, in *Global Administrative Law: Cases, Materials, Issues*, supra note 7, 185-191.

12. A process of constitutionalization is already underway at the global level through the strengthening of an international civil society, the creation of a global public sphere, the growing number of transnational networks and the proliferation of global courts. But there is no government in this global constitution. This is why global law is mostly administrative law, not constitutional law.

### **VIII. The study of Global Administrative Law as an important intellectual exercise**

I return now to the first topic that I have addressed, the study of Global Administrative Law.

We are currently engaged in a very important intellectual exercise – no less important, indeed, than that undertaken by the 19<sup>th</sup> century “founding fathers” of public law, such as Laferrière in France, Gerber, Laband and Mayer in Germany, Orlando and Romano in Italy. Scholars in New York, Rome, Heidelberg and elsewhere are working on a new area of legal theory and practice: that of global law<sup>27</sup>.

This scholarly work has three main features. It is, firstly, a truly global effort. Jurists from all over the world are engaged in such research, some providing in-depth analyses of individual global regimes, while others seek to deduce a body of common principles and rules from the many and varied governance experiences.

It is worth noting that a scholarly endeavor of this sort has not been undertaken since the 17<sup>th</sup> century. Indeed, ever since the attack from legal positivism led to the collapse of natural law approaches to the discipline, law has been conceived of as the product of nation-States exclusively, with international law conceptualized mainly on the basis of “contractual” relations between them. As a consequence, the study of each national system of law has become, for the most part, limited to national “schools” of lawyers, with occasional raids into foreign legal systems permitted to scholars of a more comparative orientation.

Secondly, this endeavor deals with an entirely new subject-matter; one that has developed only relatively recently and, chiefly, in the last twenty years. It encompasses a vast array of different treaties, rules, standards, institutions, and procedural arrangements established beyond national frontiers either by the States themselves, or by other global institutions, in order to deliver services, establish further standards, monitor compliance, or act more generally as “clearing houses”.

This body of law is confusing, at least when viewed through the lens of traditional conceptual criteria. It is law, but in most cases is not binding. It does boast established institutions, but these can most often proceed only tentatively at best, because their authority is not yet widely recognized.

Thirdly, in the study of this field one cannot rely upon the usual paradigms of public law. These were developed in national contexts as a set of values, principles, and rules necessary to the proper functioning of domestic institutions. For example, regular elections at the national and local levels serve the purpose of democracy; and the due process of law is instrumental to the protection of fundamental rights. But can they be transposed mechanically to an entirely new environment, beyond the State? Can new wine be poured into old bottles?

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<sup>27</sup> See the Global Administrative Project launched by New York University in 2005 (<http://www.iilj.org/GAL/default.asp>), the research on Global Administrative Law led by the Institute for Research on Public Administration (IRPA) in Rome (<http://www.irpa.eu/gal-section/>), and the Project on The Exercise of Public Authority by International Institutions at the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht in Heidelberg (<http://www.mpil.de>).

# Administrative Law Beyond the State\*

Stefano Battini\*\*

## 1. Is there an Administrative Law beyond the EU?

Notwithstanding the fact that no serious scholar could deny, today, that a European administrative law does exist, serious scholars do deny that an administrative law is conceivable in the legal space beyond the EU.

The cultural assumption behind such approach is easy to recognize. It can be traced back to Heinrich Triepel, a “founding father” of legal dualism: “*We do not know an organized community that has the power to pose legal norms upon the State and the individual as its members*”<sup>1</sup>. The space beyond the State and the EU, according to legal dualism, is entirely occupied by international law, which is rooted on the concept of a law between equal sovereign states exercising authority within their territorial borders. In such a space, no authority above the states can take decisions directly affecting individuals inside states, and no state can take decisions affecting individuals beyond its territory. As a consequence, is allegedly absent the conflict between public power and individual freedom, which is somehow the ID card of administrative law.

The perspective of Global Administrative Law studies could largely be seen as an attempt to challenge such a view, arguing that globalization creates today, even beyond the EU, an increasing number of “non-domestic” relationships which imply a conflict between public power and individual freedom. As these relationships escape to domestic administrative law, a Global Administrative Law, to be applied to them, partly is emerging, and partly ought to emerge and develop, in order to preserve the rule of law in a globalized and interdependent world.

More specifically, two kinds of non domestic relationships between public power and individual freedom are increasing, and, correspondingly, two *souls* of GAL are emerging.

On the one hand, supranational authorities regulate, more directly than in the past, private conduct. It does not mean that supranational authorities formally have the power to adopt rules and decisions directly and immediately binding on firms and individuals, irrespective of national incorporation and national implementation. It does mean, however, that supranational authorities substantially have the power to adopt rules and decisions immediately affecting firms and individuals, as long as states often have no other alternative but to incorporate and implement rules and decisions adopted at the supranational level: increasingly, this is the place in which the public power affecting individual freedom is actually exercised.

On the other hand, domestic authorities regulate, more intensively than in the past, foreign conduct. Again, it does not mean that domestic authorities formally have the power to “directly affect, bind, or regulate property beyond its own territory, or control persons that do not reside within it”: notwithstanding the increasing trend to the extraterritorial application of domestic regulation<sup>2</sup>,

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\*\* Professor of Administrative Law, Tuscia University of Viterbo.

<sup>1</sup> E. Triepel, *Volkerrecht und Landesrecht*, Leipzig, 1899 (citing from the Italian translation by G.C. Buzzati, *Diritto internazionale e diritto interno*, in *Biblioteca di scienze politiche ed amministrative*, edited by A. Bruniati, Torino, 1913, p. 19)

<sup>2</sup> K. Raustiala, *Does the Constitution Follow the Flag? The Evolution of Extraterritoriality in American Law*, OUP, 2011. On the topic, S. Battini *Extraterritoriality: an Unexceptional Exception*, in T. Zwart, G. Anthony, Jean Bernard Auby and John Morison (edited by), *Values in Global Administrative Law*, Hart Publishing, Oxford, 2011.

territoriality is still the rule<sup>3</sup>. It does mean, however, that domestic rules and decisions, even when formally applied to conducts occurring within national borders, have substantial effects outside national territory as long as their application involve foreign subjects: increasingly individual freedom is affected by a public power exercised by foreign domestic authorities.

This paper will very briefly focus on both kinds of relationships in turn, using a few examples, and then will draw some general concluding remarks.

## 2. Supranational authorities regulating private subjects

It is trivial to observe that, as globalization progresses, domestic regulators, facing global problems, have to exercise collectively their powers in order to overcome their intrinsic territorial limit. Therefore, just like in domestic legal orders Parliaments delegate rule-making and adjudicatory powers to administrative agencies, so states delegate similar powers to supranational bodies. These bodies, ranging from formal international organizations to informal networks of domestic public or private actors, become thus a source of a huge mass of regulatory decisions, which could be best conceptualized, according to the GAL perspective, as administrative regulation<sup>4</sup>.

Such regulation, however, today affects individual freedom more directly than it is believed according to the dualistic paradigm: domestic authorities, rather than the recipients of decisions adopted at the international level, are often just an enforcement tool of global decisions against private subjects.

A couple of examples could clarify the concept.

The first example is drawn from environmental regulation of civil aviation and refers to administrative rulemaking. The second example is drawn from anti-terrorism regulation and refers to administrative adjudication.

First example. The International Civil Aviation Organization (ICAO) adopts environmental standards in order to reduce emissions from aircraft and aircraft engines. The ICAO standards are not formally binding. States are free to adopt different standards, if they so decide. However, if a member state adopts a standard which is not “equal to or above” the ICAO standard, other member states do not have to allow aircrafts belonging to that state to travel through their airspace. On the other hand, if a member state adopts a standard which is above the ICAO standard, it results in an additional economic burden to domestic airlines, not applicable to air carriers belonging to states adopting a lower standard. In 1999, the ICAO adopted a higher standard. In 2003, the US regulator (EPA), according to the Administrative Procedure Act, started a “notice and comment” procedure in order to modify the domestic standard. Some environmental organizations proposed to adopt a standard above the level set by ICAO. The EPA, however, decided to match exactly the level of environmental protection defined by the international organization. The reasons given for such a decision, however, did not focus on environmental or health concerns; rather, the reasons focused on market harmonization: “*because aircraft and aircraft engines are international commodities, there is commercial benefit to consistency between U.S. and international emission standards. Manufacturers would only have to design to one emission standard globally, and air carriers would only need to be*

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<sup>3</sup> According to Otto Mayer, “*notre Etat ne prétend que par exception à exercer son autorité dans la sphère du territoire étranger*” (*Le droit administratif allemand*, Giard-Brière Editeurs, Paris, 1906, § 62, (*Le droit administratif international*) p. 354).

<sup>4</sup> See B. Kingsbury, N. Krisch, and R. B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems* 15 (2005); S. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 *NYU J. Int’l L. & Pol* 663 (2005); See also the essays published in: 68:3-4 *Law and Contemporary Problems* (2005); 37:4 *NYU J. Int’l L. & Pol.* (2005); 17 *Eur. J. Int’l L.* 1 (2006); 6:2 *Int’l Org. L.R.* (2009).

concerned with making sure the engines installed on their aircraft meet one standard. Such harmonization has economic and record keeping (and reporting) benefits”<sup>5</sup>.

In such a context, are the participatory rights granted by the Administrative Procedure Act to domestic environmental organization still useful, once the domestic decision is substantially (though not formally) prepackaged at the supranational level? However, as a partial redress to such a loss of due process rights, ICAO grants to international coalitions of environmental organizations the observatory status which implies a set of participatory rights directly referring to the supranational decision-making process: the right to propose the adoption of new standards or the modification of the existing ones; the right to make comments to be taken into account by the deciding authority, and so on: overall, “a right to participate in the formation of SARPs [ICAO standards], made up of several other more precise rights”<sup>6</sup>.

Second example. As is well known, a specific UN body (the Sanctions Committee) has been entrusted with the power to designate and place on a list (Consolidated List) individuals and entities associated with Al-Qaida. UN member States are bound to freeze the financial assets of any individual or entity designated by the Committee<sup>7</sup>. However, in an important and well-known judgment of 2008, the European Court of Justice set aside the European Council decision to freeze the assets of Mr Kadi, who had been designated by the UN Committee, on the grounds that his rights to a hearing and to an effective judicial remedy were patently disregarded<sup>8</sup>. As a partial redress to that decision, in 2009, the Security Council issued a Resolution which imposed a sort of duty to give reasons upon the UN Committee and provided for a sort of independent and impartial administrative review of listing decisions<sup>9</sup>.

Therefore, in the first example, we have non domestic rules, contained in ICAO agreements, which: (a) on the one hand, substantially give a supranational organization rulemaking powers in order to set the level of environmental and health protection referring to the air pollution caused by emissions from aircraft and aircraft engines; and (b) protect the interests of affected people and firms by granting them the right to participate in a “notice and comment” procedure referring to the supranational decision making process.

In the second example, we have now non-domestic rules, contained in UN Resolutions, which: (a) on the one hand, give a supranational organization adjudicatory powers in order to limit the property rights of private subjects; and (b), on the other hand, protect the property rights of the affected persons by granting them due process guarantees, such as the duty to give reasons and the right to an independent review.

What kind of law is that? We could stipulate, for peace of some international law scholars, that this is still International Law. However, we should admit that such International Law is very much removed from its traditional and original paradigm, according to which it is a law “among the States” and its subjects are “States and only States”. We could also stipulate, for peace of some administrative law scholars, that this is not Administrative Law. However, if this is not Administrative Law, we should admit that it seems as if it were.

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<sup>5</sup> EPA, *Emission Standards and Test Procedures for Aircraft and Aircraft Engines - Summary and Analysis of Comments* (EPA420-R-05-004 – November 2005), p. 6:

<sup>6</sup> Tiago Fidalgo de Freitas, *From participation towards compliance: The role of private actors in the making of SARPs by ICAO*, Paper presented at the 3<sup>rd</sup> Global Administrative Law Seminar – Viterbo 15-16 giugno 2007.

<sup>7</sup> Resolution 1267 (1999) - S/RES/1267 (1999), 15 October 1999 and subsequent amendments and modifications

<sup>8</sup> See Judgement of The European Court of Justice (Grand Chamber), 3 September 2008, in Cases C-402/05 P and C-415/05 P.

<sup>9</sup> Resolution 1904 (2009) - S/RES/1904 (2009), 17 December 2009

### 3. Domestic authorities regulating foreign subjects

Let us now turn to the second type of “non-domestic” relationships between public power and individual freedom, namely those between domestic authorities and foreign subjects. This is also the space occupied by the *second soul* of Global Administrative Law.

In conditions of economic interdependence, domestic regulation has an increased extraterritorial impact. It affects foreign conduct, particularly foreign firms seeking to market their products, to provide their services or to make their investments in the territory of any of the states sharing a common market. This is hardly a new phenomenon. Domestic rules and administrative decisions have always had a cross-border impact. However this old phenomenon has now increased in size, and the change in quantity becomes at a certain point a change in quality: it had never occurred that a so intruding and developed domestic administrative regulation was applied on a social and economic structure so deeply integrated and globalized. When markets, ruled by a deep administrative regulation that is *domestic*, become *global*, an unbalance is inevitably created: companies, which are called to move around an economic area without borders become exposed to the various and different domestic administrative regulations operating in that area and are forced to comply with each one, in order to commercialize their products in all the countries where they are in force. Traditionally, in domestic legal orders, Administrative Law has always meant, for companies, an important protection against the intrusiveness of administrative regulation. But the procedural guarantees set out by the domestic administrative law cannot obviously be enforced against foreign authorities. In this respect, companies have to rely on foreign administrative law, which is often not familiar, changing from land to land, sometimes underdeveloped. That is why a higher administrative law, more uniform as defined by supranational sources of law, is now emerging, providing companies operating around the world with a minimum quantity of administrative guarantees to rely on, whatever the country in which they do business. A growing set of supranational rules is thus emerging, which regulate the exercise of the domestic regulation affecting foreign freedom.

Three other examples could clarify the concept.

The first example refers to food safety regulation in Italy. In 2000, the Italian government suspended the placing on the Italian market of some GMO products patented by *Monsanto*, a multinational corporation headquartered in the US, on consumers’ health grounds. Monsanto contested the decision before the Italian Administrative Tribunal. However, at the same time, Monsanto managed to persuade the US government to claim, before the WTO, the violation of the SPS Agreement. This Agreement regulates the power of WTO Member States to adopt rules and administrative measures which, in order to protect health and environment, restrict international trade. The exercise of that power is subject both to procedural and substantial restrictions. As for the former, administrative decisions restricting international trade must comply with provisions which are very similar to the corresponding provisions of domestic laws regulating the administrative procedure: procedures must be undertaken and completed without undue delay; the standard processing period of each procedure must be published and the anticipated processing period must be communicated to the applicant; information requirements must be limited to what is necessary for appropriate control, inspection and approval procedures; judicial or administrative review of decisions must be ensured; and so on<sup>10</sup>. As for substantial restrictions, domestic administrative measures, adopted in application of domestic food safety legislation, must be actually “*necessary*” to ensure consumers’ health and must be “*based on*” a sufficient scientific evidence and an “*appropriate risk assessment*”. The WTO Panel issued its report in 2006<sup>11</sup> and declared unlawful the Italian measure at issue, as it lacked a

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<sup>10</sup> On the topic, P. M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 *U. Pa. J. Int’l Econ. L.* 1 2003; S. Charnovitz, *Transparency and Participation in the World Trade Organization*, The George Washington University Law School Public Law and Legal Theory Paper n. 142.

<sup>11</sup> See G. Shaffer and M. Pollack, *Reconciling (or Failing to Reconcile) Regulatory Differences: The Ongoing Transatlantic Dispute over the Regulation of Biotechnology*. Workshop on The New Transatlantic Agenda and the Future of

“rational relationship” with the risk assessment conducted by the Italian scientific consultative body (Italian Superior Institute of Health), which stated that: “in the light of current scientific knowledge [...] there are no risks to human or animal health due to the consumption of derivatives of the GMOs [...]”. Therefore, the WTO Panel concluded that “there is no apparent rational relationship between Italy’s safeguard measure, which imposes a prohibition, and risk assessments which we understand found no grounds for considering that the use of T25 maize, MON810 maize, MON809 maize and Bt-11 maize (EC-163) endangers human health or the environment”<sup>12</sup>. Remarkably, the Italian Administrative Tribunal reached the same conclusions, following the same reasoning: it set aside the decision on grounds of inconsistency between its content and the results of the investigation. To put it differently, the exercise of the administrative power has been unreasonable<sup>13</sup>.

The second example refers to public procurement in Canada. In August 2005, the Canadian Department of Public Works and Government Services, acting on behalf of the Treasury Board Secretariat, sent a Request for Proposals for the provision of professional audit services. As a qualified supplier, Deloitte & Touche submitted its bid. However, another company won the contract. Deloitte & Touche filed a claim to the *Canadian International Trade Tribunal*, which is a domestic quasi-judicial body that also acts as an international body, as it is competent for claims filed by companies alleging an infringement of the NAFTA and GPA provisions. These international agreements regulate public procurement procedures, in order to open tendering procedures to the participation of foreign companies and in order to introduce, in this way, more competition among bidders<sup>14</sup>. For example, the WTO Government Procurement Agreement (GPA) imposes on member states the obligation to provide to suppliers all information necessary to permit them to submit responsive tenders<sup>15</sup>. Deloitte & Touche claimed the violation of this specific provision, arguing that the government introduced a new criterion for the evaluation of the proposals after the submission of the bids. The *Canadian International Trade Tribunal* sustained the allegation and recommended that the Canadian government compensate Deloitte & Touche for its “lost opportunity”, at one-quarter of the profit that Deloitte would have earned had it been the successful bidder in the procurement: “it is clear that the evaluation used an evaluation criterion not previously disclosed to bidders, or reasonably predictable from the RFP. Accordingly, the Tribunal finds that PWGSC breached Article 506(6) of the AIT, Article 1013(1)

(Contd.)

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Transatlantic Economic Governance, European University Institute, Florence, 18-19 June 2004. Available at SSRN: <http://ssrn.com/abstract=955277>; G. Marceau and J. P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. A Map of the World Trade Organization Law of Domestic Regulation of Goods*, *Journal of World Trade*, 36 (5), 2002; R. Hudec, *Science and Post-discriminatory WTO Law*, 26 *B.C. Int’l & Comp. L. Rev.* 2003; J. L. Dunoff, *Lotus Eaters: Reflections on the Varietals Dispute, the SPS Agreement and WTO Dispute Resolution*, Institute for International Law and Public Policy – IILPP, White Papers Series, 2006-1

<sup>12</sup> *European Communities - Measures Affecting the Approval and Marketing of Biotech Products - Reports of the Panel - WT/DS291/R; WT/DS292/R; WT/DS293/R*, 29/09/2006, para 7.3195 (d).

<sup>13</sup> Tar Lazio, Sezione I, 3 dicembre 2004, n. 14477

<sup>14</sup> See on the topic the paper by Hilde Caroli Casavola in this volume. See also H. Caroli Casavola, *Internationalizing Public Procurement Law: Conflicting Global Standards for Public Procurement*, in *Global Jurist Advances: Vol. 6* (2006), Iss. 3, Available at: <http://www.bepress.com/gj/advances/vol6/iss3/art7>; J.B. Auby, *L’internationalisation du droit des contrats publics*, in *Droit administratif*, 2003 (Aug.-Sept) ; C. McCrudden and S. G. Gross, *WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study*, 17 *EUR. J. INT’L L.* 151 (2006).

<sup>15</sup> Particularly, art. XII, 2 states as follows: “Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following: [...] h the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of products or services of other Parties, customs duties and other import charges, taxes and currency of payment”.

of NAFTA and Article XII(2) of the AGP”<sup>16</sup>. The rule applied by the Canadian Tribunal, according to which administration must determine, and previously disclose, the evaluation criteria, is very well known in most domestic administrative law systems. It is an application of a more general standard, that is to say the impartiality principle.

The last example refers to environmental protection in Mexico. In 1998, The Mexican Agency for environmental protection (INE) refused the renewal of the license for an hazardous waste landfill, owned by a Spanish corporation, TECMED. As a foreign investor, TECMED was entitled to the protection provided for in the Bilateral Investment Agreement between Spain and Mexico. This Agreement, as the majority of the approximately 2.500 *Bilateral Investment Agreements (BITs)* currently in force, committed the contracting parties not only to admit and promote foreign investment, but also to guarantee substantial rights to foreign investors, in order to protect them against the unlawful or arbitrary exercise of the regulatory power of the host State. Two types of clauses, typically set out in Investment Treaties have the most severe impact on domestic administrative regulation: “*indirect expropriation*” and “*fair and equitable treatment*”<sup>17</sup>. As for the latter, the Investment Treaty between Mexico and Spain provides as follows: “*Each Party shall accord to covered investments of investors of the Other Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security*”. As the Agreement enables the foreign investor to bring suit against the host State before an international arbitral tribunal, TECMED filed a request for an arbitration, alleging, *inter alia*, the violation of the duty to accord to foreign investors a “*fair and equitable treatment*”. The arbitral tribunal stated that the measure applied by the Mexican government infringed the *fair and equitable treatment* clause and awarded a compensation for damages of more than 5 million dollars. The Tribunal has stated that the fair and equitable treatment clause implies a due process requirement, which obliges the government to ensure a “*fair hearing*” of the addressee of an adverse measure before adopting the decision. However, the Mexican government, in the tribunal’s opinion, did not allow TECMED to an adequate defense before denying the permit renewal: “*During the term immediately preceding the Resolution, INE did not enter into any form of dialogue through which Cytrar or Tecmed would become aware of INE’s position with regard to the possible non-renewal of the Permit and the deficiencies attributed to Cytrar’s behavior—including those attributed in the process of relocation of operations—which would be the grounds for such a drastic measure and, thus, Cytrar or Tecmed did not have the opportunity, prior to the Resolution, to inform of, in turn, their position or provide an explanation with respect to such deficiencies, or the way to solve such deficiencies to avoid the denial of renewal and, ultimately, the deprivation of the Claimant’s investment*”<sup>18</sup>. The Mexican Government thus infringed the International Treaty, providing for a *fair and equitable treatment* of the investor, as long as it infringed the principle of *due process*, which is at the center of most domestic administrative law systems.

Therefore, in all the examples referred above, we have: (a) non domestic rules, contained in international agreements, regulating the administration, by domestic authorities, of domestic legislation, such as Italian (or European) food safety legislation, Canadian public procurement

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<sup>16</sup> Canadian International Trade Tribunal, *Deloitte & Touche LLP v. Department of Public Works and Government Services - Determination and reasons* issued Thursday, May 11, 2006, File No. PR- 005-044.

<sup>17</sup> On the topic, R. Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 38 N.Y.U. J. Int’l L. & Pol., vol. 37 (2006), p. 953; G. Van Harten and M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, *European Journal of International Law*, Vol. 17, No. 1, pp. 121-150, 2006 Available at SSRN: <http://ssrn.com/abstract=907655>.

<sup>18</sup> *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, par. 173. See S. W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, IILJ Working Paper 2006/6 (Global Administrative Law Series), available at <http://www.iilj.org>; S. W. Schill, *Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed*, in *Transnational Dispute Management*, vol. 3 (2) April 2006.

legislation, or Mexican environmental legislation; (b) judicial or quasi-judicial decisions, adopted by international court (on domestic court acting as international court), setting aside domestic administrative decisions on grounds of violation of specific non domestic rules, related to more general principles, such as reasonableness, impartiality and due process.

No one could doubt that those principles, when applied by domestic courts in disputes involving domestic administrative authorities and referring to domestic administrative decisions, are “Administrative Law”. Should we reach a different conclusion when precisely the same principles are applied in precisely the same kind of disputes, by international judicial or quasi-judicial bodies? If the answer is no, we should admit that the WTO panel, the Canadian International Trade Tribunal and the Arbitral Tribunal have all applied a non domestic administrative law, which they contribute to create and develop.

#### **4. Concluding Remarks**

To sum up, the following conclusions could be drawn.

First of all, because of globalization, individual freedom is today increasingly threatened by a “*puissance publique*” which is exercised, other than by domestic authorities, by supranational and foreign ones as well. To the traditional case in which the state regulates citizens’ conduct, which is still the core of administrative law, is now to be added an ever increasing number of cases in which supranational authorities regulate private conduct, or domestic authorities regulate foreign conduct, both of which were, in the past, an exception to the opposite rule.

Secondly, these increasingly emerging regulatory relationships are themselves regulated by a law, which is neither purely domestic, nor purely international. It is neither a law to be applied only inside states, nor a law to be applied between equal and independent political communities. It involves states and individuals at the same time. In this respect, it could be best conceptualized as a “global law”, as it applies in a legal space which crosses domestic and international law, without being a unitary and monistic legal order at the same time.

Finally, such a global law is mainly made of legal materials (such as due process, duty to give reasons, independent review, impartiality, reasonableness, notice and comment, etc.) which mirror what in the most-developed domestic legal systems is known as administrative law. In other words, this global law “looks like” administrative law.

Therefore, an administrative law beyond the state, and beyond the EU, does exist and it is worth studying it.



# Courts as Global Regulators? The Judicial Regulation in the GAL Perspective

Elisa D'Alterio\*

## 1. Introduction

The present paper analyses the practice of courts to apply particular techniques (so called “doctrines”)<sup>1</sup> in order to regulate the relations between legal systems in the global administrative space, due to the lack or insufficiency of codified parameters regulating those relations. The exam of such a judicial activity gives rise to two preliminary questions: why is it interesting to study this issue? Why is this issue relevant in the Global administrative law (Gal) perspective?

Firstly, the creation of judicial doctrines – both at ultra-state and national levels – is currently a topic of great interest (and also fashionable!)<sup>2</sup> for at least three aspects: *i.* courts have developed an increasing number of functions, and this increase of judicial activities seems strictly depending on the strengthening of “judicial globalization”;<sup>3</sup> *ii.* in particular, the creation of doctrines can be considered a form of judicial reaction to the “global disorder”: it is, in fact, the way to fill the lack of normative criteria – at national and global levels - for solving certain types of contrast. Doctrines allow the identification of the court having jurisdiction and/or the applicable law to the case, and – *de facto* – the solution of the dispute; *iii.* the application of doctrines can ensure a better jurisdictional protection to citizens and a higher degree of legal certainty in the global space.

Secondly, the issue is relevant in the Gal perspective for especially four reasons. First of all, as underlined by a significant literature,<sup>4</sup> an increasing proliferation of judicial bodies characterizes the global arena and the analysis of these organisms is fundamental to understand the general features of Gal. Just to mention two examples. The decisions of the WTO judiciary bodies (Panel and Appellate Body) strongly affect the regulation of the global market and of the economic relations between Member States and multinationals, by determining important administrative measures and, sometimes, procedural limits.<sup>5</sup> The Inspection Panel of the World Bank can impose administrative restrictions on the implementation of public infrastructures (with environmental impact), by recognizing guarantees to citizens negatively affected by the public action.<sup>6</sup>

Secondly, the application of doctrines should not be considered in relation to the mere problem of judicial adjudication, but in relation to the existence of multifarious legal systems that come into

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\* Tenured Assistant Professor of Administrative Law, Univesity of Catania.

<sup>1</sup> The expression “doctrines” is used by several authors with different meanings (for instance, in US the word is used with regard to particular theories created by judges, such as the *Princess Lida doctrine*, the *judicial comity doctrine*, etc.). See S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Roma, Donzelli, 2009, 10-11, which elaborates a brief taxonomy of these theories. Herein, the word is used with the meanings of “judicial technique”/“rule of recognition” (see *infra*).

<sup>2</sup> There exists a very copious literature about the role of courts. For instance, on the web site of the “Social Science Research Network – SSRN” about 5.051 papers – whose title includes words “court/courts” - have been published.

<sup>3</sup> See A.M. Slaughter, *Judicial Globalization*, 40 Va. J. Int'l L. 1103 et seq. (2000).

<sup>4</sup> On this aspect, see R. Mackenzie, C.P.R. Romano, Y. Shany, & P. Sands, *The Manual on International Courts and Tribunals* (2010); C.P.R. Romano, *The Proliferation of International Judicial Bodies: the Pieces of the Puzzle*, 31 *N.Y.U. J. Int'l L. & Pol.* 711 (1999); T. Treves, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, *N.Y.U. J. Int'l L. & Pol.* 679 et seq. (1999).

<sup>5</sup> See the well-known cases: WTO Appellate Body, *Sardines*, WT/DS231/AB/R, 70-72; *Steel*, WT/DS248/AB/R and *Shrimp/Turtles*, WT/DS58/AB/R.

<sup>6</sup> See the application of due process of law guarantees by the World Inspection Panel in the *Report and recommendation, India: Mumbai urban transport project*, September 3, 2004.

contact in the context of a “global administrative space”. In this sense, the application of doctrines – although it takes place in judicial proceedings – aims at pursuing a more general function than that of dispute settlement. The several studies on the adjudication by global courts or quasi-judicial bodies, usually, focus on the composition of the bodies, the proceedings, the due process of law guarantees, etc.;<sup>7</sup> in all these cases, international procedural law profiles are analysed. The application of doctrines, instead, does not correspond to a mere procedural profile for at least four reasons: *i.* doctrines are created by judges and are not codified either in national procedural codes or in international treaties; *ii.* the application of these techniques is generally conditioned by political evaluations and, sometimes, by the need to guarantee global public interests; *iii.* in certain cases, the application of the judicial techniques does not lead to the settlement of the dispute, for instance when the court recognizes the application of the competing system and, consequently, adopts a self restraint behaviour (*see* in the case of the application of the equivalence criterion);<sup>8</sup> *iv.* doctrines differ from the typical procedural rules pertaining to the choice of forum and multiple proceedings, such as *lis alibi pendens* and *res judicata* rules: a «crucial difference» is that the application of doctrines «cannot normally justify total abdication of jurisdiction by the comity-affording court because such an act would exceed that court's scope of authority».<sup>9</sup> On the contrary, international procedural law studies analyse doctrines only under a procedural perspective, since they consider these techniques as mere parameters to choose the competent jurisdiction or to solve cases of *lis alibi pendens*, without looking at implications on Gal.<sup>10</sup>

Thirdly, courts resort to use of doctrines in cases pertaining to administrative or constitutional law and not covered by national and international conflict of laws rules. Furthermore, the application of these mechanisms affects the discipline of relevant administrative and constitutional law issues, such as expropriation, public finance, due process of law, environment, etc. In this sense, doctrines are applied as “standards” for governing relations between legal systems in certain public sectors, by determining the applicable system, and by affecting the contents.

Lastly, the judicial regulation contributes to the legal harmonization of the global space – due to the ordering and harmonizing effect deriving from the adoption of the judicial practices - and, consequently, to the development of Gal.

In the light of the above-mentioned aspects, the present paper aims to answer the following questions: which is the function implemented by courts when they apply doctrines? In which measure does the application of doctrines affect the development of Gal? The main objective is to demonstrate that the application of doctrines embodies a “regulatory function” of courts, which strongly affects the development of Gal. Such an objective suggests how this paper is organized. Section 2 investigates the definition of “judicial regulation” and, in particular, analyses its development in the global administrative space. In section 3, the need to demonstrate how doctrines may represent a form of judicial regulation calls for an analysis of data relating to their application. This section takes into account two significant cases singled out according to the use of some relevant doctrines by ultra-state courts to solve contrasts between systems belonging to different legal levels. Section 4 analyses the object and the main features of doctrines applied in the cases mentioned in section 3, by identifying differences from conflict of laws rules, and by highlighting their regulatory function. In the light of

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<sup>7</sup> See, for instance, the relevant studies carried out by Y. Shany: *Regulating Jurisdictional Relations between National and International Courts*, Oxford University Press, 2007 and *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, 2004.

<sup>8</sup> See para. 3 and 4.

<sup>9</sup> Y. Shany, *Regulating Jurisdictional Relations between National and International Courts*, supra note 7, 167. The Author associates several doctrines with the phenomenon of “judicial comity”. On the “judicial comity”, J. R. Paul, in his *Comity in International Law*, 32 *Harv. Int'l L.J.* 1 *et seq.* (1991) and E. D'Alterio, “From judicial comity to legal comity: a judicial solution to global disorder?”, in 9 *International Journal of Constitutional Law – ICON*, no. 2, 394 ff. (2011).

<sup>10</sup> The first studies on conflict of laws date back to Joseph Story, *Commentaries on the Conflict of Laws* (Boston, 1834).

such a result, section 5 identifies some effects deriving from the regulatory function of courts, mainly with regard to the development of Gal.

## **2. The judicial regulation in the global administrative space**

«The judicial institutions have a significant influence on the destiny of Anglo-American and occupy an important place among the political institutions in the strict sense».<sup>11</sup> In this way, Alexis de Tocqueville defined the judiciary system in the United States at the first half of the nineteenth century. He recognized the relevant role of courts in that context, by describing them as “political bodies” with the power to mediate between the legislative power and the civil society. To this end, courts can affect the application of rules and, in certain cases, create new principles and provisions.

Concisely, national courts can be “regulators”.<sup>12</sup> As described by a relevant work of Gino Gorla,<sup>13</sup> already in the medieval period “great courts” (*i.e.* French Parliaments, Cameral Tribunal of the Holy Roman Empire in Germany, Florentine Rota, etc.), which had been entrusted with the power to administrate the justice in the name of the King, could issue normative acts. The administration of justice required the adoption, in the name of the King, of judgements with a “regulatory nature”, which represented a form of supplementary legislation (so called *arrêt de règlement*). They were regulatory acts, subordinated to the law of the King, and dealt with specific administrative issues.

Also today national courts act as regulators,<sup>14</sup> by adopting judgments with “regulatory effects”, and by affecting the regulation of several administrative sectors in national systems (for instance, in France and in United Kingdom, the administrative procedure is mainly regulated by principles formulated by courts, due to the lack of a “general law about administrative procedure”).<sup>15</sup> Some authors note that in national arena «it is becoming commonplace for courts to confront questions that were long deemed beyond the realm of possible judicial competence».<sup>16</sup> Other authors, going beyond the distinction between common law and civil law systems, add that «judges continually make law in civil law jurisdictions».<sup>17</sup> In certain cases, this practice is indirectly associated with the more general trend of the “judicial activism”.<sup>18</sup>

In the global administrative space, ultra-state and national courts have – if it is possible – an even more important role. They solve disputes, interpret law, balance conflicts between powers, make

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<sup>11</sup> Alexis de Tocqueville, *Democracy in America*, 1835-1840.

<sup>12</sup> The terms “regulation/regulator” can have multifarious meanings: usually, the expressions are used to indicate both the discipline (and competent institutions) of public controls on the economic services implemented by private subjects, and the related regulatory acts of the Executive (S. Cassese, ‘Regulation’ e ‘Deregulation’, 2 *Rivista trimestrale di diritto pubblico*, 1983, 718 ff.). Nevertheless, the terms are also used to indicate a number of cases in which more or less qualified subjects (even private) set rules/standards affecting public sectors but not corresponding to “legislation”, due to the informal way followed for their adoption (F. Cafaggi (ed.), *Enforcement of Transnational Regulation. Ensuring Compliance in a Global World*, Cheltenham, Edward Elgar Publishing Ltd, forthcoming). Herein, this broader meaning of regulation will be considered.

<sup>13</sup> G. Gorla, I “Grandi Tribunali” italiani fra i secoli XVI e XIX: un capitolo incompiuto della Storia politico-giuridica d’Italia, *Quaderni del Foro Italiano*, 1969.

<sup>14</sup> On this point, see A. Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, 2000.

<sup>15</sup> S. Cassese, *La disciplina legislativa del procedimento amministrativo. Una analisi comparata*, in *Foro it.*, 1993, V c., 11.

<sup>16</sup> S. Issacharoff, *Democracy and collective decision making*, in *International Journal of Constitutional Law*, vol. 6, no. 2, 2008, 266.

<sup>17</sup> J.H. Merryman, *The Civil Law Tradition – An Introduction to the Legal Systems of Western Europe and Latin America?*, Stanford, 1985, 83.

<sup>18</sup> L. Goldstone, *The Activist. John Marshall, Marbury v. Madison and the Myth of Judicial Review*, New York, Walker & Company, 2008.

recommendations, exercise public authority through judicial law-making,<sup>19</sup> and may create principles and rules. In addition to these functions, they can also “regulate” global issues. In which sense can courts be considered regulators at the global level? What do they exactly regulate?

To answer the aforesaid questions, it is necessary to start from a main assumption: the «global regulation typically does not operate on two distinct, vertically separated levels, international and domestic. Rather, it functions through a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes and actors, resembling nothing so much as a Jackson Pollock painting».<sup>20</sup> In this context, «the state’s near monopoly over domestic and international norm-promulgation has been replaced with a more heterogeneous field of law makers – professionals associations, international bureaucracies, multinational corporations and local communities [...]».<sup>21</sup> Therefore, private operators, associations, private organizations, intergovernmental organizations, public-private organisms, NGOs, global networks make rules at the global level in relation to different aspects: the accreditation of products, the relations among national professional associations, the public services delivery, the economic relations among States, the protection of relevant public interests, etc. The different legal nature of regulators does not affect their regulatory function but rather the enforcement of their standards, which can be more or less effective depending on the features of each regulator.<sup>22</sup>

In this context, the existence of a “judicial regulation” should not be surprising. Several authors have studied cases in which ultra-state and national courts make global rules, by setting standards and creating principles and parameters within a «general process of “juridification”».<sup>23</sup> In this sense, courts have a “reformatory or proactive function”, which is «in addition to (the) ‘conservative function’ of judges to uphold legality by applying existing rules of law».<sup>24</sup> Just to mention a number of significant examples.

Some authors recognize the key role played by courts in the regulation of global public interests, such as the environment, and suggest to consider this activity in terms of risk assessment (cost-benefit analysis), by highlighting «how judges consciously or intuitively calculate economic costs and benefits».<sup>25</sup>

Other authors define some courts as «international rule of law bodies», since they consider these bodies as subjects which «act on the basis of rules of procedure that are abstract, being set before the arising of any case or situation, and are public. Most of the time, it is the bodies themselves that are given the power to draft their own rules of procedure [...]».<sup>26</sup> Therefore, courts can create not only

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<sup>19</sup> J.L. Goldstein and R.H. Steinberg, *Regulatory Shift: the Rise of Judicial Liberalization at the WTO*, in W. Mattli and N. Woods (eds.), *The Politics of Global Regulation*, Princeton University Press, 2009, 211.

<sup>20</sup> R. Stewart, *The Global Regulatory Challenge To U.S. Administrative Law*, in *New York University Journal of International Law and Politics*, 2006, vol. 37, 703.

<sup>21</sup> Y. Shany, *Regulating Jurisdictional Relations Between National and International Courts*, *supra* note 7, 101-102.

<sup>22</sup> F. Cafaggi (ed.), *Enforcement of Transnational Regulation*, *supra* note 12.

<sup>23</sup> J.H.H. Weiler, *The Geology of International Law-Governance, Democracy and Legitimacy*, in 64 *ZaoRV*, 2004, 550.

<sup>24</sup> E.U. Petersmann, “Constitutional Justice” Requires Judicial Cooperation and “Comity” in the Protection of “Rule of Law”, in *Shaping Rule of Law Through Dialogue. International and Supranational Experiences*, ed. by F. Fontanelli, G. Martinico e P. Carrozza, Europa Law Publishing, 2010, 3.

<sup>25</sup> M.S. Hrezo and W.E. Hrezo, *Judicial Regulation of the Environment under Posner's Economic Model of the Law*, *Journal of Economic Issues*, vol. 18, no. 4 (Dec., 1984), 1071-1091.

<sup>26</sup> C.P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, in *Journal of International Dispute Settlement*, 2011, 2, no. 1, 252. The Author describes a remarkable taxonomy of judicial bodies and quasi-judicial bodies in the global space.

“substantive rules” (such as in the case of the environmental regulation), but also “procedural rules” (in addition, *see* the promulgation of disciplinary codes and rules governing lawyers practicing).<sup>27</sup>

Courts can also regulate both very detailed questions, such as the insurance policies, by creating particular doctrines (*i.e.* reasonable expectations doctrine),<sup>28</sup> and broader and more remarkable sectors, such as the global market. On this last point, some authors note that «over the last fifteen years, the focus WTO/GATT trade regulation has moved from trade rounds to a judicial process. [...] the regulatory shift taking place at the WTO, from the legislative to the judicial, has given a new set of actors the authority and autonomy sufficient to set policy».<sup>29</sup>

A certain literature even affirms that the judicial regulation contributes to «the gradual construction of a global legal system. [...] It is a system composed of both horizontal and vertical networks of national and international judges, [...]. The judges who are participating in these networks are motivated not out of respect for international law *per se* [...]. They are instead driven by a host of more prosaic concerns, such as judicial politics, the demands of a heavy caseload, and the new impact of international rules on national litigants».<sup>30</sup> Global courts are engaged «in constructive dialogue that, through cross-fertilization of their views, may bring about progress in the law».<sup>31</sup>

A more radical interpretation of the phenomenon recognizes the development of a “judicial legislation”, whereby certain delegated legislative powers of making rules for the regulation of their own procedure passed by the Judicature. It differs from the principle of *stare decisis*, since courts create new rules (not limited by precedents), by implementing a function of «creation and evolution of the law».<sup>32</sup>

Lastly, other authors have analysed the creation of judicial parameters to regulate the relations between different jurisdictions in cases of multiple proceedings in the lack of normative criteria.<sup>33</sup> Also this case can be considered a form of judicial regulation, insofar as courts create new rules for regulating some issues. These studies differ from other studies about the development of judicial doctrines:<sup>34</sup> the former consider these mechanisms under a mere procedural perspective; the latter, instead, identify an “integrating role” of courts, which is represented by «some doctrines that allow cooperation, by acting either as a “clutch” to link and disconnect legal systems, or as a “glue” to keep

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<sup>27</sup> F.C. Zacharias and B.A. Green, *Rationalizing Judicial Regulation of Lawyers*, in *Ohio State Law Journal*, vol. 70, Spring 2009.

<sup>28</sup> D. Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 *William and Mary Law Review*, 4, 1389 ff. (2007).

<sup>29</sup> W. Mattli and N. Woods (eds.), *The Politics of Global Regulation*, *supra* note 19, XIV.

<sup>30</sup> A.M. Slaughter, *A New World Order*, Princeton, 2004, 65 ss. In this sense, see also J.S. Martinez, *Towards an International Judicial System*, in *Stanford Law Review*, vol. 56, 2003, 429 ss.

<sup>31</sup> T. Treves, *Judicial Law-making in an Era of “Proliferation” of International Courts and Tribunals: Development or Fragmentation of International Law?*, in R. Wolfrum and V. Roeben (eds.), *Developments of International Law in Treaty-Making*, Berlin, 2005, 619.

<sup>32</sup> M. Taruffo, *Le funzioni delle corti supreme. Cenni generali*, in *Annuario di diritto comparato e di studi legislativi*, Napoli, Edizioni scientifiche italiane, 2011, 25. Several authors recognize a “judge-made law”. *See* M. Cappelletti, *Giudici legislatori?*, Milano, Giuffrè, 1984.

<sup>33</sup> Y. Shany, *Regulating Jurisdictional Relations Between National and International Courts*, *supra* note 7.

<sup>34</sup> *See* S. Cassese, *Diritto globale. Giustizia e democrazia oltre lo Stato*, Torino, Einaudi, 141: «(...) with the recent development of non-state courts, there is a new phenomenon: the courts become the regulators of relations between different levels of government (vertically) and the producers of rules that fill the “gaps” between different ultra-state regulatory regimes (horizontally)».

them together, or as a “rhetorical device” to allow more easily waivers». <sup>35</sup> In this sense, doctrines can be defined as “rules of engagement” <sup>36</sup> regulating the relations among legal systems.

As already mentioned, the present paper focuses on the development of judicial doctrines in the Gal perspective. This profile is not considered in previous studies on judicial doctrines, which, in fact, do not investigate in-depth the real function of the application of doctrines and their implications on Gal. The following paragraph considers two relevant cases pertaining to administrative law issues (precisely, the exercise of ablative administrative powers), in which different ultra-state courts resort to similar doctrines to regulate relations between legal systems, with the consequence of affecting the related disciplines.

### 3. Case studies

a) *Kadi case*. The case deals with the application of restrictive administrative measures by ultra-state public institutions (EU institutions) to a individual suspected of terrorism on the basis of UN law. Therefore, a problem of “contact” between the EU system e UN system arises. <sup>37</sup>

Under this perspective, the case can be examined by considering four main points. Firstly, the European judge recognizes a general deference of the EU order in relation to the UN system, with the consequence that this relationship is not subjected to the article 351 TFEU (para. 288). <sup>38</sup> On this deference would depend both the general supremacy of UN law on the EU system, and the incompetence of the European court to review the legality of the UN measures and the related executive acts adopted by EU institutions. Secondly, the European judge identifies some “counter-limits”: the implementation of UN measures, in fact, cannot determine the violation of certain principles and values, that are resistant to the general prevalence of global law. These limits, initially linked with the principles of “jus cogens” (*i.e.* rules of international law), <sup>39</sup> are then associated, in the decisions of 2008 and 2010, <sup>40</sup> with the general principles and fundamental rights protected by the EU law. Thirdly, a link between these limits and the foundation of a legal review on UN measures and on the European executive acts of UN resolutions is recognized in the following terms: European judges assess the adequacy of the UN guarantees with the due process of law guarantees provided by the EU law. Finally, the results of the “exam of adequacy” condition the admissibility of the appeal: negative results allow to apply, under a general mechanism of subsidiarity, the system of guarantees provided by EU law and, consequently, to admit the appeal.

b) *Bosphorus case*. The case regards the application of an administrative seizure by a national authority on the basis of EU law, which prejudices property rights protected by the ECHR system. In this judgement, a “contact” between EU law and ECHR system takes place.

In particular, the *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi* is a Turkish airline that leases two aircrafts of the Yugoslav national airline. Due to the outbreak of armed conflicts in Yugoslavia, the UN system provides for sanctions against this regime. After landing in Dublin of the aircraft, the Irish authorities, in compliance with UN measures carried out at EU level (Resolution no. 820/1993, executed by EC Regulation no. 990/1993), apply the seizure of the vehicle without

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<sup>35</sup> S. Cassese, *I tribunali di Babele*, *supra* note 1, 10.

<sup>36</sup> M. Kumm, *Constitutional Democracy Encounters International Law: Terms of Engagement*, in *New York University Public Law and Legal Theory Working Papers*, no. 47, 2006.

<sup>37</sup> The case is broadly well-known. Herein, the analysis focuses on the specific profile of the use of doctrines to regulate relations between legal systems.

<sup>38</sup> ECJ—Grand Chamber, 3 September, 2008, joined causes 402/05 P e 415/05 P.

<sup>39</sup> Court of First Instance, *Yassin Abdullah Kadi v. Consiglio UE e Commissione Ce*, 21 September 2005, cause 315/01.

<sup>40</sup> Court of First Instance, *Kadi v. Commission*, 30 September 2010, cause 85/09.

providing any compensation. After a series of procedural events, the case is lodged to the Strasbourg Court, by alleging the infringement of Article 1 of ECHR Protocol no. 1, which protects the property right.<sup>41</sup> The Court rejects the appeal, asserting that there is no infringement of the provision at issue, given that the Irish authorities did not exercise full discretion, but they acted in compliance with EU executive provisions of UN resolutions (para. 148). The Court affirms that the EU guarantees are “equivalent” or, in other words, “comparable” to those afforded by the ECHR system (para. 154-155). In the light of such equivalence between EU law and ECHR system, it is inferred that Irish authorities – by applying the seizure on the basis on EU provisions - complied with the ECHR (para. 156-165).

#### **4. Object and techniques of the judicial regulation**

The above-mentioned judgements deal with the application of administrative measures on private subjects. In both cases, public authorities (national and ultra-state bodies) – under ultra-state provisions - exercise “ablative powers” at the expense of individuals, who lodge appeal in different ultra-state forum against such measures. The general problem is to identify the legal guarantees applicable to the claimant, due to the impossibility to apply national administrative law. In both cases, ultra-state courts have to choose between the system to which they belong (so called *lex fori*) and the competing system (respectively, EU system *v.* UN system; ECHR system *v.* EU system). How do courts choose the system? Are there criteria for the selection? Courts cannot resort to conflict of laws rules, since the cases do not concern private law issues. Furthermore, there no exist specific provisions regulating relations between, respectively, UN system and EU order, and EU order and ECHR system, with regard to administrative issues (as those arisen in the cases). For these reasons, courts have had to create specific criteria: counter-limits doctrine (in the *Kadi* case), and equivalence criterion (in the *Bosphorus* case). Which are the main features of these techniques?

Despite their respective peculiarities, counter-limits and equivalence criteria are judicial doctrines with two common denominators: *i.* they work on the basis of the same mechanism; *ii.* they affect the application of administrative measures provided by ultra-state law. Firstly, the application of both doctrines is preceded by an activity of “judge judging judges”<sup>42</sup> corresponding to the evaluation of a judicial system by another equally independent and equivalent. This practice cannot be considered a judicial review of the act, but it could be defined a check on the “adequacy” of the safeguards provided by the competing system. The adequacy, in turn, is weighted in relation to either the standards of due process of law (in counter-limits doctrine), or the degree of protection afforded by the competing system (in equivalence criterion). At the same time, both doctrines work as “access texts” to a possible judicial review: in fact, in the *Kadi* case, the infringement of due process of law standards allows the judicial review of UN measures by the EU judges; in the *Bosphorus* case, the lack of equivalence would have allowed the judicial review of the EU acts by the Strasbourg Court.

As regards the second aspect, the application of doctrines affect the regulation and the enforcement of ultra-state administrative sanctions (respectively, freezing of funds and seizure), insofar as it allows the identification of the legal system providing for guarantees applicable to the individuals liable for administrative measures. Theoretically, the application of ultra-state administrative sanctions would comply with ultra-state administrative guarantees. For instance, a citizen liable for an administrative measure (a sanction, an expropriation, etc.) under the Italian law has the rights to be promptly informed, to participate in the related administrative procedure, to access to administrative documentation, etc., envisaged by Law no. 241/1990 (“Italian Law on administrative procedure”). On the contrary, at the global level there no exist general provisions providing for administrative

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<sup>41</sup> ECHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, Application no. 45036/98, June 30, 2005.

<sup>42</sup> The expression is drawn from Slaughter, *supra* note 30.

guarantees applicable to “multilevel cases”<sup>43</sup> - such as *Kadi* and *Bosphorus* cases –; each ultra-state regime has own and peculiar rules according to the logic of “self-contained regimes”.<sup>44</sup> Moreover, there no exist pre-established hierarchies among legal regimes: in “multilevel cases”, each ultra-state regime applies its rules without looking at the possible guarantees envisaged by the competing system. In this perspective, courts fill a gap, by creating rules (doctrines) to identify the applicable system of guarantees in favour of individuals.

How do courts elaborate these rules? Do they take into account particular interests? Counter-limits and equivalence criteria are doctrines aimed at guaranteeing the better protection of private subjects, although their application does not always determine this result (such as in the *Bosphorus* case). Usually, these doctrines lead to the application of the more “complete” system, according to the general interest of protection of fundamental rights. Nevertheless, also other interests may affect the use of these doctrines: political strategies, economic conditions, etc. (*see* para. 5).

In general, judicial doctrines (*see* the reciprocity principle, the reference technique, the technique of conclusiveness, the *forum non conveniens*, the margin of appreciation doctrine, the interposition technique, the court to court agreements, etc.)<sup>45</sup> are characterized by a discretionary and flexible nature: they do not aim at establishing hierarchies, but they are only inspired by a need of harmonization. These techniques however are not a mere expression of a “free appreciation” of judges, but they correspond to stable mechanisms, applied in many cases. Furthermore, they structurally differ from national conflict of laws rules and choice-of-forum rules envisaged by international treaties:<sup>46</sup> these codified parameters, due to their “stringent nature”, would not allow judges to make any balancing of the interests underlying public sectors, in order to identify the applicable regime<sup>47</sup>. For instance, in the *Kadi* case, the European Court of Justice could not have determined the applicable regime on the basis of the conflict-of-laws criteria (for example, domicile of the parties, the place where the infringement occurred, the citizenship of the individual), because of the need to consider the existence of general public interests (peace and international security) as well as the protection of fundamental rights. In this sense, doctrines answer the lack or insufficiency of global codified criteria, given that – more generally - «situations of jurisdictional interaction not fully covered by any specific international law instrument governing the interplay between the relevant international courts and their national counterparts».<sup>48</sup>

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<sup>43</sup> The expression “multilevel cases” would refer to cases in which there is a contact between two legal systems belonging to different legal levels.

<sup>44</sup> A. Lindroos e M. Mehling, *Dispelling the Chimera of Self-Contained Regimes. International Law and the Wto*, 16 *The European Journal of International Law*, 5 (2006).

<sup>45</sup> The assumptions described in this section are corroborated by a broader analysis carried out as a three-year research program now published in E. D'Alterio, *La funzione di regolazione delle corti nello spazio amministrativo globale*, Milano, Giuffrè, 2010. In this sense, *see* also R. Caponi, *Giusto processo e retroattività di norme sostanziali nel dialogo tra le corti*, in *Giur. cost.* 2011, 3753 ff.

<sup>46</sup> For example, *see* article 282 of UNCLOS, which envisages a deference mechanism vis-à-vis the judicial systems of regional-supranational regimes, to which the parties have adhered, and capable of making final and binding decisions; article 35 of the ECHR, which regulates the subsidiarity mechanism, which is at the basis of the operation of the judicial system of Strasbourg; article 26 of the Convention establishing the International Centre for Settlement of Investment Disputes - ICSID, which envisages the exclusive use of that jurisdiction, when it is competing with others, except if the parties have not determined differently; article 2005 of NAFTA, which regulates the hypothesis of a conflict between the jurisdiction of the Nafta Panels, and that of the Dispute Settlement Body of the WTO.

<sup>47</sup> Moreover, at the ultra-state level, a trend not to apply these rules may be noted. In particular, there appears to be «a wider trend to erode or circumvent the application of jurisdiction-regulating rules through emphasizing differences between related claims in order to justify the existence of multiple proceedings». On this point, *see* F. Marongiu Buonaiuti, *Litispendenza e connessione internazionale*, Napoli, Jovene, 2008, 18-20.

<sup>48</sup> Y. Shany, *Regulating Jurisdictional Relations between National and International Courts*, *supra* note 7, 39.

## 5. Can a court be a “Gal regulator”?

A well-known artist of the last century, Kazimir Malevich, argued that «the artist can be creative only when the shapes in his paintings have nothing in common with nature». <sup>49</sup> In this sense, the figure of the judge is not much different from that of the Suprematist painter.

This paper has sought to highlight this profile, first of all, by analysing the large literature on judicial regulation along with some significant examples of this practice (section 2). In addition to the important experiences at the national level (examined by Tocqueville, Gorla, etc.), there exist several cases of judicial regulation at the global level. On this point, it is possible to define a taxonomy, whereby a “substantive regulation”, a “procedural regulation”, and a “constructive regulation” are recognizable. Substantive regulation would occur when courts elaborate rules immediately affecting the discipline of certain sectors, such as in the cases of environment, insurance policies, and global market. Procedural regulation would correspond to standards created by courts to regulate judicial procedures, ethic codes, etc. Finally, a constructive regulation would be represented by judicial doctrines. <sup>50</sup> A certain literature associates doctrines with the procedural regulation, but - as previously underscored - it is a restrictive interpretation of the practice. On the contrary, doctrines can be considered the way through which “multilevel questions”, mainly pertaining to administrative issues, are regulated in an “indirect substantive manner”. In other words, courts, which have to solve a multilevel case - not covered by any codified rule -, choose the applicable legal system on the basis of parameters (doctrines) created by themselves. The use of a certain doctrine may lead to the application of different systems depending on the case. For instance, the counter-limits doctrine - but even the equivalence criterion - imposes the application of the system providing for the better (or fuller) protection of fundamental rights in cases of ultra-state administrative sanctions against individuals. On the basis of a judge-made criterion, courts identify substantive rules applicable to the case, by affecting their contents with the aim to extend guarantees. Why can this practice be defined a “constructive regulation”?

The elaboration of doctrines contributes to the development of Gal in a twofold way, respectively, by affecting the regulation of specific issues, and by «ordering the pluralism». <sup>51</sup> As regards the first aspect, the application of doctrines may affect the regulation of administrative issues in the lack of codified parameters, which allow the identification of the applicable system in multilevel cases (para. 3 and 4). For instance, in the *Kadi* case, the application of counter-limits doctrine produces a concrete effect: in the administrative procedure of the UN Sanction Committee due process of law guarantees must be provided. <sup>52</sup> Also in the *Bosphorus* case, the application of the equivalence criterion determines effects on the regulation of the administrative sanctions applied at the European level: in these cases, administrative guarantees at least equivalent to those envisaged in the ECHR system must be provided. In both cases, the administrative limits does not derive from neither administrative national systems, nor international treaties, but are imposed by courts through the application of doctrines. It can be explained due to the existence of a global administrative space, within legal regimes enter into contact - since in several cases they regulate overlapping sectors - arising multilevel cases not covered by general provisions.

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<sup>49</sup> The expression is drawn from G. Di Milia (ed. by), *Kazimir Malevič. Suprematismo*, Milano, 2000, 37.

<sup>50</sup> The examples are drawn from para. 2.

<sup>51</sup> M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*, Oxford, Hart, 2009.

<sup>52</sup> UN system has adopted important guarantees - “Focal point” and “Mediator” - respectively, provided by UN Resolutions no. 1730(2006) and no. 1904(2009), to comply with limits imposed by European judges.

In this perspective, doctrines are part of Gal: they may be defined as “global secondary rules” or, more precisely, “global rules of recognition”—to evoke the well-known expression of H. L. A. Hart.<sup>53</sup>

As regards the second profile, the application of doctrines contributes to harmonize the global disorder. The global administrative space is characterized by the existence of a wide range of legal systems among which there are no predetermined, stable, and codified relations owing to the lack of uniform regulatory instruments and, more generally, of a homogeneous global institutional framework. The implementation of these judicial techniques, therefore, produces an effect of harmonization and coordination among the different legal systems, without recognizing any project for the implementation of a global judicial order by courts.<sup>54</sup> This assumption is perfectly compatible with the features of global space, which is non-hierarchical, diffused, and definable as a “fluid or liquid order”.<sup>55</sup>

In the light of the above-mentioned aspects, courts can be added to the plethora of “Gal regulators”. Nevertheless, such a definition may arise at least four problems.

(1) *Legitimacy*. Several authors recognize a problem of legitimacy relating to the composition of global courts. In whose name do they judge and regulate? On this point, there exist multifarious theses: some ones affirm a democratic justification, others a procedural legitimation, but the real question deals with to the definition of the courts as regulators: it may represent a problem insofar as the judicial techniques are characterized by an high degree of discretion and they are not subjected to a judicial review. Moreover, it is difficult to identify when courts regulate and when they only adjudicate, because there are several cases in which the settlement of the dispute depends on the regulation of the relations between the applicable systems.

(2) *Mutual interests and political influence*. Why do courts create doctrines? In other words, *cui prodest*? The application of the judicial techniques reflects most of all political interests (some scholars speak about “the strategic theory of judicial behaviour”).<sup>56</sup> For instance, some authors affirm that the application of the equivalence doctrine by the Strasbourg Court aims at keeping balance in the relationship between EU and ECHR systems. The application of certain techniques, moreover, may reflect forms of distrust between judicial systems. For instance, the application of the counter-limits doctrine in the *Kadi* case reflects the distrust of the European Court of Justice with regard to the procedure of the UN Sanctions Committee and the judicial guarantees provided by the UN system. Courts test the level of “dignity” of the competing system, by subjecting it to a very strict review. In all cases, this “judge judging judge” activity is strictly depended on the political influence and diplomatic relations among systems.

(3) *Sectors*. In which measure does the application of a doctrine or the identification of the prevailing system depend on the sector? For instance: does the prevalence of the EU system on the UN regime - determined by the application of the counter-limits doctrine – characterize all cases related to the protection of human rights? On the one side, the application of each doctrine seems associated with specific sectors: for instance, the counter-limits doctrine is strictly linked with the protection of human rights affected by public powers; on the other side, the prevalence/or the subordination of a

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<sup>53</sup> «[...] while the primary rules concern the actions that individuals must do or not do, all [...] secondary rules regard primary rules themselves. They specify in a decisive manner the ways through which primary rules can be reviewed, introduced, deleted, changed, and determine the fact of their violation»; as regards “rules of recognition”, the Author specifies: «where there is such a recognition we are in the presence of a very simple form of secondary rule: a provision for the final identification of primary rules that impose obligations». See H. L. A. Hart, *The Concept of Law* 112-113 (2<sup>nd</sup> ed., 1994).

<sup>54</sup> See A. Stone Sweet, *Judicialization and the Construction of Governance*, 32 *Comp. Pol. Stud.* 164 (April 1999).

<sup>55</sup> These terms are drawn from Cassese, *supra* note 1. See also the definition of “liquid reality” by Z. Bauman, *Liquid Modernity* (2000).

<sup>56</sup> R.A. Posner, *How Judges Think*, (2008).

legal system does not depend on the sector: in fact, had the UN system provided for due process guarantees at least equivalent to those envisaged in the EU system, the *Kadi* claim would have been rejected, because the UN system would have prevailed, although the case concerned the protection of human rights. Therefore, in the global arena there are not pre-established hierarchies, but very flexible parameters.

(4) *Enforcement*. When does the judicial regulation differ from the judicial enforcement of rules? On this point, it is possible to identify at least three aspects on the basis of which judicial regulation can be distinguished from the mere judicial enforcement. Judicial regulation would occur: *i.* when courts create new rules not envisaged by any legal system; *ii.* when they choose which system apply without following any hierarchy; *iii.* when they either impose new limits, or recognize not codified guarantees.

The above-mentioned aspects are open problems whose solution requests in-depth analyses, partially carried out by important working groups. As in every research, in fact, a thesis may open new fields of investigation and possible perspectives, and as a «traveller in a winter's night» it makes us wonder: «what does story down there await its end?».<sup>57</sup>

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<sup>57</sup> I. Calvino, *Se una notte d'inverno un viaggiatore*, Milano, 1994 (first edition, 1979), 300.



# The ‘puzzle’ of global governance after the financial crisis

Giulio Napolitano\*

## 1. A globalization without rules

In the second half of the 20<sup>th</sup> century, the economic globalization largely exceeded the legal and institutional one. Many markets were fully integrated throughout the world, even in the absence of a common regulatory framework. This output was coherent with the free market approach under which the contemporary globalization took place.<sup>1</sup> As a consequence, the institutional landscape of the economic global governance remained highly fragmented. On one side, international institutions revealed internal weakness and criticism. Moreover, no substantial connection among the different institutional systems was activated. Finally, important gaps even in a free-market perspective remained unfilled. The absence of an effective global antitrust jurisdiction is perhaps the most evident example of that.

Financial markets were the champions of the globalization process. Their global regime was characterized by three fundamental features. The first one was the primacy of the deregulation recipes. Governments throughout the world were pushed to open their markets and to soften the regulatory devices. The second one was the dominance of free competition among legal (dis)orders, according to which financial institutions were able to choose the most favorable regulatory environment. The third one was the reservation to national jurisdiction of every decision needed to face a “local” crisis of a financial institution.

The United States and the United Kingdom were at the forefront of this transformation of the financial markets. In the Nineties they abolished any significant restriction to the movement of capitals and to the capacity of the traditional commercial banks to expand their business into hazardous activities. This way, they were able to attract foreign investors and to get their financial institutions free from intrusive oversight by public authorities. When banks and other financial institutions got under distress, the U.S. and U.K governments decided autonomously, on a case by case basis, to nationalize them and to avoid the default. The same happened when the U.S. government, on the contrary, decided not to bail out Lehman Brothers. No consultation process was opened, not even with strategic partners of U.S.. Citizens and world political leaders knew about that decision only from the newspapers, before experiencing the negative outcomes of it over their national financial markets.

## 2. Financial stability as a global public good

The 2008 financial crisis, followed by the 2010 sovereign debt crisis, might represent a chance to reverse such an historical trend and to build up the basis for a stronger economic global governance and a better relation between the State and the market.<sup>2</sup>

After the Lehman Brothers’ default and the global panic and distress generated by it, crises of big financial institutions are not any longer considered purely “local”. That’s why also solutions may not be exclusively “national”. The financial crisis showed the need for supranational collective action. As far as the markets, both real and financial, have not been so integrated since the end of the 19th century, also the correction of their failures must be global, for two different, even if often confused, reasons.

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\* Professor of Public Law, University of RomaTre.

<sup>1</sup> S. Strange, *The Retreat of the State: the Diffusion of Power in the World Economy*, 1996.

<sup>2</sup> G. Shaffer, *Transnational Legal Process and State Change: Opportunities and Constraints*, IILJ Working Paper, 2010/4 at [www.iilj.org](http://www.iilj.org)

The first reason is that merely national solutions would leave space to regulatory arbitrage by multinational enterprises in order to escape unwanted rules and controls. This way, government action would be ineffective. The second reason is that virtually all domestic policies produce important international spillovers, and some of these can be quite harmful. Uncoordinated national measures may cause a government's failure if regarded from a third country point of view and produce even a negative reverse effect for the state which adopted them.

The point is that in a greatly interdependent world economy, the number of global or at least regional public goods quickly increased, from financial stability to sustainable growth, and called for greater global and regional collective action.<sup>3</sup> The sovereign debt crisis in 2010 strengthened this awareness. The risk of a default of Greece became pretty soon a problem for the whole Europe. And European institutions and Member States were asked to solve it by all the world leaders, starting from the U.S. President.

Strategic reaction to the financial and the sovereign debt crises are different and reveal the 'composite' approach towards a new global governance. Like a 'puzzle', each piece is different from the other. And there are still some badly cut and other missing. The solution of the puzzle is far away, but global public law can give a contribution to it.

### **3. An enhanced multilateralism: the establishment of the G-20 and the global reform of financial markets**

One kind of reactions to the financial crisis was the attempt to re-launch multilateralism enlarging the membership and increasing the effectiveness of supranational fora and institutions.

The first attempt to strengthen the institutional architecture of global governance was the establishment of the G-20 as the «premier forum of international economic governance».<sup>4</sup> The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialized and developing economies to discuss key issues in the global economy. To tackle the financial and economic crisis that spread across the globe in 2008, the G-20 members were called upon to further strengthen international cooperation. Accordingly, Leaders' Summits coupled the ones held by Treasury Ministers, giving the G-20 the highest political authority. This way, the G-20 became the premier forum for international economic development in order to promote open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability.

The actions of the G20, with its balanced membership of developed and developing countries, helped the world to deal effectively with the financial and economic crisis. The scope of financial regulation was broadened, and prudential regulation and supervision were strengthened. Global governance improved to better take into consideration the role and the needs of emerging of developing countries, especially through the reforms of the governance of the IMF and the World Bank.

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<sup>3</sup> T. Saddler, *Overcoming Global and Regional Collective Actions Impediments*, in *Global Policy* (2010) 40-50; with specific reference to the problem of systemic risk, I. Goldin and T. Vogel, *Global Governance and systemic Risk in the 21<sup>st</sup> Century: Lessons from the Financial Crisis*, in *Global Policy* (2010) p. 4 et seq.

<sup>4</sup> J. Kirton, *Towards Multilateral Reform: The G-20 contribution*, 2004, <www.utoronto.ca>; P.I. Hajnal, *The G8 system and the G20: evolution, role and documentation* (Ashgate, Aldershot, 2007). A different issue concerns the emergence of a de facto joint leadership of U.S. and China, as underscored by G. Garrett, *G2 in G20: China, the United States and the World after the Global Financial Crisis*, in *Global Policy* (2010) p. 29 et seq. From the perspective of middle powers, D.D. Bradlow, *Reforming Global Economic Governance: A Strategy for Middle Powers in the G20*, Paper prepared for the workshop on Going Global: Australia, Brazil Indonesia, Korea and South Africa in International Affairs, Jakarta, Indonesia, May 25-26, 2010.

The strengthening of the G-20 was fundamental to transfuse new blood into multilateralism, overcoming limits of authority and legitimacy of the Group of Seven (G-7) industrialized countries.<sup>5</sup> The more the G-20 will be able to play a prominent role, the more solutions adopted will be tinged with politics rather than with regulatory expertise and technocratic know-how.

A second attempt to improve the economic global governance was represented by the reformation of the International Financial Institutions that were established in the framework of the Breton Woods Agreements: the World Bank and the International Monetary Fund. The fundamental idea was to modernize the institutions fundamentally so that they could better reflect changes in the world economy after the crisis and more effectively play their roles in promoting global financial stability, fostering development and improving the lives of the poorest.

In April 2010, the 186 countries that own the World Bank Group endorsed boosting its capital by more than \$86 billion and giving developing countries more influence. Along with this first general capital increase for the World Bank for more than 20 years and shift in voting power to developing countries, the Development Committee of the Board of Governors also backed the Bank's new post-crisis strategy, and a comprehensive reform package in order to improve the governance of the Bank. The four main components of the package concerned financial resources, voting power, post-crisis strategy, operational reforms.

Also the International Monetary Fund was at the core of a comprehensive package of quota and governance reforms in order to achieve a more legitimate, credible and effective institution. The aim is to ensure that quotas and Executive Board composition are more reflective of new global economic realities, and to secure the IMF's status as a quota-based institution, with sufficient resources to support members' needs.

A third attempt to push for worldwide solution was the strengthening of global financial regulation and supervision.

On the institutional side, the most important achievement was the establishment in April 2009 of a new Financial Stability Board (FSB) as the successor to the Financial Stability Forum (FSF). In November 2008, the Leaders of the G20 countries called for a larger membership and a stronger institutional basis of the FSF.

The purpose was to strengthen its effectiveness as a mechanism for national authorities, standard setting bodies and international financial institutions in order to address vulnerabilities and to develop and implement strong regulatory, supervisory and other policies in the interest of financial stability. As announced in the G20 Leaders Summit of April 2009, the expanded FSF was then re-established as the Financial Stability Board (FSB) with a broadened mandate to promote financial stability. The FSB is now called to coordinate at the international level the work of national financial authorities and international standard setting bodies and to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies.

On the regulatory side, all financial institutions and operations were put under review. The most important achievement was the agreement reached by the Basel Committee on Banking Supervision (BCBS) on the new bank capital and liquidity framework, which increases the resilience of the global banking system by raising the quality, quantity and international consistency of bank capital and liquidity, constrains the build-up of leverage and maturity mismatches, and introduces capital buffers above the minimum requirements that can be drawn upon in bad times. The framework includes an internationally harmonized leverage ratio to serve as a backstop to the risk-based capital measures. The new standards are expected to reduce banks' incentive to take excessive risks, lower the

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<sup>5</sup> N. Woods, *Global Governance after the Financial Crisis: A New Multilateralism or the Last Gasp of the Great Powers?*, in *Global Policy* (2010), pp. 51-52.

likelihood and severity of future crises, and enable banks to withstand – without extraordinary government support – stresses of a magnitude associated with the recent financial crisis.

Nonetheless, greater level of global economic integration, even after a shocking experience like the financial crisis, didn't produce, at least apparently, a radical change on the institutional side. As a matter of fact, states didn't transfer authority to existent or new supranational bodies. No global authority of financial markets was established. The regulatory reform didn't re-introduce a clear distinction between commercial banks and financial institutions and require a long-lasting implementation process at national level. According to the critics, the capacity of the FSB and of the Basel Committee to design sound reforms was undermined by capture and conflict of interest. Some of the rules applied at national level to prevent them could be usefully applied to prevent those risks.

#### **4. The cooperation among governments in bailout, recovery and fiscal sustainability policies**

Benefits and outcomes of the re-launched multilateralism were limited. Individual action by national governments remained fundamental to address the financial crisis. The crisis, anyhow, showed how far an individual government's decision (to bailout or not a big financial institution, just to take an example) may affect the economic and financial outcome of other countries. Since September 2008, then, governments realized the existence of relevant spill-over effects of every response to the crisis they were going to adopt.

All governments recognized the importance of cooperation to achieve the production of new fundamental global public goods, like financial stability and sustainable growth. At the same time, experiencing the relation of the required decisions to the core of national sovereignty, they didn't want to tie their hands and to commit to some form of legally binding supranational authority.

That's why governments implicitly claimed that "concerted practices" could represent the most viable way to achieve cooperation in highly sensible political matters. Informal contacts and meetings among political leaders and the G-20 summits became the preferred rooms to exchange points of view, coordinate action without assuming legal obligations, monitoring voluntary compliance. Of course, what governments claim to be cooperative behaviors at the global level could actually be mere "parallel behaviors", simply adopted to satisfy domestic interests and pressures at the national level. This kind of ambiguity could perfectly fit a double and opposite need of governments: on one side, ensuring financial markets and public opinions throughout the world that global collective action is taking place through concerted practices; on the other side, assessing that the well-being of national citizens is at the core of sovereign decisions of governments (even if «parallel» across countries)<sup>6</sup>.

The concerted practice/parallel behavior scheme can be applied to explain the governmental strategies about the bailout of banks and financial institutions. In the first half of 2008, bailout measures were adopted on a case by case basis by governments, like the United Kingdom and the U.S., as purely domestic choices. At the beginning of September 2008, it was the decision by the U.S. not to bailout Lehman Brothers that revealed the worldwide negative spillover effect of a national government option. In such a dramatic way, it became clear the existence of a neglected global public good (financial stability), that should have been protected from both market and government failures.

Since that, efforts at coordination between states started. Informal contacts and meetings among the U.S. and the European countries put the basis to share an economic policy analysis and to figure out the necessary measures to avoid the collapse of the global financial system. As the crisis was coming to a head, October 9 saw a simultaneous move of the central banks of U.S, Europe and China aimed at

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<sup>6</sup> The "concerted practice" theory of cooperation among governments is developed in G. Napolitano, *The two ways of global governance after the financial crisis: Multilateralism versus cooperation among governments*, in *International Journal of Constitutional Law*, 2011, p. 310 ss.

reducing interest rates by half a point. On October 11, the meeting of G-7 Finance Ministers, for the first time, outlined a set of joint rules and measures. Only after that, the enlarged G-20 Washington summit held in November 2008 for the first time agreed on the relevance of the «urgent and exceptional measures» taken by governments to stabilize financial markets and to support the global economy, providing liquidity, strengthening the capital of financial institutions, protecting savings and deposits, unfreezing credit markets.

Nonetheless, nor a formal agreement was stipulated, neither a decision from any supranational authority or network was delivered. On the contrary, governments adopted parallel behaviors in order to address insolvency and liquidity problems of financial institutions in each country. This way, governments succeeded in combining a cooperative approach at global level with the defense of national prerogatives.<sup>7</sup> Even if coordinated, bailouts after the failure of Lehman Brothers continued to be predominantly national, for two fundamental reasons. On the one hand, the pressure from individuals, families and businesses for protective measures are focused on electorally-accountable national representative bodies. On the other hand, states are the only entities that possessed the financial resources necessary to fund rescue packages. Moreover, they were the only ones who had the necessary authorizing powers, as well as the acknowledged legitimacy to exercise them. The success of this strategy was assessed in the G-20 London summit, where the final declaration stated that governments «have provided significant and comprehensive support» to the banking systems «to provide liquidity, recapitalize financial institutions, and address decisively the problem of impaired assets».

In efforts at coordination, the approval of specific pieces of legislation on bailout played an important role, as a signal revealing the game that each state was going to play. Before that, each country decided case by case whether to bailout or not and how. Going on this way would have greatly increased uncertainty not only in the market but also in relationships among states. In this context, each government would have acted just looking at his own interest, ignoring the spillover effects of its decisions. On the contrary, the approval in many countries of a new body of legislation created a more cooperative environment, revealing the existence of a dominant strategy to bailout and creating a more uniform playground.

The governments' response to the crisis was not limited to the financial sector. With potential supply exceeding actual demand, due to falling of private consumption, each country adopted stimulus packages to restore balance in the markets. Once again, in a deeply interconnected economy, national measures, to be effective, must be coordinated at global level, in order to cover supply both through internal consumption and export. The problem is that fiscal stimulus policies, compared to financial regulation, represent a field where achieving true supranationalism is even more difficult, as far as they produce distributional effects and largely rely on taxpayers. That's why, also in this field, cooperation among governments through "concerted practices" was the only viable mechanism through which some form of economic global governance could take place.

Cooperation among governments, once again, played a fundamental role in shaping a collective response to the crisis, while preserving the sovereign domain of national economic fiscal policies. Informal talks among governments and open discussions within the G-20 summits helped to discuss and compare different solutions, then adopted through the simultaneous approval of specific pieces of legislation at national level. Once approved, the G-20 asked to avoid unilateral holding-out and to keep recovery plans at work. Perfect synchronization of stimulus action was intended as a key factor in order to ensure full success of the concerted practice strategy.

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<sup>7</sup> As the Financial Stability Board stated, «while financial crisis management remains a domestic competence, the growing interactions between national financial systems require international cooperation by authorities» (FSF Principles for Cross-border Cooperation on Crisis Management, 2 April 2009, p. 2).

Relying on national measures approved by elected Parliaments, anyhow, may be dangerous, as far as the results of the political process could be altered by the influence of pressures groups. For example, cooperative games to sustain recovery may be vanished by crisis-era state measures that are likely to adversely affect a large number of trading partners and a sizeable amount of international trade. Notwithstanding the repeated collective commitments to further develop an open global economy and to «fight protectionism»<sup>8</sup>, governments almost trebled the amount of discrimination in place by imposing 356 discriminatory measures, with harmful measures outnumbering beneficial measures by a ratio of 4:1.<sup>9</sup>

The objective of building up a strong and balanced growth became even more difficult to achieve in a context of fiscal crisis. On the topic, the G-20 Toronto summit clearly stated that «sound fiscal finances are essential to sustain recovery, provide flexibility to respond to new shocks, ensure the capacity to meet the challenges of aging populations, and avoid leaving future generations with a legacy of deficits and debt». At the same time, the Toronto summit warned that «the path of adjustment must be carefully calibrated to sustain the recovery in private demand». As a matter of fact, there is a risk that «synchronized fiscal adjustment across several major economies could adversely impact the recovery».

## 5. The global relevance of the sovereign debt crisis in Europe

As a matter of fact, the financial crisis of 2008 was followed by the crisis of sovereign debt. To a certain extent, the former had even paved the way to the latter, as the unbalance of public finances, combined with low growth rates, overloaded public debt rates. Thus, the risk of a default, that formerly lied with undertakings, suddenly concerned also the States. The issues of liquidity and solvency were particularly severe in the Euro zone. One year and a half after the downturn of the economic crisis, then, Europe was the first asked to face with the problem of “saving the saviors”.

The emersion of the sovereign debt crisis in the Eurozone became immediately extremely relevant for all the global community. Till that time, the European Union played a limited role in global economic governance arena<sup>10</sup>. Suddenly, Europe conquered the center of the stage. And its proper management of the sovereign debt crisis became matter of concern for all the world. Member States could not be let alone to face it. The president of the United States and the G-20 strongly pushed European leaders to find a political solution and the legal devices necessary to apply it.

The problem was that the European legal order did not envisage any tool for easing the public debt of a member State<sup>11</sup>. This is why the outbreak of the Greek crisis required the creation of new institutional mechanisms, in order to prevent the (eventual) sovereign default from having negative domino effects on the Euro and on the public finances of other member States, no matter if they were virtuous. After subsidizing Greece through the coordination of several bilateral agreements, the

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<sup>8</sup> Since the first Washington summit the G-20 member states reaffirmed the importance of an open global economy and assumed the commitments to refrain from raising barriers to investment or to trade in goods and services. From this perspective, in the Pittsburgh summit, governments declared their intention to minimize «any negative impact on trade and investment» of their «domestic policy actions, including fiscal policy and action to support the financial sector»; reassessed the importance of an «open global economy»; vigorously stated their commitment to «fight protectionism».

<sup>9</sup> Global Trade Alert, *Unequal Compliance: The 6<sup>th</sup> GTA Report*, Centre for Economic Policy Research, June 2010.

<sup>10</sup> A. Hervé, *The Participation of the European Union in Global Economic Governance Fora*, in *European Law Journal*, 2012, p. 143 ss.

<sup>11</sup> The no-rescue clause embedded in the Treaty suggested exactly the contrary. J.H.H. Weiler, highlights that certain choices made throughout European integration can be harmful and betray the view of Jean Monnet, who wanted to unify European citizens, rather than States (J.H.H. Weiler, «*Nous coalisons des Etats, nous n'unissons pas des hommes*», in *La sostenibilità della democrazia nel XXI secolo*, M. Cartabia e A. Simoncini (Eds.), Bologna, il Mulino, 2009, 51 onwards).

European institutions and the member States decided to address these issues at European level and negotiated the creation of a specific safety nets.

At first the Member States agreed on the *European Financial Stabilisation Mechanism (Efsm) Regulation*<sup>12</sup>, adopted under Art. 122, par. 2, Tfeu. Pursuant to Art. 122, where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council may grant financial assistance. However, the triggering event shall not depend on a failure to comply with EU law, but it should rather derive from a serious deterioration of international economic and financial conditions. On this basis, the Council created a small fund at the disposal of the European Commission.

Later on, financial assistance was considered worth more resources. In fact, the member States committed to allot up to 440 billion Euro to a special purpose vehicle. Moreover, they decided to issue special bonds guaranteed by the member States themselves, whose participation in the fund would be proportionate to their contribution to the capital of the European Central Bank. The special purpose vehicle was set up on 7 June 2010, under the name of European financial stability facility (hereafter "Efsf" or "Fund"). It was a limited company under the laws of Luxembourg and its sole shareholder was the Grand Duchy of Luxembourg. Pursuant to its by-laws, the Efsf then opened its capital to the sixteen members of the Euro Area (it was the so-called *Efsf Framework Agreement*). The (pretty complex) tools described above were used to grant financial assistance to Ireland and Portugal and the special purpose vehicle also intervened for granting the second rescue package to Greece.

Note that the Efsf raised moral hazard concerns, as its intervention eased the burden of non-virtuous behaviors on both financial operators and member States<sup>13</sup>. This is why it was agreed that the Fund would last for only three years. However, the Efsf was clearly too weak to ensure financial stability, especially when the "safety net" was faced to the speculative attacks against sovereign debts. On the one hand, the fund was weak because of its temporary nature; on the other hand, its resources were still scarce. In this respect, it is worth recalling that the Efsf was also financed through bonds guaranteed by the member States. Hence, the downgrade of their ratings inevitably affected the value of their guarantees, which, in turn, entailed a further reduction of the resources at the disposal of the Efsf.

## **6. The establishment of Esm as an insurance contract among governments**

The legal framework changes radically with the establishment of the *European Stabilization Mechanism* (hereafter "Esm" or "Mechanism"). To that purpose, the Heads of State and Government modified Art. 136, by adding that "the Member States whose currency is the Euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the Euro area as a whole". In order to prevent any misuse of collective support, it is also stated that "the granting of any required financial assistance under the mechanism will be made subject to strict conditionality". In order to speed up the reform, the amendment was adopted under the simplified procedure, pursuant to Art. 48, par. 6, Teu.

The content of the Esm Agreement aimed at reconciling several interests. On the one hand, the new framework provided for stronger bases for financial support. In fact, instead of being based on the sole "emergency issue", the Mechanism leans on a stable institutional frame. Besides, the new treaty has flattened some of the main objections raised against financial support in the aftermath of the Greek sovereign debt crisis. In fact, it was contended that the Council Regulation on the European Mechanism for Financial Stabilization conflicted with Art. 125 Tfeu, which states that "the Union

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<sup>12</sup> Regulation no. 407/2010 of the Council of 11 May 2010.

<sup>13</sup> In this regard, European Central Bank, *Reinforcing economic governance in the Euro area*, 10 June 2010, 11 onwards, outlines the need to set a frame in order to minimize moral hazard.

shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State". Thus, it was argued that European intervention implied a liability, incompatible with the wording of the Tfeu. Second, the financial solidarity principle laid down by Art. 122, par. 2, Tfeu, requires that the triggering financial emergency depend on causes beyond the control of the member State concerned. However, it was questionable whether the sovereign debt crisis, although deepened by international financial crisis, was really beyond control by member States<sup>14</sup>. In view of these objections, the special provision is certainly welcome, as it explicitly sets aside the general "no-bailout principle" and it provides for a legal basis more robust than art. 122 Tfeu<sup>15</sup>. However, this implied to set aside the solidarity principles and the idea of the natural expansion of the scope of European implicit powers.

Moreover, the Esm is tightly linked to the Fiscal Compact Treaty. In fact, in order to prevent moral hazard, the Esm will grant financial support only provided that: (i) the requiring member State has sought to avoid the crisis by adopting the virtuous behaviors imposed by the Treaty; (ii) the requiring member State has complied with the conditions laid down by the Commission. In sum, the Mechanism will address the issues of solvency and liquidity only after the failure of all the other means. In this regard, the possibility to be granted the Esm funds could be a powerful incentive for ratifying the Fiscal Compact Treaty, which could also be the foreword for issuing European bonds.

The establishment of the European Stability Mechanism represents a turning point in European integration process. Its permanent nature transforms the Union into a community of risks, not only of benefits. As a collective insurance device against future damages that could affect a country or a people, it assumes an intimate constitutional nature. The legal status and some fundamental rules of the Esm, unfortunately, seem unable to meet the challenges raised by such an ambitious program. Transparency and accountability needs are not satisfied. And the day by day effectiveness of the Mechanism could be seriously undermined by ambiguities and perhaps mistakes in the institutional design.

Firstly, the Treaty defines the Esm an "international financial institution". Such a definition doesn't fit its authentic nature. On one side, it's not truly international. Even if established by a specific Treaty, its birth is covered by an amendment to the Treaty on the functioning of the European Union. Its dimension is European and its tasks are complementary to the European economic governance. On the other side, the Mechanism is not merely a financial institution, like a commercial bank. Its subscribers are Member States of the Union. The governance is in the hands of ministries of finances. Its purpose is to give aid to Member States, not to earn money or raise revenues. The definition as an international financial institution is not only misleading. It also produces undue legal effects, creating an obstacle to the proper application of general rules on transparency and accountability referred to E.U. public institutions.

Secondly, procedures to grant financial assistance are ill conceived. On one side, they are too much complicated and long lasting. On the other side, they depend on the request advanced by a needing Member State. But if it doesn't issue the request – for internal political reasons – the financial stability of all the Eurozone could be threatened. That's why it could be extremely useful to introduce a third party kick off. The power to start the procedure should be conferred also to a qualified number of other Member States, or to the European Systemic Risk Board.

Thirdly, too much discretion is given to the Board of Governors. The Board has been vested with the power to grant support to a member State. In order to foster the efficiency of the financial

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<sup>14</sup> Bailouts are «in breach of substantive rules of the Monetary Union» according to M. Ruffert, *The European Debt Crisis and European Union Law*, in *Common Market Law Review*, 2011, p. 1777 ss., in part. p. 1785 ss.

<sup>15</sup> B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, in *European Policy Studies*, 2011, n. 6, in [www.sieps.se](http://www.sieps.se), p. 6.

assistance, it can also allow Member States to allot the subsidy to the re-capitalisation of a financial institution. Finally, it can decide to purchase bonds of a Member State both on the primary and the secondary market. While adopting such measures, the Board of Governors seems to enjoy a broad discretion, as suggested by the fact that it “*may decide*” to adopt the measures mentioned above. Indeed, the Treaty does not set any general goal or primary interest for exercising such powers. Although the appraisal by the Commission shall be taken into account, it is not binding on the Board. The problem is that the Board is not even compelled to give reasons. It seems, however, that a motivation would be utterly necessary, especially whenever the Board sets aside the advice of a European institution. It is highly recommendable also the introduction of the dissenting opinion: representatives of Member States exercising *de facto* a veto power should be obliged to give reasons, from the perspective of the European interest and not only of the national one.

Fourthly, the rules on dispute resolution violate the principle of “*nemo iudex in causa propria*”. In fact, the Treaty entrusts the Board of Governors itself with the settlement of disputes arising on the interpretation and application of the Ems Treaty between the Ems and an Ems member State. Thus, dispute resolution is mainly “political”, as it belongs to the same body that leads the Ems and represents national Governments, with the non negligible effect of rendering the Board of Governors a sort of *iudex in causa propria*. In this regard, the set up of an independent Board of Appeal – like those of some European agencies – would be more appropriate.

Fifthly, the Treaty does not envisage any of the accountability tools that are usually made available towards European agencies. There are no consultation procedures, neither with general stakeholders, nor with “qualified” parties, such as institutional investors and creditors. There are no transparency duties, nor is it possible to have access to the files. Moreover, the Board of Governors does not report to the European Parliament and there are no procedures to assess Esm's efficiency. Only the financial administration of Esm is subject to a specific set of rules.

## **7. Solving the puzzle of global governance: the contribution of global public law**

The establishment of a stronger economic global governance is a complex and long-lasting process. Different solutions may converge to that purpose. Some of them represent a re-launch of multilateralism. Others are based on new forms of cooperation among governments. Each of them retains its own sovereign powers, but practices are concerted and outputs collectively rated. Finally, the emergence of the sovereign debt crisis gave birth to an original form of collective insurance among governments. The actual image of global governance is that of an incomplete puzzle. The pieces are different one from the others. Some are properly intertwined, others not. And there are still some missing.

The fundamental problem is that the proper working of each pillar of the new economic global governance is affected by legitimacy and efficiency deficits. The capacity of networks and fora to promote an effective regulatory reform is limited by conflict of interest and capture. Cooperation among governments is undermined by opportunistic behavior of political leaders, who sometimes appear to be too much sensible to short-term evaluations. Ambitious mechanisms of collective insurance between Member States of the European Union may fail, because operational and accountability devices are ill-designed.

Global and European Administrative Law devices, such as information, transparency, participation, judicial review, can play a very important role in increasing the legitimacy and the accountability of crucial players of the regulatory reform process and of the financial assistance mechanism<sup>16</sup>. At the

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<sup>16</sup> R. Stewart, *U.S. Administrative Law: A Model for Global administrative Law, Law and Contemporary Problems*, 2005, p. 63 ff.; S. Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 *Journal of*

same time, the constitutional relevance of the transformations arising from the financial and the sovereign debt crisis requires new conceptions of supranational constitutionalism, and an enhanced attention to democracy and check and balance issues. A sounder cutting of the existing pieces and a clever discovery of the missing ones could contribute to solve the puzzle of global governance.

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*International Law and Politics*, 2005, p. 663 et seq.; B. Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 1 *ILJ Working Paper* (2009).

# Global Financial Regulation The Challenges Ahead and GAL

Maurizia De Bellis\*

## 1. Regulation of financial markets and GAL

After the German bank *Bankhaus Herstatt* collapsed, in 1974, the Basel Committee on Banking Supervision (BCBS) was established, as a new tool to foster transnational cooperation among the G10 central banks<sup>1</sup>. At that time, no global standard setting activity was taking place: the BCBS started drafting the first standards on banking at the end of the decade, soon followed by its counterpart for securities, the International Organization for Securities Commissioners (IOSCO), set up in 1983. During the 80s, the two transnational regulatory networks were rather obscure: one of the BCBS first President, Huib Muller, declared that «We don't like publicity. We prefer, I might say, our hidden secret world of the supervisory continent»<sup>2</sup>.

In the late 90s, the phenomenon of global financial standards gained momentum. In the aftermath of the Asian financial crisis, the G7 started supporting the standard setting process within the BCBS, the IOSCO and the private standard setter for accounting, the then named International Accounting Standards Committee (IASC; in 2001, it has been reorganized and renamed International Accounting Standard Board (IASB))<sup>3</sup>. Moreover, the International Monetary Fund (IMF) and the World Bank were involved in the standards dissemination process.

After the global financial crisis that started in 2008, the activity of these standard setting bodies was placed under wider scrutiny. Moreover, the most significant new actors of financial governance, the G20 and the Financial Stability Board (FSB) attracted the attention of many observers<sup>4</sup>.

Global financial standards and rules have been studied from a number of different research perspectives. The Global Administrative Law (GAL) research approach is helpful in framing this phenomenon for a number of reasons: because of the subjects intervening; because of the object of regulation; because of the procedures being used to set the rules and because of the way through which standards are being implemented within national legal orders<sup>5</sup>.

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\* Tenured Assistant Professor of Administrative Law, University of Rome "Tor Vergata".

<sup>1</sup> Ethan B. Kapstein, *Governing the Global Economy. International Finance and the State*, 1994.

<sup>2</sup> See H.J. Muller, *Address to the 5<sup>th</sup> International Conference of Banking Supervisors*, 16 May 1988, in T. Porter, *States, Markets and Regimes in Global Finance*, New York, St. Martin's Press, 1993, at 66.

<sup>3</sup> See G7, *Economic Communiqué: Making a Success of Globalization for the Benefit of All*, 28 June 1996, in <http://www.g7.utoronto.ca/summit/1996lyon/communique.html>.

<sup>4</sup> See, *ex multis*, Douglas W. Arner and Michael W. Taylor, "The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?", 2009, AIIFL Working Paper No. 6, available at <http://ssrn.com/abstract=1427084>; Eric J. Pan, "Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks", in *Chicago Journal Of International Law*, 2010, Vol. 11, p. 244 ss.; Giulio Napolitano, "The two ways of global governance after the financial crisis: Multilateralism versus cooperation among governments", in *International Journal of Constitutional Law*, 2011, Vol. 9, p. 310 ss.

<sup>5</sup> Among the first sets of papers about global administrative law there are three journal symposia: Benedict Kingsbury et al. (eds.), "The Emergence of Global Administrative Law", in *Law and Contemporary Problems*, 2005, Vol. 68, p. 1-385; Benedict Kingsbury and Nico Krisch (eds.), "Global Governance and Global Administrative Law in the International Legal Order", in *European Journal of International Law*, 2006, Vol. 17, p. 1-278; and the "Global Administrative Law symposium", in *New York University Journal of International Law and Politics*, 2005, Vol. 37. Subsequent publications include sets of papers from conferences convened by the New York University School of Law Institute for International Law and Justice's (IILJ) and partner institutions: a substantial series of working papers and extensive bibliographies as well as links to papers from other scholars around the world can be found on the website <[www.iilj.org/GAL](http://www.iilj.org/GAL)> and

First, regulators intervening in global financial governance are traceable to all the main types of global administrations identified by GAL scholars<sup>6</sup>: transnational networks of governmental officials (BCBS and IOSCO); administration by formal international organizations (IMF and the World Bank); hybrid intergovernmental/private administration (the FSB, bringing together not only the intergovernmental international organizations and the transgovernmental regulatory networks mentioned above, but also domestic regulators) and administration by private institutions with regulatory functions (the IASB, but also the International Federation of Accountants' (IFAC), setting auditing standards).

Second, the very content of global financial rules is of an administrative nature: as national regulatory authorities cannot cope with problems – such as financial stability – which have a global impact and scope, they establish regulation within transnational networks<sup>7</sup>.

A third reason for which the GAL theoretical framework can be successful in identifying the features of global financial regulation is because of the way through which global rules are, first, drafted and, later on, implemented within national legal orders. On the one hand, both transnational and private regulators are increasingly setting their standards following procedures resembling closely to principles well known within domestic administrative law<sup>8</sup>. On the other hand, the implementation of global standard departs from the tradition international law model. There is no ratification of international treaties. Global standard are set as purely voluntary soft law, intended to be implemented by the regulatory authorities taking part in the network, because of its reputation and expertise. Market actors are expected to use private standards, such as accounting ones, voluntarily. In the last decade, however, a number of different mechanisms have been used to improve the implementation of global standards, which show a different model of interaction between global rules and national law.

Analysing global financial regulation through GAL lenses, the paper aims at tackling four main research questions.

A first question looks at *who* sets the rules: what is the balance of powers within the financial architecture that is emerging after the crisis? Is there a centre or a global institution prevailing over the others?

Second, *what* global rules provide for must be examined. Under this regard, the core problem is the one of the efficiency of regulation: are reforms that are being carried on well suited to be successful?

The success of global regulation does not depend only on the features of the standard setters and on the substantial provisions which are being set forth in the rules, but also on *how* global rules are being set and implemented. Moreover, the standard setting procedure and the implementation process give insights for more general problems, currently at the core of studies on the globalization of law.

On the one hand, global regulators are increasingly setting standards following due process requirements. The use of procedural tools is often presented as a tool to cope with the lack of accountability of global regulators. But are these instruments sufficient for this purpose?

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<<http://www.irpa.eu/index.asp?idA=161>>. See also Sabino Cassese et al. (eds.), *Global Administrative Law: Cases, Materials, Issues*, second edition 2008, available at [www.iilj.org/GAL/GALCasebook.asp](http://www.iilj.org/GAL/GALCasebook.asp).

<sup>6</sup> See Benedict Kingsbury et al., “The Emergence of Global Administrative Law”, in *Law & Contemporary Problems*, 2005, Vol. 68, p. 15 ss., at 20-23.

<sup>7</sup> Richard Stewart, “Administrative Law in 21st century”, in *New York Law Review*, 2003, Vol. 78, p. 437 ss.

<sup>8</sup> See Sabino Cassese, “A Global Due Process of Law”, in Anthony Gordon et. al. (eds.), *Values in Global Administrative Law*, Oxford, Hart Publishing, 2011, p. 17 ss., and Giacinto della Cananea, “Beyond the State: the Europeanization and Globalization of Procedural Administrative Law”, in *European Public Law*, 2003, p. 563 ss; Armin von Bogdandy, “Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization”, in Stefan Griller (ed.), *International Economic Governance and Non-Economic Concerns – New Challenges for the International Legal Order*, Wien-New York, Springer, 2003, p. 128 ss.

On the other hand, the implementation process of global standards departs from the traditional model of ratification and shows the increasing links between global regulation and national ones. What do the very diverse ways through which global financial standards are being implemented tell us about the globalization of domestic law?

All of these questions have been the object of an in-depth analysis elsewhere<sup>9</sup>. The purpose of this paper is the one of pointing out some of the most pressing challenges ahead and of showing the potential of GAL in helping understanding existing patterns and in framing solutions.

## 2. The global financial architecture and the quest for a centre

Transnational regulatory networks (TRNs), such as the BCBS and the IOSCO, have long been considered as the key feature of the new financial architecture<sup>10</sup>. Others stressed the role of the “infrastructure” of global financial regulation, pointing out that the substance of global financial regulation is often shaped by private entities<sup>11</sup>.

After the global financial crisis, two new actors established themselves as essential and received widespread attention: the G20 and the FSB. The roots of both institutions date back to the late 90s, in the aftermath of the Asian financial crisis<sup>12</sup>.

Yet, the G20 - bringing together emerging countries and G10 ones<sup>13</sup> - until 2008 met only as a group of financial ministers. The first G20 political summit took place in Washington, in November 2008. During the Pittsburgh summit, the group of twenty presented itself as «the premier forum for international economic cooperation»<sup>14</sup>.

On the other hand, the originally named *Financial Stability Forum* (FSF) was reorganized as *Financial Stability Board* (FSB) after the G20 London Summit in April 2009<sup>15</sup>. Its membership was broadened to all G20 countries regulatory authorities and its mandate and powers were clearly identified within the FSB Charter, previously lacking<sup>16</sup>. In the FSB participate – together with the international organizations (the IMF, the World Bank, the OECD and the Financial Action Task Force on Money Laundering (FATF)), transnational networks for banking, securities and insurance (BCBS, IOSCO and IAIS, respectively) and the IASB – national administrative authorities (such as central banks, supervisory authorities and treasury departments) from the G20 countries.

The FSB seems to play three key functions in global financial governance: it coordinates the activity of the standard setting bodies; it identifies priorities and actions to be taken under this regard

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<sup>9</sup> I analyzed the point in further details elsewhere: see Maurizia De Bellis, *La regolazione dei mercati finanziari*, Milano, Giuffrè, 2012.

<sup>10</sup> Anne-Marie Slaughter, “The Real New World Order”, in *Foreign Affairs*, 1997, Vol. 76, n. 5, p. 184 ss.

<sup>11</sup> Among the first ones, Timothy Sinclair, “The Infrastructure of Global Governance: Quasi-Regulatory Mechanisms and the New Global Finance”, in *Global Governance*, 2001, vol. 7, p. 441 ss. For a recent analysis, Tim Buthe e Walter Mattli, *The New Global Rulers. The Privatization of Regulation in the World Economy*, Princeton e Oxford, Princeton University Press, 2011.

<sup>12</sup> See, *ex multis*, B. Eichengreen, *Toward a New Financial Architecture. A Practical Post-Asia Agenda*, Washington D. C.: Institute for International Economics, 1999.

<sup>13</sup> Emerging countries such as Argentina, Brazil, China, India, Indonesia, Korea, Mexico, Russia, Saudi Arabia, South Africa and Turkey.

<sup>14</sup> G20, Leaders’ Statement, Pittsburgh, 23-4 Septemebr 2009, available at [http://www.g20.org/Documents/pittsburgh\\_summit\\_leaders\\_statement\\_250909.pdf](http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf), para. 19.

<sup>15</sup> See Fsb, *Press Release, Financial Stability Forum re-established as the Financial Stability Board*, 2 April 2009, available at [http://www.financialstabilityboard.org/press/pr\\_090402b.pdf](http://www.financialstabilityboard.org/press/pr_090402b.pdf).

<sup>16</sup> Si v. FSB, *Financial Stability Board Charter*, September 2009, available at [http://www.financialstabilityboard.org/publications/r\\_090925d.pdf](http://www.financialstabilityboard.org/publications/r_090925d.pdf).

(which it has been doing not only preparing periodic reports, but also publishing recommendations and guidelines); it monitors the implementation of the standards through peer reviews<sup>17</sup>.

According to some commentators, in the last years the G20 took the leading role in global financial governance, setting the agenda for financial reforms, at the expenses of technocratic bodies such as the BCBS and the IOSCO<sup>18</sup>. This phenomenon has been presented a kind of revenge of politics over technique. But is it so?

The balance of powers among the different actors intervening within global financial governance appears less straightforward, for a number of reasons.

First, it must be born in mind that the standard setting process continues to take place within the TRNs. A case in point is the drafting of Basel III (Section III): even though the G20 and the FSB gave directions for reform, the details were established within the Basel Committee, and these details were at the heart of the compromises which were made and are crucial for the efficiency of regulation.

Second, the interaction between the FSB and the G20 is a crucial point. The FSB documents and the following G20 communiqués suggest that the Board is often playing the central role, recommending the G20 not only which are the priority areas of intervention, but the very measures to be undertaken. The G20 priorities in Washington and London summits followed closely the recommendations set forth in the FSF report of April 2008<sup>19</sup>. After the Pittsburgh summit, the G20 impact in setting the agenda of financial reform became stronger<sup>20</sup>. Yet, the FSB still plays a crucial preliminary role, so that the G20 often simply endorses its activity<sup>21</sup>. Moreover, the FSB itself has often explicitly called for G20's support to its standard setting activity, a support conceived as vital for the success of reforms, *vis-à-vis* the increasing pressure of lobbies<sup>22</sup>.

These two elements – the standard setters' central role in the drafting of the standards and the FSB's leading function – show that technocratic bodies are more coordinated, do not operate in a vacuum, but their role is still crucial.

The interaction between technique and politics in global financial regulation is all but settled, and the balance between the two is one of the main challenges ahead.

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<sup>17</sup> More specifically, according to the Charter, the main tasks included in the FSB mandate are: a) assessing the vulnerabilities affecting the global financial system and identifying related actions needed to address them, and their outcomes; (b) promoting coordination and information exchange among authorities responsible for financial stability; (c) monitoring market developments; (d) monitoring best practice in meeting regulatory standards; (e) undertaking joint strategic reviews of the policy development work of the international standard setting bodies to ensure their work is timely, coordinated, focused on priorities and addressing gaps (FSB, *Charter*, art. 2, para. 1).

<sup>18</sup> David Zaring, "International Institutional Performance in Time of Crisis", in *Chicago Journal of International Law*, 2010, Vol. 10, p. 475 ss..

<sup>19</sup> See Fsf, *Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience*, April 2008, available at [http://www.financialstabilityboard.org/publications/r\\_0804.pdf](http://www.financialstabilityboard.org/publications/r_0804.pdf). For an analysis of the correspondance between the FSF recommendations and the G20 ones, see J. Kirton, *Introduction: Prospects for the G20 Leaders Summit on Financial Markets and the World Economy*, in *The G20 Leaders Summit on Financial Markets and the World Economy*, edited by J. Kirton, available at <http://www.g8.utoronto.ca/g20/g20leadersbook/index.html>, at 4.

<sup>20</sup> See N. Woods, *The G20 Leaders and Global Governance*, ottobre 2010, available at <http://www.globoeconomicgovernance.org/wp-content/uploads/Woods-2010-The-G20-and-Global-Governance.doc.pdf>, p. 3.

<sup>21</sup> See G20, *Leaders' Statement The Pittsburgh Summit*, at 8-9: «Excessive compensation in the financial sector has both reflected and encouraged excessive risk taking. Reforming compensation policies and practices is an essential part of our effort to increase financial stability. We fully endorse the implementation standards of the FSB aimed at aligning compensation with long-term value creation, not excessive risk-taking».

<sup>22</sup> Si v. FSF, *Improving Financial Regulation. Report by the Financial Stability Board to the G20 Leaders*, settembre 2009, parr. 3, 11 e 35.

### 3. Global rules and the efficiency of regulation

Global standards cover many areas of financial regulation. The Basel Committee sets principles and standards for effective banking supervision, in areas such as capital requirements and counterparty credit risks. The IOSCO establishes standards for securities regulation, covering aspects such as credit rating agencies (CRAs) conduct and hedge funds. Two private organizations, the IASB and the IFAC, set standards for accounting and auditing, respectively.

The spread of global financial standard has long been considered a successful trend. Yet, the fact that many global financial standards existed when the crisis unfolded and that they did not prevent it made some claim that there could be an end of global financial standards and codes<sup>23</sup>. This does not appear to be the case. Three trends can be observed, which point to a different direction.

First, it must be recalled that at the end of the 90s an attempt to codify global financial standards was started, when the FSF started compiling a “Compendium of Standards”, bringing together all the financial and economic standards, internationally recognized as «important for sound, stable and well functioning financial systems», established by the members of the FSF itself<sup>24</sup>. Later on, the Compendium has been endorsed by the FSF successor, the FSB, which updated it, recently including more than sixty new standards elaborated between 2009 and 2012<sup>25</sup>.

The second trend is the one of the revision of existing – but insufficient – standards. Two cases in point are the revision of the existing standard for capital requirements (Basel III, replacing Basel II), intended to strengthen banks’ resilience<sup>26</sup>, and the revision of the IOSCO’s Code of conduct fundamentals for credit rating agencies, aiming at taking into account CRAs’ failure in the area of derivatives<sup>27</sup>.

Third, new global rules are being set in areas where they were lacking. As mentioned above, after the global financial crisis the FSB moved from the mere role of coordinator of other standard setters’ rules played by its predecessor, the FSF, to establishing itself guidelines and recommendations. Examples include the Principles for Sound Compensation Practices (PSCP)<sup>28</sup>, followed by more specific Implementation Standards in the same area<sup>29</sup>; and the sets of recommendations about over the counter (OTC) derivatives<sup>30</sup> and systemically significant financial institutions (SIFI)<sup>31</sup>.

Hence, there does not seem to be an end to global standards and codes; on the contrary, old ones are being updated and confirmed (the Compendium standards), others are being deeply revised (Basel III and IOSCO CRA Code) and new rules are being set. But are revised ruled and new ones enough to pursue global financial stability?

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<sup>23</sup> Layna Mosley, “An End to Global Standards and Codes?”, in *Global Governance*, 2009, Vol. 15, p. 1 ss.

<sup>24</sup> I analysed the structure of the FSF Compendium elsewhere: see Maurizia De Bellis, “Global Standards for Domestic Financial Regulations: Concourse, Competition and Mutual Reinforcement between Different Types of Global Administration,” in *Global Jurist Advances*, Vol. 6, Iss. 3, available at <http://www.bepress.com/gj/advances/vol6/iss3/art6>.

<sup>25</sup> See [http://www.financialstabilityboard.org/list/fsb\\_cos\\_subject\\_area/index.htm](http://www.financialstabilityboard.org/list/fsb_cos_subject_area/index.htm) (last visited 21 April 2012).

<sup>26</sup> See BCBS, *Basel III: International framework for liquidity risk measurement, standards and monitoring*, 16 December 2010, available at <http://www.bis.org/publ/bcbs188.htm>. A revised version has been published in June 2011: see BCBS, *Basel III: International framework for liquidity risk measurement, standards and monitoring. Revised version*, 1 June 2011, available at <http://www.bis.org/publ/bcbs189.htm>.

<sup>27</sup> IOSCO, *The Role of Credit Rating Agencies in Structured Finance Markets - Final Report*, May 2008, Annex A, available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD270.pdf>.

<sup>28</sup> FSB, *Principles for Sound Compensation Practices*, 2 April 2009.

<sup>29</sup> *Si v. FSB Principles for Sound Compensation Practices. Implementation Standards*, 25 September 2009.

<sup>30</sup> FSB, *Implementing OTC Derivatives Market Reforms*, 25 October 2010.

<sup>31</sup> FSB, *Reducing the moral hazard posed by systemically important financial institutions*, 20 October 2010.

On the one hand, there are some positive developments. For example, according to commentators, Basel III will increase steadily banks' capital requirements, contributing to their stability<sup>32</sup>. Yet, it is uncertain whether this step forward is far enough: the two controversial risk-weighting methods on which Basel II was based - the 'standardized' approach (according to which risk weights - and, consequently, the capital requirements that a bank has to respect - depend on the issuer's rating), and the 'internal ratings-based' approach (IRB, according to which qualifying banks can use their own estimates to quantify their exposure) - were not changed<sup>33</sup>. In more general terms, the negative impact of the new capital rules on growth, especially in the context of the European sovereign debt crisis, is highly problematic<sup>34</sup>.

Moreover, the effectiveness of some of the new rules is questionable. In the areas of derivatives and SIFI, the Board's recommendation do not suggest *ex ante* harmonization; on the contrary, they aim at fostering convergence when national disciplines have already been adopted. In two areas generally considered to be crucial for the success of financial reform - as it is well known, derivatives were a key factor in the unfolding of the crisis of 2008, while the consequences coming from the collapse of Lehmann Brothers raised the attention on the problem of the so-called "too big to fail" institutions - , global rules leave more space to national regulatory autonomy.

Moreover, the very regulatory approach incorporated in the new rules is less strong than what at first expected. For example, the FSB preliminary documents about SIFI took into account the use of structural measures - aimed at separating the most risky activity from the others<sup>35</sup> -, while the final document abandons this approach.

Reforms in the area of capital requirements and CRAs have been matched by weaker rules in the equally, if not more, relevant areas of derivatives and SIFIs. This imbalance can stem from the timing of reform, as initiatives approved shortly after the spread of the crisis were less affected by the pressure of financial lobbies<sup>36</sup>. It remains to be seen how the unfolding of the EU sovereign debt crisis will influence the process of reform: if it will make gaps in current regulation more evident, thus urging reforms, or if concerns for growth will freeze such process.

#### **4. The procedure: the limits and conditions for global due process to act as a means of accountability**

Concerns about the lack of accountability of global financial regulators are not new. Critiques have focused on the secrecy of these institutions and their technocratic nature for a long time<sup>37</sup>. In the last

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<sup>32</sup> See Adrian Blundell-Wignall and Paul Atkinson, *Thinking Beyond Basel III: Necessary Solutions for Capital and Liquidity*, May 2010, in *OECD Journal: Financial Market Trends*, 2010, disponibile anche all'indirizzo [www.oecd.org/dataoecd/42/58/45314422.pdf](http://www.oecd.org/dataoecd/42/58/45314422.pdf), at 13-4.

<sup>33</sup> See Alan Blinder, *Two cheers for the New Bank Capital Standards*, in *Wall Street Journal*, 30 September 2010; Adrian Blundell-Wignall and Paul Atkinson, *Thinking Beyond Basel III*, p. 16-7 e 21.

<sup>34</sup> Si v. Douglas J. Elliott, *Basel III, the Banks and the Economy*, 23 July 2010, The Brookings Institution paper, available at [http://www.brookings.edu/papers/2010/0726\\_basel\\_elliott.aspx](http://www.brookings.edu/papers/2010/0726_basel_elliott.aspx), p. 1.

<sup>35</sup> See FSB, *Progress on the global regulatory reform agenda. Letter to G20 Ministers and Governors*, 19 April 2010, at 2, «Where systemically important institutions are not effectively resolvable, it will strengthen the case for measures such as raising capital surcharges or other requirements to a point where the likelihood and impact of default is reduced to a very low level, *or restrictions on activities/size/structure that make them resolvable*», and FSB, *Progress and issues on the global regulatory reform agenda. Letter to G20 Leaders*, 24 June 2010, p. 2, «supplementary prudential requirements such as capital surcharges *and/or structural constraints* that address the greater risks that systemically important firms pose to the financial system» (italics added).

<sup>36</sup> Richard Portes, "Wasting a Crisis", in *Eurointelligence*, 8 October 2009.

<sup>37</sup> Martin Shapiro, "Deliberative", 'Independent' Technocracy v. Democratic Politics: Will the Globe Echo the EU?", in *Law & Contemporary Problems*, 2005, Vol. 68, n. 3-4, p. 342 ss. and Sol Picciotto, "Networks in International Economic

decade, global regulators significantly improved the transparency of their standard setting activity. For example, according to Barr and Miller, the growing transparency and due process followed by the Basel Committee were effective means in strengthening the network's accountability<sup>38</sup>. Yet, due process requirements vary steadily across different regulatory regimes, and so does their efficacy in enhancing the different regulators' accountability.

The approval of the second Basel Committee's accord on capital requirements (Basel II) marked a move from the previous secrecy of the Committee. It involved the publication of three consultative draft, each followed by a period in which interested parties could send their comments. Participation in the process was massive, with more than two hundred comment letters for each consultative document<sup>39</sup>. Yet, BCBS's due process for the approval of capital rules encountered two limits: first, stakeholders involved were mostly banks and financial institutions, with little or no input from consumers and academics<sup>40</sup>; second, participation was granted by the Committee on a case by case basis, with no general rule limiting its discretion for the future being set forth<sup>41</sup>. Under such conditions, it might have led to the global regulator's capture by the banks<sup>42</sup>.

When Basel III was approved, only one exposure draft for public comments was published<sup>43</sup>, while the final document was released after one year (a much shorter period than the five years necessary to finalize Basel II). Instead of three notice and comment rounds, only one was used by the Committee. Participation was widespread, with more than two-hundred comment letters being sent to the Committee<sup>44</sup>. Participants were again mostly banks and financial institutions and the scope of participation was decided by the BCBS on a case by case basis.

IASB's due process, on the contrary, is more predictable: the private organization, which started following some due process requirements already back in the 90s, published a *Due Process Handbook* in 2006, identifying the different standard setting phases and recognizing the principles of transparency, accessibility, extensive consultation, responsiveness and accountability. Hence, IASB's due process includes not only participation and transparency, but also the duty to give reasons: it must explain why a specific standard is being adopted and the way in which it took into account the comments received<sup>45</sup>. Moreover, a Monitoring Body (MB) – established after the global crisis, and bringing together representatives of the European Commission, the American Securities and Exchange Commission (SEC), and the Japan Financial Services Agency, together with two representatives of the IOSCO – is responsible, *inter alia*, for verifying that the IASB follows its own due process<sup>46</sup>.

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Integration: Fragmented States and the Dilemmas of Neo-Liberalism", in *Northwestern Journal of International Law & Business*, Vol. 17, n. 2/3, 1997, p. 1014 ss.

<sup>38</sup> Michael S. Barr and Geoffrey P. Miller, "Global Administrative Law: the View from Basel", in *European Journal of International Law*, Vol. 17, n. 1, 2006, p. 15 ss.

<sup>39</sup> See <http://www.bis.org/bcbs/cacomments.htm>.

<sup>40</sup> See Michael S. Barr and Geoffrey P. Miller, "Global Administrative Law: the View from Basel", p. 24.

<sup>41</sup> See Stefano Battini, "Introduzione", in Id. (ed.), *La regolazione globale dei mercati finanziari*, Giuffrè, 2007, p. 1 ss., at 11.

<sup>42</sup> Duncan R. Wood, *Governing Global Banking*, at 150.

<sup>43</sup> See BCBS, *Consultative proposals to strengthen the resilience of the banking sector announced by the Basel Committee*, 17 December 2009, available at <http://www.bis.org/press/p091217.htm>.

<sup>44</sup> See *Comments received on the consultative documents "Strengthening the resilience of the banking sector" and "International framework for liquidity risk measurement, standards and monitoring"*, April 2010, available at <http://www.bis.org/publ/bcbs165/cacomments.htm>.

<sup>45</sup> See IFRS Foundation, *Iasb's Due Process Handbook*, last version December 2010, available at <http://www.ifrs.org/NR/rdonlyres/C3D78611-8792-441F-B426-6AF5189C83B8/0/DueProcessIASB2011.pdf>, at 39, 41, 43, 49, 98 and 112.

<sup>46</sup> See *IFRS Foundation Constitution*, available at <http://www.ifrs.org/NR/rdonlyres/0B820728-7F10-4877-8068-7B65D2A3058B/0/ConstitutionDec2010.pdf>, para. 15, lett. g and *Memorandum of Understanding between the*

The use of notice and comment used at the global level must be carefully scrutinized, in order for it to effectively lead to both stronger accountability and efficacy, and not to result in a 'regulatory capture'. Conditions for global due process to increase accountability of global regulators are several:

- a) it must be predictable, not granted on a case by case basis;
- b) it cannot identify only with participation, but it must involve also duty to give reasons;
- c) participation must be open to all the affected stakeholders;
- d) there must be an external assessment on whether the global regulator followed its due process.

Lastly, it must be pointed out that due process must be matched with other means of accountability, not only procedural but also institutional ones. Under this regard, a GAL "bottom up" approach has been suggested: i.e. a use of national administrative law tools, for example the obligation of national authorities to report to national Parliament about their activity within the transnational networks<sup>47</sup>.

## 5. The implementation process. The global/national interplay and the evolution of the globalization of law

Global and national are not two separate levels<sup>48</sup>. National authorities take part in TRNs and in the FSB, participating in the setting of global rules and implement them at the national level. The analysis of the implementation phase, in particular, provides insights for the evolution of the global/national interaction.

Standards drafted within transnational regulatory networks are later on implemented by the domestic authorities taking part in TRN. This was the general model of implementation of the Basel capital accord of 1988<sup>49</sup>. This is still the case for most IOSCO standards. Basel II was partly implemented in the US through acts of rulemaking of the competent financial authorities (even though that specific process of implementation was particularly controversial, due to the emergence of a number of internal criticism coming both from the Congress and from small and medium size banks)<sup>50</sup>.

Yet, in a number of cases the model of the implementation through acts of the national regulatory authorities has been abandoned. In the EU, Basel II was incorporated in the Capital Requirements Directive, which required the implementation of those measures from 2007<sup>51</sup>. The EU CRAs Regulation draws widely upon IOSCO Code provisions and puts in place a registration system<sup>52</sup>.

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*Monitoring Board and the IFRS Trustees*, available at [http://www.ifrs.org/NR/rdonlyres/FF78D98F-A025-4BCB-B063-4CC418237F5A/0/Monitoring\\_Board\\_Mou080110.pdf](http://www.ifrs.org/NR/rdonlyres/FF78D98F-A025-4BCB-B063-4CC418237F5A/0/Monitoring_Board_Mou080110.pdf), art. III., par. 7, iv e 9, i-iv.

<sup>47</sup> Richard Stewart, "U.S. Administrative Law: a Model for Global Administrative Law?", in *Law & Contemporary Problems*, 2005, Vol. 68, n. 3-4, p. 63 ss., at 76 and 85.

<sup>48</sup> S. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 *NYU J. Int'l L. & Pol* 663 (2005), at 680.

<sup>49</sup> *Si v. United States General Accounting Office* (US GAO), *International Banking: Implementation of Risk-based Capital Adequacy Standards*, GAO/NSIAD-91-80, available at <http://archive.gao.gov/d21t9/143022.pdf>, pp. 2 e 13.

<sup>50</sup> See also Pierre-Hughes Verdier, "U.S. Implementation of Basel II: Lessons for Informal International Law-Making", 30 June 2011, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1879391](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879391) and Richard J. Herring, "The Rocky Road to Implementation of Basel II in the United States", in *Atlantic Economic Journal*, 2007, vol. 35, p. 411 ss.

<sup>51</sup> Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions, in OJ L 177, June 30 2006, at 1 et seq.

<sup>52</sup> See Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies. For a comment, see Fabian Amtenbrink and Jakob De Haan, "Regulating Credit Ratings in the European Union: A Critical First Assessment of Regulation 1060/2009 on Credit Rating Agencies", in *Common Market Law Review*, 2009, p. 1915 ss.

Regulation EC n. 1606/2002 (so called IAS Regulation) requires all publicly traded EU companies to prepare their consolidated accounts using IASB's standards, IFRS, since 2005 (as endorsed in the EU)<sup>53</sup>.

Explanations for this trend are several. On the one hand, they might show the willingness of the EU to control the globalization of law, far beyond the control which would take place through the informal implementation by national authorities. On the other hand, this trend can also be explained on the basis of EU institutional complexity, and on the lack – until recently – of EU financial regulatory authorities. The establishment, after the crisis, of a new European financial architecture could lead to a different result. Recent data seem to go in this direction: the newly established European Banking Authority (EBA) is implementing Basel III without waiting for the CRD revision process to be completed<sup>54</sup>. The implementation of global standards through acts of the European supervisory authorities – similar to the model currently used in the US – could expand in the EU context as well.

Hence, the ongoing evolution of the ways of global financial standards implementation shows how the interaction between global, European and national regulation has found no settled balanced.

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<sup>53</sup> About the endorsement procedure, see Maurizia De Bellis, “EU and Global Private Regulatory Regimes: the Accounting and Auditing Sectors”, in Edoardo Chiti and Bernardo G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison*, Springer, 2011, p. 269 ss.

<sup>54</sup> See EBA, *Recommendation on the creation and supervisory oversight of temporary capital buffers to restore market confidence*, EBA/REC/2011/1, 8 December 2011, par. 2.



## Global Rules on Public Procurement

Hilde Caroli Casavola \*

During the last fifteen years public procurement has accounted for 5,5 trillions of US dollars – fifty times the value of the EU Gross Domestic Product. In 2008 it hovered between twelve and seventeen per cent of the GDP of the Member States of the Organization for Economic Cooperation and Development (OECD).<sup>1</sup> Such contracts are increasingly subject to rules and standards set outside a national context.

More than forty supranational regulations are established by a growing number of international organizations and agreements. A variety of institutions and bodies has regulatory power over contracts concluded by public administrations.<sup>2</sup> The World Trade Organization (WTO),<sup>3</sup> the World Bank<sup>4</sup> and the Regional Development Banks (such as the Asian Development Bank and the African Development Bank), the OECD, the UN as well as the various States bound by formal bilateral and multilateral agreements, are amongst such institutions. It has been sharply observed that « we live in an era of unprecedented diffusion of sophisticated public procurement regimes on a global scale ».<sup>5</sup>

In the view of understanding these emerging regulatory phenomena, the traditional conceptual instruments of domestic administrative law and international law increasingly appeared outdated. Several new kinds of relationship between individuals and global actors – States, administrations, international organizations and different bodies – can be better outlined (in terms of reciprocal influence, interaction, mutual impact, conflicts and more) in the Global Administrative Law perspective.<sup>6</sup>

Why do nations and international organizations adopt global rules on public procurement? Which characteristics can be found in identifying these procurement regimes? And do these regimes share common aspects with other sectors of Global Administrative Law?

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\* Associate Professor of Public Law, University of Molise.

<sup>1</sup> Ocse, *Government at a Glance 2011*, August 2011, pp. 148-9. The value of 17% includes 5% average value of procurement of State-owned or controlled firms.

<sup>2</sup> The literature on public procurement has mainly highlighted the phenomenon's characteristics according to the specific legal framework (trade, aid development, foreign investments and anti-corruption cooperation; see, amongst others, S. Arrowsmith, R. Anderson eds., *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge University Press, 2011, F. Weiss, D. Kalogeras, *The Principle of Non-discrimination in Procurement for Development Assistance*, in *Public Procurement Law Review*, no. 1, 2005, pp. 1-14; S. Schill, *Contracting with Foreigners: International Investment Law Implications*, in *Droit comparé des Contrats Publics - Comparative Law on Public Contracts*, a cura di R. Noguellou, U. Stelkens, Brüssel, 2010, p. 63 ss.; C.R. Yukins, *Integrating Integrity and Procurement: The United Nation Convention against Corruption and the Uncitral Model Procurement Law*, in *Public Contract Law Journal*, 2007). On the relationship existing between regulatory systems established by different organizations and international agreements, H. Caroli Casavola, *La globalizzazione dei contratti delle pubbliche amministrazioni*, Milano, Giuffrè, 2012.

<sup>3</sup> In the framework of the WTO, the first *Agreement on Government Procurement* (so-called "Code") was negotiated during the Tokyo Round (1979). The following plurilateral *Government Procurement Agreement -GPA* was negotiated during the Uruguay Round (1986-1994).

<sup>4</sup> As World Bank is referred the organization that manages the financing provided by the International Bank for Reconstruction and Development (IBRD) and the International Association for Development (IDA).

<sup>5</sup> J.J. Schwartz, *On Globalization and Government Procurement*, in *Public Procurement. The Continuing Revolution*, edited by S. Arrowsmith, M. Trybus, Kluwer Law International, The Hague, 2003, p. 23 ff., esp. p. 44.

<sup>6</sup> B. Kingsbury, N. Krisch, R. Stewart, *The Emergence of Global Administrative Law*, in 68 *Law & Contemporary Problems* 3/4 (2005), p. 15-61; S. Cassese, *The Globalization of Law*, in 37 "Journal of International Law and Politics", 4 (2005) 973.

The goal of this paper is to direct attention to the questions above recalled, and to focus on some useful remarks concerning four points.

First, the objectives pursued by the most developed sets of relevant rules. Secondly, the main features of globalization and public procurement. Third, the constants shared with other Global Administrative Law' phenomena, and last, the characteristics or peculiar aspects of global public procurement regimes.

## 1. Why global rules on public procurement?

The emerging global regulations pursue several different goals. These goals vary depending on the distinctive historical and cultural background of each autonomous regulatory initiative.

The main historical aim is to eradicate traditional home-biased procurement and to remove unnecessary barriers to national market access:<sup>7</sup> domestic contract law often allows discriminatory treatment and restrictions of competition in the awarding procedures.<sup>8</sup>

For instance, the negotiations launched in the context of the International Trade Organization in 1946<sup>9</sup>, on initiative and strong support of the United States, aimed to subject government procurement to international trade rules, removing conventional trade barriers, such as tariffs and quotas. The purpose was to bind national legislators to apply common tendering procedures, and thus to open up rich domestic procurement markets, including the European internal one.<sup>10</sup>

In particular, many international agreements and conventions use competition mechanisms in order to enhance access to domestic public procurement markets. The rules of best value for money, and efficient and effective management of public resources are often established on the basis of transparency and free trade principles (like in the GPA and the NAFTA).<sup>11</sup> The need for such rules may partially be seen in problems of global scale, like reducing the burden on public budgets or leveling the playing field for international economic operators.

Most recently, creeping protectionism has increased and discriminatory tendencies in public procurement have been strengthened as effect of the financial crisis.<sup>12</sup>

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<sup>7</sup> M.G. Herander, *Discriminatory Government Procurement with a Content Requirement: its Protective Effects and Welfare Costs*, 1986, 14 *Atlantic Economic Journal*, p. 20; A. Mattoo, *The Government Procurement Agreement: Implications of Economic Theory*, 1996, 19 *The World Economy* p. 695; F. Trionfetti, *Home-biased Government Procurement and International Trade: Descriptive Statistics, Theory and Empirical Evidence*, in S. Arrowsmith, M. Trybus (editors), *Public Procurement. The Continuing Revolution*, cit., pp. 223-233.

<sup>8</sup> S. Arrowsmith, *Public Procurement as an Instrument of Policy*, 1995, *Law Quarterly Review*, p. 235, and in a different perspective, C. McCrudden, *Buying Social Justice. Equality, Government Procurement & Legal Change*, Oxford University Press, 2007.

<sup>9</sup> The Agreement on Government Procurement -AGP (see *supra*, n. 3) will entered into force only in 1981. The text of the plurilateral GPA, signed in 1994, has been recently renewed (April 2012) in the view of extending its coverage. For a comprehensive analysis of the new text, S. Arrowsmith, *Government Procurement in WTO*, The Hague, 2003; on the last challenges, see the bibliography in the previous note.

<sup>10</sup> On the GPA as "walled garden" of the USA procurement market, see C.R. Yukins, S.L. Schooner, *Incrementalism. Eroding the Impediments to a Global Public Procurement Market*, in *Georgetown Journal of International Law*, 2007, vol. 38, pp. 529-576, esp. p. 569 ff.

<sup>11</sup> On the common principles, rules and standard of global public procurement regimes see H. Caroli Casavola *Internationalizing Public Procurement Law: Conflicting Global Standards for Public Procurement*, in *Global Jurist, Advances*, vol. 6, no. 3, pp. 4 et seq.

<sup>12</sup> F. Erixon, R. Sally, *Trade, Globalisation and Emerging Protectionism Since the Crisis*, European Center for International Political Economy Working Paper n. 2, 2010, p. 8, and A. Krueger, *Protectionism and the crisis*, in *The Collapse of Global Trade, Murky Protectionism, and the Crisis: Recommendations for the G20*, edited by R. Baldwin, S. Evenett, London, Centre for Economic and Policy Research, 2009, p. 37. On the specific topic related to public procurement, J.

In the case of the World Bank, the main objective of the *Procurement Guidelines*<sup>13</sup> is to ensure that procurements in Bank-financed projects are conducted in a manner to guarantee that financing is effectively used for the purposes for which it was agreed. The fight against corruption is crucial among the aims of the WB procurement regime: the *Guidelines* provide procedural and substantial measures to this end.<sup>14</sup>

Several other supranational sets of rules pursue the same objective. The increasing importance of anticorruption purposes in procurement regulations is evident not only in the “norm cascade”<sup>15</sup> occurred from the end of the 1990’s onwards – that is, the rapid and broad spreading out of numerous regulatory initiatives on a global scale, including the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*,<sup>16</sup> the Inter-American Convention,<sup>17</sup> the African Union Convention,<sup>18</sup> the EU Criminal Convention<sup>19</sup> and the UN Convention Against Corruption –,<sup>20</sup> but also in the most recent recognition of the integrity principle in the revised text of the GPA.<sup>21</sup> It is the first explicit reference to corruption practice and conflicts of interest, adopted in one WTO Agreement. Although the subsequent substantive obligations are still not clear, mostly depending on the material application,<sup>22</sup> this change has great significance for the potential implications in terms of interpretation of other Treaty rules.

A second objective of the WB *Procurement Guidelines* is to support the management and reform of public procurement systems in borrower countries. This objective is progressively attaining greater

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Linarelli, *Global Procurement Law in Times of Crisis: New Buy American Policies and Options in the WTO Legal System*, in *The WTO Regime on Government Procurement: Challenge and Reform*, edited by S. Arrowsmith, R. Anderson, cit., pp. 773 ff., G.C. Hufbauer, J.J. Schott, *Buy American: Bad for Jobs, Worse for Reputation*, Peterson Institute for International Economics Policy Brief No. PB09-2 (2009), S.L. Schooner, C.R. Yukins, *Tempering “Buy American” in the Recovery Act - Steering Clear of a Trade War*, in *Government Contractor*, n. 10, 2009, p. 78, and Id., *Public Procurement: Focus on People, Value for Money and Systemic Integrity, not Protectionism*, in *The Collapse of Global Trade, Murky Protectionism, and the Crisis: Recommendations for the G20*, cit., pp. 87-92.

<sup>13</sup> Adopted in 1964, the World Bank *Guidelines for Procurement under Ibrd Loans and Ida Credits* were modified in 1994, 1999, 2004, 2006, 2010 and 2011 (available at <http://web.worldbank.org/wbsite/external/projects/procurement/0,,pagePK:84271~theSitePK:84266,00.html>).

<sup>14</sup> According to para. 1.14, lett. a), b) e c) of the *Procurement Guidelines*, a separate and autonomous body of the WB, the *Department of Institutional Integrity*, has the power to investigate only in cases of alleged fraud and corruption. On the importance of preventing corruption in Bank projects and programs see World Bank, *Helping Countries Combat Corruption. Progress at the World Bank Since 1997*, Washington, 2000, 12 ss.

<sup>15</sup> K.W. Abbot, *Rulemaking in the WTO: Lessons from the Case of Bribery and Corruption*, in *Journal of International Economic Law*, 2001, n. 4, p. 275, esp. p. 278.

<sup>16</sup> The OECD Convention was signed in 1997 and is currently applied in the 38 countries that have transposed its provisions into their national legal orders. States have the task of guaranteeing that the OECD rules are effective in their domestic legal orders. See the site [www.oecd.org/document/30/0,3343,en\\_2649\\_201185\\_2027102\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,3343,en_2649_201185_2027102_1_1_1_1,00.html).

<sup>17</sup> Inter-American Convention against Corruption, adopted on March 29, 1996 (available at <http://www.oas.org/juridico/english/treaties/b-58.html>). See R.J. Zedalis, *How does the New OECD Convention on Bribery Stack up Against the Foreign Corrupt Practices Act?*, in *Journal of World Trade*, 1998, n. 32, p. 167.

<sup>18</sup> *African Union Convention on Preventing and Combating Corruption*, signed in 2002 (see the site [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf)).

<sup>19</sup> Council of Europe, *Criminal Convention Against Corruption*, signed in Strasbourg, January 27, 1999 (<http://conventions.coe.int/Treaty/en/Treaties/html/173.htm>).

<sup>20</sup> *United Nations Convention Against Corruption-Uncac*, signed in Merida, October 31, 2003 (Committee for the Negotiation of a Convention Against Corruption, UNA/58/422; [www.unodc.org/unodc/crime\\_signatures\\_corruption/html](http://www.unodc.org/unodc/crime_signatures_corruption/html)). See S.D. Murphy, *Adoption of UN Convention Against Corruption*, in *American Journal of International Law*, n. 98, 2004, p. 182.

<sup>21</sup> Art. IV, co. 4 of the revised GPA (GPA/112, 16 December 2011).

<sup>22</sup> See A. Reich, *The New Text of the Agreement on Government Procurement: An Analysis and Assessment*, in *Journal of International Economic Law*, 12 (2010), p. 997.

relevance in developing and less developed countries, as strategic condition for public infrastructure investments and other contractual activities in the context of the recent economic crisis.

As for other supranational procurement regimes (including the GPA), efforts to bring about fundamental changes to disparately developed domestic systems and to affirm a minimum common set of rules, have continually been the focus of international organization's activities in the longer term. In the light of the multiple intersections of public procurement with other sectors (trade, environment, human rights etc.), the progressive expansion and improvement of the global disciplines generally include an enhanced range of scope.

## 2. The main features of globalization and public procurement

Considering the general frameworks of the emerging regulatory paradigm, we can outline the main features of globalization and public procurement in three distinct groups.

First of all, procurement regulation at a global level is mainly based on a structure of State' consent relationships. Most of the legal instruments providing global regulations have pactual nature: consensual acts and voluntary rules (f.i. the GPA, the *Convention on the Settlement of Investment Disputes*, the *European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities*,<sup>23</sup> the *OECD Anti-Bribery Convention* and a wide number of bilateral free trade agreements). In force of these acts each individual State limits its own regulatory powers and binds public bodies and private individuals. Most of the disputes are resolved by way of conciliation, through solutions mutually satisfactory for the parties. In the case of GPA, the Dispute Settlement Body-DSB promotes consultations among them.

On the contrary, in several cases – as for the World Bank *Procurement Guidelines* – procedural requirements are imposed by supranational and transnational bodies as rules of conduct (formally not binding) and are accepted as financing conditions, but they are not co-decided by the recipient countries. In these cases too, however, contractors express their consent and agree to the same objectives: as a result, public regulatory bodies, local agencies and economic operators, subject to the national legal order, are bound by those rules.

Second, regulatory contents are essentially defined on the basis of economic criteria, market dynamics and game strategies (such as the comparative advantage, transaction costs, information asymmetries, best-value-for money, minimum value thresholds, incentive mechanisms).<sup>24</sup> The dominant model of public procurement regulation – the GPA – is mainly based on competition and serves the so-called “purity principle”, that is to say the establishment of a system that reduces as far as possible the insertion of non-economic criteria into the procurement process, like social policy conditions.<sup>25</sup> These criteria often arise the problem of compatibility of using procurement as a policy tool and avoiding new barriers for market access.

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<sup>23</sup> Signed in Madrid in 1980, European Treaty Series (ETS), no. 106, Strasbourg, Council of Europe, Treaty Office, 15<sup>th</sup> October 2003, available at <http://conventions.coe.int/treaty/en/Treaties/Word/106.doc>.

<sup>24</sup> See, amongst many, R. Coase, *The Firm, The Market, The Law*, University of Chicago, 1988, A. Peacock, M. Ricketts, *Government and Industry*, Londra, 1991, R. Dornbusch, S. Fischer, P. Samuelson, *Comparative Advantage, Trade and Payments in a Ricardian Model with a Continuum of Goods*, in *American Economic Review*, v. 95, n. 2, 1980, p. 203-224, and most recently, P.R. Krugman, M. Obstfeld, M. Melitz, *International Economics: Theory And Policy*<sup>9</sup>, 2012, pt. I, c. 3. In particular, on public procurement, G. Piga, K.V. Thai, *The Economics of Public Procurement*, in *Riv. pol. econ.*, n. 1, 2006.

<sup>25</sup> S. Arrowsmith, *Horizontal Policy in Public Procurement: A Taxonomy*, in *Journal of Public Procurement*, 10 (2010), p. 149; C. McCrudden, *Buying Social Justice. Equality, Government Procurement & Legal Change*, Oxford University Press, 2007, Id., *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement*, in *Journal of*

The recent revisions to the GPA could be seen as leaving more space to tackle environmental issues and to favour “green public procurement”.<sup>26</sup> However, the problem of the sharp definition of which environmental measures could be legitimately required as conditions or evaluation criteria is still open.<sup>27</sup>

Another relevant aspect is that standardization of public procurement rules largely follows an Anglo-Saxon model with regard to the technical specifications, bidder notice, competitive tendering and award criteria. An important characteristic of this model is that it does not make a difference between the public or private nature of the contractors. It always applies the same principles, and thus seems to be based on the idea of a strong private sector involvement in public activities. Because of the main economic imprint of procurement rules, technical expertise is generally required for national and supranational regulators and decision-makers.

Third, global bodies and regimes have developed a wide range of cross-references, interrelationships and reciprocal influence, including transfer of legal institutions (as competitive bidding procedure, transparency and fairness requirements).

Two examples can be referred to clarify this point.

The first example is the sixth *Recognizing* of the Preamble of the revised GPA: emphasis is here on the concept of transparency, impartiality and the commitment to avoid conflicts of interest and corruption. What is more significant is, however, the final reference to the UN *Convention Against Corruption*: it is recognized, for the first time, as one of the international instruments appropriate to clarify the WTO public procurement contents relevant to pursue those objectives.

The second example is drawn from the legal persons’ liability regulation and refers to criminal and administrative adjudication.

The 1997 OECD Convention entrusts the signing States with the twofold task of transposing the OECD rules into their domestic legal orders and guaranteeing that they are effective. According to the Convention, the Italian legislator established new rules,<sup>28</sup> including the obligation for potential contractors of domestic public authorities, to adopt certain organizational, management and supervisory models, and to set up internal supervisory bodies, to avoid incurring such liability.<sup>29</sup> In one of the first application, the well-known *Enelpower* case,<sup>30</sup> a German company, emerged as the winner from two contract award procedure, was found in breach of the domestic legislation by the national judge. It held to be excluded from such legislation’s scope of application, since the absence in the German discipline, not only of a duty to adopt management and supervisory models, but also of prohibitive sanctions and criminal liability for legal persons. In his order, the judge emphasized that “such legislative provision has its primary origin in international and Community Conventions, such

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*International Economic Law*, 1999, p. 3-48. On the environmental interest, P. Kunzlik (ed.), *The Environmental Performance of Public Procurement*, Oxford University Press, 2007.

<sup>26</sup> Art. X, co. 6 and 9 of the revised GPA.

<sup>27</sup> S. Arrowsmith, *The Revised Agreement on Government Procurement: changes to the procedural rules and other transparency provisions*, in *The WTO Regime on Government Procurement: Challenge and Reform*, edited by S. Arrowsmith, R. Anderson, cit., pp. 285 ff., esp. p. 320 ff.

<sup>28</sup> Section 11 of Law no. 300, dated 29 September 2000.

<sup>29</sup> The implementing decree created a specific “administrative offence for complex structures” (Report of the ministerial Committee on Legislative Decree no. 231 of 8 June 2001, with particular reference to section 5). The offence comprises elements of administrative law and of criminal law. The liability *regime* applied to legal persons is that of strict liability (for “organisational fault”).

<sup>30</sup> Disqualification Order dated 28 April 2004, annotated by U. Draetta, *Prime sanzioni interdittive in Italia a carico di persone giuridiche per corruzione di pubblici ufficiali*, in *Il diritto del commercio internazionale*, 2004, pp. 241-44. See the commentary by L. Borlini, *La lotta alla corruzione internazionale: le Convenzioni dell’OSCE e delle NU, il caso Enelpower, la “tangentopoli” irachena*, in *La Comunità internazionale*, 2005, pp. 75-95.

as (...) the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (...), which require provision for the liability of legal persons. All such conventions, no matter how indirectly they relate to the present proceedings, have been ratified by Italy and Germany and therefore, despite differing forms of implementation, constitute positive law and a source of obligations for both Countries”.<sup>31</sup>

In this light, the reason for the decision of the domestic adjudicative body directly focuses on the international rules. On these rules are based the national ones, applied by the national courts. They aim at ensuring that foreign competitors respect supranational rules and thus protect global public interests (i.e. those of contracting authorities, national competitors, states and other parties). Such interests include the fight against international corruption and an enhanced degree of competition in procurement contracts.

The globalization or “internationalization” of domestic procurement systems takes great advantage from both the horizontal (lateral opening of national legal orders and supranational regimes, law transfer) and the vertical dimension (self-contained regimes, national-global) of interactions among the actors in the global space.

### 3. Common aspects with other Global Administrative sectoral regimes

With regard to aspects common to public procurement regimes and other Global Administrative regimes, three are relevant.

First, global rules and standards directly affect citizens of the State-parties (involved in or addressed by the rule-making and decision-making processes) and non-State parties, such as private firms and administrative entities (i.e. the regions and local authorities). Despite the informal and sometimes non-binding nature of many of the sources of authority, global organizations and institutions exercise power and control over individuals as well as States (including States that are third parties to international treaties and agreements).<sup>32</sup>

A significant example is given by the World Bank procurement system: a list of the debarred firms and individuals is published and regularly updated on the official website of the Bank.<sup>33</sup> It includes subjects of 57 different countries, sanctioned under the Bank’s fraud and corruption policy as set forth in the *Procurement Guidelines*. Following the sanction procedures and the declaration of ineligibility, economic operators cannot be awarded a World Bank-financed contract for a certain period of time.

Second, a considerable body of widespread global rules and principles shows a prominent administrative nature. A minimum common standard of procedural guarantees (such as competitive bidding and fair, open, transparent and timely completed procedure, reasoned award decision) and due process obligations (participation of private parties, independence of the reviewing body and others) play a fundamental role in developing the legal phenomena.

To clarify the concept a useful example can be drawn from the Canadian International Trade Tribunal case-law.

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<sup>31</sup> Court of Milan, Office of Preliminary Investigation Magistrate Salvini, Disqualification Order dated 28 April 2004, cit. p. 1.

<sup>32</sup> These new phenomena are driven by a process of «mutual penetration and harmonization» and develop through linkages and «mutual connections» among domestic, international and global laws (connecting regimes). Such a process of transfer of legal institutes, rules and standards takes place along vertical and horizontal lines (S. Cassese, *The Globalization of Law*, cit., 980; Id., *Administrative law without the State? The challenge of global regulation*, in “Journal of International Law and Politics”, v. 37 (2005), n. 4, pp. 663-694).

<sup>33</sup> See [www.worldbank.org/html/opr/procure](http://www.worldbank.org/html/opr/procure).

The latter is a domestic quasi-judicial body also acting as international review body with regard to complaints filed by non-Canadian companies (against national authorities), for procurement subject to GPA, NAFTA and several other international agreements.<sup>34</sup> The case refers to *Corel*, a Canadian company, competitor of Microsoft in a combined procurement of licences and integration/training services. Against the award decision in favour of the latter, Corel filed the claim to the CITT, raising the issue of violation of GPA and NAFTA provisions on tender documentation. The claimant alleged that procuring authorities did not provide sufficient information relating to conversion costs. This information was necessary to permit potential suppliers other than the incumbent to quantify the offer and submit proposals. In its determination, the Tribunal found that the government had incurred in serious deficiencies in the procurement process and apparent discriminatory treatment of non-incumbent bidders.<sup>35</sup> It concludes that «[i]n the Tribunal's view, not only is the prejudice to Corel in this instance real but there is also prejudice to the integrity of the Canadian procurement system».<sup>36</sup>

Here, the high degree of proceduralization serves the function of applying the principles of equal treatment, non-discrimination, competition and integrity of both the domestic and the international procurement markets.

Third, the more developed a global regime's compliance system is, the more effective it will be in resolving related disputes adequately. This aspect has a direct impact on contracts in terms of what remedies are available to the contracting parties. Moreover it ought to guarantee greater impartiality on the part of the deciding body, something craved by private parties as a counterbalance to the special nature of the powers enjoyed by the public contractors. In this respect, the example of CITT has once again extreme importance: the Tribunal receives, on average, less than hundred procurement complaints per year; only about half are accepted for inquiry; of those accepted, less than half are decided in favour of the complainant. Nevertheless, it «has been a vehicle for Canadian suppliers to obtain greater fairness, openness and transparency in the way that federal government procurement is conducted in Canada».<sup>37</sup>

#### 4. Peculiar aspects of global public procurement regimes

Turning to the characteristics of global public procurement regimes, three aspects deserve consideration.

First, a common inter-regime pattern is the tendency to leave no space to the exercise of unilateral powers by national authorities and (sovereign) States before, during and after the negotiation of the contracts. On the other side, the execution phase is almost excluded from global regulations.

The second aspect is the need of flexibility and maximum sharing of the considerable body of global rules and standards.<sup>38</sup> A flexible approach to procedural regulation is often a mean for enhancing consent and membership in the sector systems. The original and primary objective of global

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<sup>34</sup> See also the case referred in the paper by S. Battini, *Administrative Law beyond the State*, in this volume, § 3.

<sup>35</sup> Canadian International Trade Tribunal, *Re Corel Corp.*, Determination of October 26, 1998 (PR-98-012 and PR-98-014), n. 79/1998, p. 21 (available at [www.citt.gc.ca/procure/determin/prin2m\\_e.asp](http://www.citt.gc.ca/procure/determin/prin2m_e.asp)). Amongst other aspects, the Tribunal underlined that the government «offers no coherent rationale for establishing the file conversion and training costs at 50 percent of their value in the evaluation process. It is simply not clear why this percentage was chosen and how specifically the risks to the government and taxpayers were balanced within the context of effective competition».

<sup>36</sup> CITT Determination, *Re Corel Corp.*, p. 22.

<sup>37</sup> R.W. Heggart, *Bid Challenge in Canada and the Impact on Public Procurement: Observations of Changes from Inside the Reviewing Agency*, in *3<sup>rd</sup> International Public Procurement Conference Proceedings*, 2008, p. 1251-9.

<sup>38</sup> P. Trepte, *Regulating procurement: understanding the ends and means of public procurement regulation*, Oxford - New York, Oxford University Press, 2004, p. 392-3.

regimes is, in fact, to “attract” (i.e. induce acceptance by) the greatest possible number of countries and thereby guarantee that rules such as competitive tendering procedure, are widely applied.

In this light, a considerable number of measures of the GPA of 2011 were reworded to include in procurement processes and decisions, the use of electronic tools (for communications and auctions) at the same conditions and with the same guarantees (like non-discrimination effects) already provided for the traditional ones (f.i. written document or texts). In the same rational, evaluation criteria and technical specifications provisions were revised to cover the possibility of considering environmental issues in their making, and minimum time periods were reduce in order to speed up procurement procedures in the case of a state of urgency.

Third, the existence of judicial review systems is crucial for compliance. Global regulatory regimes with their own remedial mechanisms (judicial, quasi-judicial or surrogated) often acquire a substantial and creative approach: they are tending to extend jurisdiction in their subject-matter by interpreting key concepts, which are undetermined or vague in the regulations (such as “entity covered”, “value of the contract”).

A meaningful example is provided by the Dispute Settlement Body in the *Korea Airport* decision.<sup>39</sup> The GPA applies, in particular, to the list of procuring entities indicated by each Party as entities bound by the Agreement. Competent for the disputed procurement was first designated the Korean Ministry for Transportation and it was included in the list of the Korean entities subject to GPA. Later on, the administrative competence passed on several other domestic agencies, but the list was never updated.

The main legal issue focused on the nature of those authorities and their substantial relationship with the central government. Whilst the complainant argued that the procuring entities were “branch offices” or “subordinate linear organizations” tied to the central administration by a relationship of “instrumentality”, Korea referred to its national legislation and maintained that those bodies were separate legal persons enjoying functional autonomy.<sup>40</sup> In the Panel Report, the notion of “associated entity” is explained by applying the “legal unity principle”, on one side, and the “principal-agent” scheme, on the other.<sup>41</sup>

In this perspective, national legal orders penetrate the framework of supranational regimes and acquire importance within the global administrative space by exploiting the “holes” leave empty or free for use of the “open”, indeterminate legal concepts. The ongoing dynamic of clarifying and reassessing key notions takes great advantage from the interplay and the dialogue between the national (and regional, like the EU one) public procurement legal orders and the global regimes.

Nevertheless, time and costs of settling a dispute before “global trade tribunals” are still the main reason discouraging harmed parties from bringing claims to supranational review bodies (like the WTO Dispute Settlement Body). Therefore, implementation, organization and adjudicatory powers are mainly left to the States. This character explains why important global regimes, like the GPA and the World Bank *Procurement Guidelines*, have been plagued with a high degree of inconsistency in the various national review mechanisms and have experienced serious difficulties in obtaining effective enforcement.

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<sup>39</sup> See decision of the WTO Dispute Settlement Body adopted on 19 June 2000 (WT/DBS/M/84; Panel request of 11 May 1999, WT/DS163/4; Panel Report presented on 1 May 2000, WT/DS163/R).

<sup>40</sup> Korea based its case, in particular, on the characteristics of the tasks entrusted to these bodies. These, it was generally considered, made the tasks’ discharge more appropriate through parties outside the traditional central government apparatus, given the latter’s bureaucratic organization (para. 4.254 of the *Panel Report*).

<sup>41</sup> For a comprehensive analysis of the case and the main legal issues involved, see H. Caroli Casavola, *Global Rules for Public Procurement*, in *Droit comparé des Contrats Publics - Comparative Law on Public Contracts*, edited by R. Noguellou, U. Stelkens, Bruxelles, Bruylant, 2010, p. 27 seq., esp. pp. 34-40.

# Procurement Regimes of International Organizations

Elisabetta Morlino\*

## 1. Introduction

How to satisfy water, food and medicine needs for children living in countries ravaged by famine? How to house millions of refugees coming from countries at war? How to support democratic institutions in post-conflict countries? How to get aircrafts for peace-keeping operations? How does the United Nations (UN) fulfil its printing needs?

In 2010 the whole UN system procured a wide range of goods, service and works for a total of over 14.5 billion dollars<sup>1</sup>. From 2000 until 2010 the value of the purchase orders placed by the UN Procurement Division (UN/PD) only has raised from 687.62 million Dollars to 3,144. 52 million Dollars (with a peak in 2009 of 3,488.42 million Dollars)<sup>2</sup>. This is a trend that has been steadily growing since the international organizations' foundation and that has been even more prominent in the last decades<sup>3</sup>. It can be explained with the physiological growth of the structure and the functions of international organizations. For instance, in the case of the UN, it is the result of the great increase of peace-building and peace-keeping operations. Procurement and its regulation are, thus, acquiring more and more a crucial role in the fulfillment of the organizations' mandate and goals.

Despite this relevant empirical evidence, there are few scholarly works analyzing the rules governing international organizations' procurement and its practice. Between the '60s and the '70s, some works were published on the contracts concluded by international organizations, which focused, however, mainly on the contractual phase<sup>4</sup> and the related issues, such as the law applicable to contracts<sup>5</sup>, and neglected a systematic inquiry into the administrative phase of vendors' selection<sup>6</sup>.

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\* Research and Teaching Assistant in Administrative Law at University of RomaTre.

<sup>1</sup> Statistics can be found in United Nations, *2010 Annual Statistical Report on United Nations Procurement*, 2010, also available at [https://www.ungm.org/Publications/Documents/ASR\\_2010.pdf](https://www.ungm.org/Publications/Documents/ASR_2010.pdf)

<sup>2</sup> Statistics for the United Nation Procurement Division are available at <http://www.un.org/depts/ptd/statistics.htm>

<sup>3</sup> An overview on the increasing use of public-private partnerships by international organizations is provided by B. Bull.D. McNeill, *Development Issues in Global Governance. Public-Private Partnerships and Market Multilateralism*, Routledge: Abingdon, 2007.

<sup>4</sup> See M. J. Salmon, *Les contrats de la Banque internationale pour la reconstruction et le développement*, in «Annuaire français de droit international», 1956, 635 et seq.; J.-C. Groshens, *Les Marchés passés par les organisations internationales*, in «Revue du droit public et de la science politique en France et à l'étranger», 1956, vol. 4, 741 et seq.; R. Monaco, *Osservazioni sui contratti conclusi da enti internazionali*, in Aa. Vv., *Studi in onore di Francesco Santoro Passarelli*, Napoli, Jovene; 1972; N. Valticos, *Les contrats conclus par les organisations internationales avec des personnes privées: Rapport provisoire*, in «Annuaire de l'Institut de droit international», 1977(a), vol.57(1), 1 et seq.; id., *Les contrats conclus par les organisations internationales avec des personnes privées: Rapport définitive*, in «Annuaire de l'Institut de droit international», 1977(b), vol.57(1), 132 et seq.; J. Colin, M. H. Sinkondo, *Les relations contractuelles des organisations internationales avec les personnes privées*, in «Revue de Droit International et de Droit Compare», 1992, vol. 69, 7 et seq.; G. Van Hecke, *Contracts between International Organizations and Private Law Persons*, in R. Bernhardt (a cura di), *Encyclopedia of Public and International Law* (II ed. 1992), North-Holland, Elsevier, Vol. I, 812 et seq.; M. Audit, *Les marchés de travaux, de fournitures et de services passés par les organisations internationales*, in «Journal du Droit International», 2008, n. 4, 941 et seq.

<sup>5</sup> See C. W. Jenks, *The Proper Law of International Organizations*, Londra, Stevens & Sons Ltd./Dobbs Ferry, N.Y., Oceana Publications, 1962; F.A. Mann, *The Proper Law of Contracts Concluded by International Persons*, in «British Year Book of International Law», 1959, n.35, 34 et seq.; H. Batifol, *Problèmes des contrats privés internationaux*, Parigi, Association des études internationales, 1962; G. R. Delaume, *The Proper Law of Loans Concluded by International Persons: A Restatement and a Forecast*, in «The American Journal of International Law», 1962, vol. 56, n. 1, 63 et seq.; id., *Issues of applicable law in the context of the World Bank operations*, in N. Horn, C.M. Schmitthof (a cura di), *The Transnational Law of International Commercial Transactions*, Deventer/Boston, Kluwer, 1982; Glavinis, *Les litiges*

Furthermore, much attention has been devoted to examine the rules set forth by some international and supranational organizations, e.g. the WTO or the EU, to harmonize rules regulating State procurement<sup>7</sup>, but never an adequate attention has been given to the rules of activity that the international organisations set forth for their own procurement activity.

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*relatifs aux contrats passés entre organisations internationales et personnes privées*, Parigi, L.G.D.J., 1990, 183-236; N. Valticos, *Les contrats conclus par les organisations internationales avec des personnes privées: Rapport provisoire*, cit., 6-63; id., *Les contrats conclus par les organisations internationales avec des personnes privées: Rapport définitive*, cit., 151-169; G. van Hecke, *Contracts between International Organizations and Private Law Persons*, in R. Bernhardt (a cura di), *Encyclopedia of Public and International Law* (II ed. 1992), North-Holland, Elsevier, Vol. I, 812 et seq.; V. M. E. Schneider, *International Organizations and Private Persons: The Case for a Direct Application of International Law*, in Aa. Vv., *Etudes de droit international en l'honneur de Pierre Lalive*, Basilea, Helbing & Lichtenhahn, 1993; M. H. Sinkondo, *Le rôle de la volonté de l'organisation internationale dans la détermination du droit applicable aux contrats conclus avec les personnes privées*, in «Revue de droit international et de droit comparé», 1997, n. 4, 367 et seq.; F. Seyersted, *Common Law of International Organizations*, Leiden/Boston, Martinus Nijhoff Publishers, 2008; M. Audit, *Les marchés de travaux, de fournitures et de services passés par les organisations internationales*, cit., 954-960; B. Heuninckx, *Applicable Law to the Procurement of International Organisations in the European Union*, in «Public Procurement Law Review», 2011, 20(4), 103 et seq..

<sup>6</sup> Indeed very few and sectional have been the studies on international organizations' procurement: B. Heuninckx, *Defence Procurement Law in Europe. The Role of International Organisations*, paper presented at the Third Global Procurement Research Student Conference, University of Nottingham, 21-22 June 2007; H. Neumann, *Procurement in the United Nations System*, Frankfurt: Peter Lang, 2008; Y. Renouf, *When legal certainty matters less than a deal: Procurement in International Organizations*, paper presented at the University of Geneva-NYU conference on *Practical Legal Problems of International Organizations. A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights*, Geneva, 20–21 March 2009, available at [www.iilj.org/GAL/GALGeneva.asp](http://www.iilj.org/GAL/GALGeneva.asp); T. Sakane, *Challenges for Humanitarian Food Assistance: The World Food Programme Procurement Administration*, paper presented in the 3<sup>rd</sup> *International Public Procurement Conference*, Geneva, 28-30 August 2008; Id., *Public Procurement in the United Nations System*, in K.V. Thai (ed.), *International Handbook of Public Procurement*, Boca Raton/Florida: Francis&Taylor, 2009, 233 et seq.

More attention has instead been devoted to procurement by EU Institutions. However, often these studies have focused on singles aspects of the procurement procedure or on single judicial cases see J. B. Auby, *Accountability and Contracting Out by Global Administrative Bodies. The Case of Externalization Contracts made by European Community Institutions* paper presented at the *Global Administrative Law Workshop*, New York University, 18 Oct. 2006; R. Bickerstaff, *Commission Staff Working Documents on the Requirements for Conducting Public Procurement Using Electronic Means*, in «Public Procurement Law Review» 2006, n. 1, 17 et seq.; P. Braun, *Interim Measures Against Community Institutions: Case T-303/04*, in «Public Procurement Law Review» 2005, n. 2, 25 et seq.; Id, *Damages for Irregularities in the Award Process: Case T- 160/03*, in, «Public Procurement Law Review» 2005, n. 4, 98 et seq.; A. Brown, *Interim Measures Against the Community Institutions in Procurement Cases: A Note on the Esedra Case*, in «Public Procurement Law Review» 2001, v. 2, 51 et seq.; id., *Commission Award Procedure for Supply of Office Furniture*, in «Public Procurement Law Review» 2003, n. 2, 41 et seq.; B. Heuninckx, *Towards a Coherent European Defence Procurement Regime? European Defense Agency and European Commission Initiatives*, in «Public Procurement Law Review» 2008, 1, 1-20; S. Kahn, *Advanced Technology Projects and International Procurement: The Case of the European Space Agency*, in «Public Procurement Law Review» 1993, n. 1, 13 et seq.; D. A. Kalogeras, *Revision of the Financial Rules Applicable to the General Budget of the European Communities*, in «Public Procurement Law Review» 2007, n. 4, 98 et seq. Id., *Remedies in the Field of Public Procurement Against the Institutions of the European Community: Quis Custodiat Ipsos Custode?s*, in «Public Procurement Law Review» 1999, n. 5, 211 et seq.; H.-J. Priess, *Contracting with the European Communities. Legal Aspects of E.C. Procurement and Subsidies*, in «Public Procurement Law Review» 1996, n. 1, 7 et seq.

<sup>7</sup> Instead much scholarly work has been dedicated to examine the harmonization of national public procurement rules thanks to global standards set forth by international organizations. See, *inter alia*, H. Caroli Casavola, *Internationalizing Public Procurement Law: Conflicting Global Standards for Public Procurement*, in «Global Jurist», 2006, n. 6, 3 et seq. also available at <http://www.bepress.com/gj/advances/vol6/iss3/art7/> ; F. Weiss, D.Kalogeras, *The Principle of Non-discrimination in Procurement for Development Assistance*, in «Public Procurement Law Review», 2005, n.1, 1 et seq. V. Rege, *Transparency in Government Procurement. Issues on Concern and Interest to Developing Countries*, in «Journal of World Trade», 2001, n. 35, 489 et seq.; S. Arrowsmith, A. Davies, *Public Procurement: Global Revolution*, The Hague: Kluwer Law International, 2000; S. Arrowsmith, J. Linarelli, D. Wallace, *Regulating Public Procurement: National and International Perspectives*, The Hague: Kluwer Law International, 2000; J. B. Auby, *L'internationalisation du droit des contrats publics*, in «Droit Administratif», 2003, n.5, 5 et seq.; id., *La globalisation, le droit et l'Etats*, Paris:

The aim of this paper is then to explore and discuss four salient aspects of the phenomenon. The first is a definitional issue: what shall be included in the concept of international organizations' procurement and what are the main types of procurement activity carried out by international organizations. The second is a legal one: what are the main features of procurement regulation. The third is political: what is the interplay of principles and interests behind IO's procurement regulation and how this interplay determines the content of this body of administrative law. The last is a theoretical question: why the body of norms regulating international organizations' procurement can be better read, interpreted and reformed through the lens of global administrative law<sup>8</sup>.

## 2. A Taxonomy

To a greater extent than States international organizations require external support for their functioning. Unlikely the States that in order to carry out their internal or external administrative functions and to fulfil their institutional mission can count on public properties and infrastructures – that is resources imputable to the State itself-, international organizations depend for these purposes primarily on the States and on other public or private subjects from which they procure goods, service and works.

Depending on the institutional mission with which are entrusted, international organizations carry out two types of procurement procedures: direct or indirect procurement. The international organizations may procure the needed goods, services and works through its competent administrative officials, wheatear located at its Headquarters or in the field. The agreement or contract resulting from such procedure can be concluded with private or public subjects, such as private companies, nongovernmental organizations, national governments, other international organizations. This procedure is generally used to allow the exercise of internal administrative functions, such as, for instance, the correct functioning of the offices, but also for external administrative functions linked to the institutional mission of the organizations, for example, the procurement of food by the WFP to be shipped to third world countries.

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Montchrestien, 2003; A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing*, The Hague: Kluwer International Law, 1999.

<sup>8</sup> Literature on global administrative law has now become extremely rich. Just to mention some of the works theorizing the concept: J.-B. Auby, *La globalisation, le droit, l'Etat*, Paris, 2003; S. Cassese, *La crisi dello Stato*, Roma-Bari: Laterza, 2002; Id., *Lo spazio giuridico globale*, Bari: Laterza, 2003; Id., *Global Administrative Law: An Introduction* 2005, 13-18, 20-26 (Feb. 22, 2005), available at [http://www.iilj.org/global\\_adlaw/documents/CassesePaper.pdf](http://www.iilj.org/global_adlaw/documents/CassesePaper.pdf). ; Id. *Oltre lo Stato*, Roma-Bari: Laterza, 2006; Id. *The Globalization of Law*, in «New York University Journal of International Law and Politics», 2005, n. 37, 973 et seq.; Id., *Administrative Law without the State? The Challenge of Global Regulation*, in «New York University Journal of International Law and Politics», 2005, n.37, 663; L. Casini, *Diritto amministrativo globale*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, Milano: Giuffrè, 2006, *ad vocem*; S. Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, in «Global Governance», 2008, n. 14, 39 et seq.; N. Krisch, B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, in «European Journal of International Law», 2006, n.17, 1 et seq.; B. Kingsbury, *The Concept of 'Law' in Global Administrative Law*, «European Journal of International Law», 2009, n. 20 (1), 23 et seq.; B. Kingsbury, N. Krisch, R.B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems*, 2005, vol. 68, 15 et seq.

With a specific reference to international organizations see B. Kingsbury, L. Casini, *Global Administrative Law Dimensions of International Organizations Law*, in «International Organizations Law Review», 2009, n. 6, 319 et seq.

For a complete bibliography on GAL themes see <http://www.iilj.org/GAL/documents/GALCasebookBibliography.pdf> and for an analysis of GAL cases see S. Cassese et al. (eds.), *Global Administrative Law: Cases, Materials, Issues*, 2<sup>nd</sup> edition, 2008, available at <http://www.iilj.org/GAL/GALCasebook.asp>.

A skeptical view on the GAL approach has been expressed in E. Schmidt-Aßmann, *The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship*, in «German Law Journal», 2008, n.9, 2061 et seq.; A. von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, in German Law Journal», 2008, n.9, 1909 et seq.

Some international organizations, however, operate also using indirect ways of procurement. In order to fulfil their institutional mission they bestow the necessary resources to another public (or more rarely, private) subject, i.e. a national government, who will in turn procure the necessary goods, services or works. The organization can outsource<sup>9</sup> an entire function and within this, the procurement activity will be managed by the subject the function has been outsourced to. Alternatively, it can outsource just the procurement activity<sup>10</sup>. As to the legal regime applicable, the international organization can leave autonomy to choose the procedure and rules that the private or public party deems more appropriate, only imposing the observance of some substantial legal prescriptions, e.g.: the observance of fundamental human rights and labour rights. It is the case of procurement through *letter of assist*, that is an agreement of political nature signed between the international organization and a State, usually used in peace-keeping of peace building missions. Alternatively, international organizations impose on the public subject the observance of guidelines which set the procurement procedures that the national administrative bodies in charge of the procurement function shall follow. Individuals taking part to the procurement selection are granted rights *vis-à-vis* the national administration in virtue of the rules set up by the organization. Furthermore monitoring mechanisms are set up to control compliance with the procurement rules. Examples of this kind can be found in the World Bank Procurement Guidelines<sup>11</sup> or in procurement guidelines of other development banks. Also, as to the contractual arrangements between the national administration and the selected vendors, whereas the personnel performing the contract falls under the responsibility of the contractor and not of the organization, the international organization sometimes monitors also the contract performance. Failure to comply with the procurement rules and/or to correctly manage the contract is, eventually, penalised with the imposition of economic sanctions, such as the curtail of funds.

If seen from the point of view of the relationship between the administration and the citizens, while in indirect procurement, international organizations function as an intermediary subject between national administrations and the private subjects, establishing rights of the latter *vis-à-vis* the former; in direct procurement is the international organization itself that shapes the legal position of the private subject in front of the international administration. The regulatory outcome, as it will be analysed in the following section, differs under many respects.

### 3. The Main Features of International Organizations' Procurement Regulation

The quantitative growth of expenditure in procurement has been complemented by the progressive development of rules regulating the process of vendors selection, especially in direct procurement modes. Indeed, since the origins of the organizations, there has been a gradual shift from procurement carried out in informal ways, according to a loose set of internal administrative circulars, mainly through direct contracting, to procurement performed according to a much better developed body of

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<sup>9</sup> On outsourcing see United Nations, General Assembly, *Procurement reform and outsourcing*, GA/RES/52/226B, 27 April 1998); United Nations, Joint Inspection Unit, *The Challenge of outsourcing for the United Nations system* (JIU/REP/97/5); id., *Management Audit Review of Outsourcing in the United Nations and United Nations Funds and Programmes*, JIU/REP/2002/7, December 2002; id., *Procurement Practices within the United Nations*, JIU/REP/2004/9, 2004.

<sup>10</sup> Definition is taken from United Nations, Joint Inspection Unit, *The Challenge of outsourcing for the United Nations system*, *supra*, 1

<sup>11</sup> World Bank, *Guidelines: Procurement of Goods, Works, and Non-Consulting Service under IBRD Loans and IDA Credits & Grants*, January 2011, available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>. On World Bank procurement see *inter alia* R. Hunja, *Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines*, in «Public Procurement Law Review», 1997, n. 6, 216 et seq.; T. Tucker, *A Critical Analysis of the Procurement Procedures of the World Bank*, in S. Arrowsmith, A. Davies (eds.), *Public Procurement: Global Revolution*, The Hague, Kluwer Law International, 1999, 139 et seq.,

hard and soft rules, found in financial regulations, procurement manuals and guidelines<sup>12</sup>, following a pre-defined procedure and, to some extent, granting competition among vendors, publicity and transparency of the operations. Furthermore, this body of regulations in the last decade is undergoing a process of harmonization, at least among international organizations belonging to the United Nations system.

International organizations' procurement, as defined by procurement manuals and guidelines, usually consist of a multi-phase process: registration of vendors, solicitation of offers, evaluation and award. The regulation of such phases is usually said to be guided by five basic principles: the promotion of institutional objectives; competition through fairness, integrity and transparency; economy and effectiveness; best value for money; accountability. Here I focus on competition and accountability, as these two are the features that mainly differ international organizations' procurement from national government procurement.

### 3.1 Competition

Competition is usually the leading principle guiding government procurement. The *Government Procurement Agreement*<sup>13</sup> as well as the European procurement directives 2004/17/CE and 2004/18/CE require national administrations to comply with a whole set of publicity, transparency and accountability requirements designed to grant competition and non-discrimination. Both the WTO and the EU have, indeed, as institutional mission the creation free market economies. Rules governing international organizations' procurement give, on the contrary, less emphasis to competition. Some examples may be worth to be mentioned.

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<sup>12</sup> To mention some of these: FAO, *Procurement Manual*, 9 September 2003; Id., *Financial Regulations*, 2008, available at [http://www.unsystemceb.org/searchkeywords\\_form?subjects:list=Financial%20Regulations](http://www.unsystemceb.org/searchkeywords_form?subjects:list=Financial%20Regulations); UNICEF, *HQ Procurement Manual*; id., *Field Procurement Manual*; United Nations, *Procurement Manual*, March 2010, available at <http://www.un.org/depts/ptd/manual.htm>; Id., *Financial Regulations and Rules of the United Nations*, ST/SGB/2003/7, 9 May 2003; Id., *UN Procurement Practitioner's Handbook*, November 2006, available at <http://www.unops.org/SiteCollectionDocuments/Procurement%20docs/UN%20procurement%20practitioners%20handbook.pdf>; UNDP, *Financial Regulations and Rules*, april 2000; Id., *Guidelines for Direct Execution*, 25 June 2001, rivisto ed emendato 22 July 2004; Id., *Procurement Manual*, May 2005; Id., *United Nations Development Programme Procurement Manual (User Guide)*, January 2006; UNOPS, *Procurement Manual*, December 2007; Unops, *Procurement Manual*, September 2010, available at <http://www.unops.org/SiteCollectionDocuments/Procurement%20docs/UNOPS%20procurement%20manual%20EN.pdf>; WFP, *Non-Food Procurement Manual*, 1999

For financial institutions: African Development Bank, *Financial Regulations of the African Development Bank*, May 15, 2002, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Legal Documents/00157744-EN-ADB-FINANCIAL-REGULATIONS.PDF>; Id., *Rules and Procedures for Procurement of Goods and Works*, May 2008, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-related-Procurement/ADB%20RULES%20AND%20PROC%20%20GOODS%20%20AND%20WORKS%2028TH%20NOVEMBRE%202008.PDF>; Id., *Rules and Procedures for the Use of Consultants*, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-related-Procurement/ADB%20RULES%20AND%20PROC%20CONSULTANTS%2028TH%20NOVEMBRE%202008.PDF>; Asian Development Bank, *Procurement Guidelines*, April 2010, available at <http://www.adb.org/documents/procurement-guidelines>; International Fund for Agricultural Development, *Project Procurement Guidelines*, available at <http://www.adb.org/documents/procurement-guidelines>; World Bank, *supra*.

<sup>13</sup> WTO, *Government Procurement Agreement*, 1996 available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) On the World Trade Organization, procurement and competition see, to mention but a few, S.J. Evenett, B.M. Hoekman, *Government Procurement: Market Access, Transparency and Multilateral Trade Rules*, in «European Journal of Political Economy», 2005, n. 21, 163 et seq.; R. Hunja, *Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines*, in «Public Procurement Law Review», 1997, n. 6, 216 et seq.; T. Tucker, *A Critical Analysis of the Procurement Procedures of the World Bank*, in S. Arrowsmith, A. Davies (eds.), *Public Procurement: Global Revolution*, The Hague, Kluwer Law International, 1999, 139 et seq.; S. Arrowsmith, *Transparency in Government Procurement: the Objectives of Regulation and the Boundaries of the World Trade Organization*, in «Journal of World Trade», 2003, n. 37, 293 et seq.

*a. Advertisement.* In the very first phase, the general rule on vendors' selection is that potential vendors are identified by placing an advertisement. However, in direct procurement, this rule has exceptions which are widely used. Procurement manuals allow procurement officers to decide not to post an *Expression of Interest* (EOI) because circumstances of the case do not warrant doing so. No specific justification is required for such decision. In practice, especially for some organizations, such as WFP or FAO, this exception is widely used.

*b. Solicitation.* Whereas in government procurement there are usually three tendering methods (open tendering, restricted tendering, negotiated procedures; in the EU directives, also competitive dialogue), in international organisations' direct procurement the system does not provide for open procedure as basic procedure, but only for selective tendering procedures: the vendors who can take part to the selection are only those who receive the solicitation documents sent by the procurement officer. Again no reason giving is required to motivate the exclusion.

Furthermore, the Procurement Manuals generally *suggest* to invite all the vendors registered for a certain sector of activity, but at the same time allow to limit the number of potential vendors to be invited. This can be done *inter alia* in virtue of the "interest of the organization"; or if the list of potential recipients of Solicitation documents is "unduly long" or, more generally, "whenever the particular circumstances of the case render it impractical or not feasible"; and in all other circumstances that the competent administrative bodies deem to be exceptional. A significant room for discretionary evaluation is, hence, left to the procuring entity.

It is not usually so for indirect procurement where, instead, the organization requires the national administration to adopt open tendering procedures as basic procedures. Limited international bidding, national international bidding or direct contracting are also allowed but only in the cases listed by the organization. Furthermore, the possibility of putting in place direct contracting procedures is subordinated to the authorization of the international organization.

### 3.2 Accountability

Accountability<sup>14</sup> of procuring entities is crucial to ensure that the provisions set up in the rules and regulations are observed by the competent administration. Under this respect direct and indirect procurement differ<sup>15</sup>. Four main types of accountability can be identified:

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<sup>14</sup> The concept of accountability has been widely explored and variously defined. For the purposes of this paper some useful conceptualizations are to be found in : R. Behn, *Rethinking democratic accountability*, Washington, DC: Brookings Institution, 2001; M. Bovens, *The quest for responsibility: Accountability and citizenship in complex organisations*, Cambridge, UK: Cambridge University Press, 1998; Id., *Analysing and assessing accountability: A conceptual framework*, in «European Law Journal», 2007, 13, 447–468; P. Day & R. Klein, *Accountabilities: Five public services*, London: Tavistock, 1987; R. W. Grant & R.O. Keohane, *Accountability and abuses of world power*, in « American Political Science Review», 2005, 99, 29–43; C. Harlow, *Accountability in the European Union*. Oxford, UK: Oxford University Press, 2002; R.O. Keohane, *Global governance and democratic accountability*, in D. Held & M. Koehnig-Archibugi (eds.), *Taming globalization: Frontiers of governance*, Cambridge, UK: Polity, 2003, 130-157; R. Mulgan, *Accountability*: "An ever-expanding concept?", in «Public Administration», 2000, vol. 78, 555–574; Id., *Holding power to account: Accountability in modern democracies*. Basingstoke, UK: Palgrave Macmillan, 2003; J. Mashaw, *Structuring a 'Dense Complexity': Accountability and the Project of Administrative Law*, in «Issues in Legal Scholarship», 2005, Article n. 4; R. MULGAN, 'Accountability': An Ever-Expanding Concept?, in «Public Administration», 2000, n. 78, 555 et seq.; B. Radin, *The accountable juggler: The art of leadership in a federal agency*. Washington, DC: CQ Press, 2002; B. S. Romzek & M.J. Dubnick, *Accountability in the public sector: Lessons from the Challenger Tragedy*, in «Public Administration Review», 1987, vol. 47, 227–238; R. B. Stewart, *Accountability, Participation, and the Problem of Disregard in Contemporary Global Governance*, IILJ International Legal Theory Colloquium, Discussion Draft Paper, 2008, available at <http://iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf>

<sup>15</sup> On accountability of international institutions see *inter alia* L. Casini, B. Kingsbury, B. Kingsbury, *supra*, which suggest that the adoption of a GAL approach would foster international organizations' accountability; N. Krisch, R.B. Stewart, *supra*; R. Grant, R. Keohane, *Accountability and Abuses of Power in World Politics*, IILJ Working Paper 2004/7, 14, at <http://iilj.org/papers/2004/2004.7%20Grant%20Keohane.pdf>; A. Reinisch, *Securing Accountability of International*

a. *Hierarchical Administrative Accountability (direct procurement)*. In direct procurement international organizations usually provide for the opportunity to complain against procurement decisions (e.g. disqualification from registration or award) in front of the same administrative authority which took the decision or in front of higher level administrative authorities. In some organizations, as for instance the European Space Agency (ESA), the review procedure is highly formalized and proceduralized and foresees three incremental steps (Head of the Procurement Department, the Ombudsman for ESA, the Independent Procurement Review Board); in some others, as the UN, a formalized debriefing process is under experimentation; in many others, as WFP, FAO, UNICEF, the complaint remain informal;

b. *Institutional Accountability (direct and indirect procurement)*. Some OIs set up third, impartial bodies such as the ombudsman, for EU Institutions or for ESA, which can be activated at the request of private parties. Such bodies have jurisdiction over the administrative activity of the international organization and are vested with investigative powers. An interesting variant of this kind of accountability may be found in indirect procurement. Procurement guidelines of the WB, for instance, provide for *ex-ante* and *ex-post* mechanisms to make national administrations accountable to the Bank<sup>16</sup>. *Ex-ante* mechanisms include the Bank's review of the State's procurement procedures, documents, bid evaluations, award recommendations and contracts to ensure that the procurement process is carried out in accordance with the Bank guidelines. *Ex-post* mechanisms consist of complaints filed from the bidders in front of the Bank's authorities. The Bank may then take action and ask the national administration to provide all the relevant documentation for the Bank's review and comments. At the end of the process the Bank may recommend to the national administration the further steps to be taken<sup>17</sup>.

c. *Legal accountability (direct procurement)*. Only the EU have set a third impartial judicial body to decide on complaints against procurement decisions of EU institutions and this is the European Court of Justice.

d. *'International' accountability (direct and indirect procurement)*. Assuming an extensive definition of accountability, within this concept it may be included also the possibility for private parties to file an informal complaint in front of State representatives in the international organization. These may, at their will, exercise a political pressure on the competent administrative authorities in order to obtain a review of the decision.

#### 4. Principles and Interests Behind the Rules: their Interplay

To sum up, on one hand we have the development of a body of administrative rules governing international organizations' procurement, the proceduralization of the administrative activity and, to some extent, the recognition of duties on the part of the administrative bodies *vis-à-vis* private parties.

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*Organizations*, in «Global Governance», 2001, n. 7, 131 *et seq.*; A.M Slaughter. *The Accountability of Government Networks*, in «Indiana Journal of Global Legal Studies», 2000, n. 8, 347 *et seq.*; K. Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 in «Michigan Journal of International Law», 2004, n. 25, 1

<sup>16</sup> World Bank, *Procurement guidelines*, *supra*, Appendix 1 and Appendix 3, para.15

<sup>17</sup> On the role of the World Bank in the promotion of State accountability see *inter alia* D. D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, in «Vanderbilt Journal of International Law», 1994, n. 34, 553 *et seq.*; N. Woods, A. Narlikar, *Governance and the Limits of Accountability: The WTO, the IMF and the World Bank*, in *International Social Science Journal*, 2001, n. 53, 569 *et seq.*; D. Clark, J. Fox, K. Treacle ( eds.), *Demanding accountability : civil-society claims and the World Bank Inspection Panel*, Lanham, Md. : Rowman & Littlefield, 2003; World Bank, *Accountability at the World Bank. The Inspection Panel 10 Years On*, World Bank publication, available online at [http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8\\_07.pdf](http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8_07.pdf); E. R. Carrasco, A.K. Guernsey, *The World Bank's Inspection Panel: Promoting True Accountability through Arbitration*, 2008.

On the other hand the content of such duties and the scope of the corresponding rights are scarcely developed in direct procurement, fairly developed in indirect procurement, but in both cases less apt to safeguard private subjects' interests, if compared to State procurement.

Three reasons can be identified to explain such difference. The first two refer to the interplay of guiding principles within the organizations, the third with the interplay of interests behind procurement rules.

The first reason relates to international organizations' institutional objectives. These include the promotion of peace and security, economic development and poverty eradication, the promotion of human rights, democracy and good governance, and other similar goals. Indeed the tight link between institutional goals and procurement brings to what could be deemed as a distortion from a purely competitive system. Especially during the first decade of this century and beyond, procurement rules and practices have tended to promote procurement opportunities for vendors from developing countries and countries with economies in transition. This has been done, for instance, either by loosening competition requirements or by including domestic preference clauses in the bidding documents.

The second point regards economy and effectiveness. In national government procurement, economy and effective management of resources have been traditionally the main concerns of national administrations, while competition was deemed as instrumental to this primary objective. In contemporary procurement systems, for instance in EU regulations or in the GPA, this relationship has been overturned being competition the primary policy objective. As said, in international organizations' competition is not usually an institutional goal and thus procurement reproduce the traditional dynamic where competition is instrumental to economy and not *viceversa*.

The third reason has to do with the interplay of interests behind international organizations' procurement regulation<sup>18</sup>. Indeed, such procurement is based on a tripartite asset of interests. First, the interest of the organization itself to procure goods, services and works in an economic and effective manner and in a way that is compatible with its institutional objectives and more appropriate to promote them. In indirect procurement this means also an interest of the organization to hold the procuring entity accountable. Second, the interest of the private subjects to get the award and, instrumentally to this, the interest to transparency and accountability of the administrative action. Finally, the interests of the State members who finance the organization and want to see the budget invested returned under the form of awards to their companies. Hence, the State members who, on behalf of their citizens, should be the main promoters of competition, transparency and accountability of international procuring entities are keen to promote such values only as long as this may advantage their own companies. For instance, a wave of reform in favour of more competitive processes took place in the early Nineties when United States realized that the percentage of awards to American companies was progressively decreasing compared to the percentage of tenders awarded to developing countries' companies.

## 5. GAL Dimensions of International Organizations' Procurement Regulation?

By way of conclusion, I will now briefly address the last question, can procurement regulation be better understood, interpreted and eventually reformed through the lens of global administrative law?

Traditionally, *international administrative law* (o public international law) was the law produced by international institutions –which were mainly international administrations-, that regulated the

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<sup>18</sup> On the idea that interaction between actors within the international institutions plays a determinant role in the construction and evolution of administrative law in those institutions, see E. Benvenuti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, in «Law and Contemporary Problems» 2005 (Summer/Autumn), n. 68, 319 et seq.

relationships between such institutions: «[it was] essentially interstate law in terms of its nature; it [was] administrative as to its contents»<sup>19</sup>.

With the development of international organizations whose secretariats were conceived as independent from States, rules were elaborated to regulate the relationships between the organizations, its organs and the individuals who served as civil servants in the organizations. This body of norms, referred by some scholars as internal law and by some others as administrative international law, differed greatly from the traditional public international law. In the words of Jenks: «1. [i]t is a separate system of law for each organization; 2. [...] the sources of internal law are hierarchical [i.e. there is a treaty, then regulations, mostly administrative]; 3. [...] the subjects (persona) of the internal law are the organization, its member States as such and their representatives on the organs of the organization as such, its several organs and their members, including its officials as such»<sup>20</sup>. The legitimacy of the international organization to adopt rules affecting private parties came from the internal institutional contractual relationship between the organization and its officials. Furthermore, the rules applicable to these individuals had a procedural character as well as a substantial nature. Finally, the content of such rules was more that of labor law, than that of administrative law in a narrow sense.

Under all these respects, the case of international organizations' procurement regulation shows peculiarities which are not be fully captured by the concept of international administrative law, but that may require the development of a new theoretical framework.

First of all, international organizations' procurement rules affect directly private parties. But these are affected in virtue of a non-contractual relationship. Even more, affected private parties may belong to States which are not even member of the international organizations. Under this respect the vendor who takes part to the procurement procedure finds herself in the analogous condition of the individual participating to the procedure selecting international organization officials. This element poses the minimum requisite for qualifying the relationship between the international organization and the private party as an administrative-type relation.

Second, the interplay of actors and related interests shaping procurement regulation is not anymore only that between international administration and its officials or between national administrations, but it's a tripartite interplay of interests between international administrations, private parties external to the administration and the State. We are, thus, moving not in a bi-dimensional space (international), but in a tri-dimensional space (global).

Third, the content of the rules is strictly administrative and procedural, as they do not govern labor relationships with officials.

If we, thus, adopt the category of global administrative law to interpret the phenomenon, not only we are able to detect its novelty with respect to previous forms of regulation and the peculiar dynamics behind it, but we are also able to point out at its limits and at possible reforms as reference to administrative law *strictu sensu*, not intended as international administrative law mainly governing labor relationships of officials, provide us with a wide *spectrum* of tools that can be applied at the supranational level to unlock the interplay of interests and its negative effects and to foster transparency, reason giving, accountability still within the framework of international organizations' objectives.

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<sup>19</sup> S. Battini, *International Organizations and Private Subjects: A Move Toward A Global Administrative Law?*, IIIJ Working Paper 2005,3, at 8, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=723165](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=723165).

<sup>20</sup> W. Jenks, *supra*, 73. See *inter alia* .F. Amerasinghe, *The Law of the International Civil Service (As Applied by the International Administrative Tribunals)*, Oxford: OUP, 1994 (2<sup>nd</sup> ed.); S. Bastid - Basdevant, *Les fonctionnaires internationaux*, Paris: Recueil Sirey, 1931; S. Battini, *Amministrazione senza Stato*, Milano: Giuffrè, 2003; U. Borsi, *Il rapporto di impiego nella Società delle Nazioni*, in «Rivista di diritto internazionale», 1923. C;.



# Towards global administrative systems? The case of sport

Lorenzo Casini\*

## 1. Sports Law as Global Law

In the early 1990s, a judgment by the European Court of Justice on the free movement of football players within the European Community marked a milestone for sports law:<sup>1</sup> the decision (the “*Bosman* case”) limited the autonomy of international sports orders, affirmed the supremacy of EC law over sports rules, and cast serious doubts on the legal theories thus far applied to the sports context.<sup>2</sup>

In the twenty years that followed, the points of interaction between sports law, international law and national legal systems have increased enormously, to the extent that they have become innumerable and multifaceted: regulatory, institutional, procedural, and judicial.<sup>3</sup> Every branch of law must deal with sports-related issues, which arise in a most diverse range of fields: from anti-trust regulation to commercialization of radio and television broadcasting rights, from labour disputes to the protection of human rights.<sup>4</sup> In this connection, the legislative acts approved by States for hosting international sporting events are only one of several examples.<sup>5</sup> National laws “observe” the system of norms produced by international sporting institutions, and States comply with the provisions within the foundational documents of the latter. National norms often make reference to the Olympic Charter, which, in some cases, is even incorporated into domestic legislation.<sup>6</sup> States shape the national regulation of doping-related matters on the basis of a “Code” approved by the World Anti-Doping Agency (WADA), a public-private foundation created for the purpose and regulated by Swiss private law with its headquarters in Canada.<sup>7</sup>

Globalization further enhanced the social and economic growth of a phenomenon, which is, by its very nature, universal.<sup>8</sup> As a matter of fact, “sports law is not just international; it is non-governmental

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\* Associate Professor of Administrative Law, University of Rome “Sapienza”.

<sup>1</sup> ECJ, Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, 15 December 1995: see D. O’Keeffe and P. Osborne, “*L’affaire Bosman: un arrêt important pour le bon fonctionnement du Marché Unique Européen*” (1996) *Rev. Marc. Un. Eur.* 17.

<sup>2</sup> See S. Gardiner, R. Parrish and R.C.R. Siekmann (eds.), *EU, Sport, Law and Policy. Regulation, Re-Regulation and Representation*, The Hague, 2009; A. Massera, ‘Lo sport e il principio della parità delle armi, tra politiche antidoping e diritto della concorrenza’ (2007) *Rivista italiana di diritto pubblico comunitario* 175, and Id., ‘Sport e ordinamenti giuridici: tensioni e tendenze nel diritto vivente in una prospettiva multilaterale’ (2008) *Diritto pubblico* 113.

<sup>3</sup> For an overview, see F. Latty, *La lex sportiva. Recherche sur le droit transnational* (2007), and L. Casini, *Il diritto globale dello sport* (2010).

<sup>4</sup> On these issues, P. Weiler, *Leveling the Playing Field. How the Law Can Make Sports Better for Fans*, Cambridge, 2000, and S. Greenfield and G. Osborn (eds.), *Law and Sport in Contemporary Society*, London, 2000.

<sup>5</sup> Such as the *London Olympic Games and Paralympic Games Act 2006*, enacted for the 2012 Olympic Games.

<sup>6</sup> As happened in Turkey, with the Parliamentary Act no. 3796 of 1992, the so-called “Turkish Olympic Law” (see A.M. Mestre, *The Law of the Olympic Games*, The Hague, 2009, p. 21).

<sup>7</sup> L. Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, in Symposium on “Global Administrative Law in the Operations of International Organizations”, L. Boisson de Chazournes, L. Casini e B. Kingsbury eds, 6 *International Organizations Law Review* 411 (2009); and K. Henne, *WADA, the Promises of Law and the Landscapes of Antidoping Regulation*, 33 *Political and Legal Anthropology Review* 306 (2010).

<sup>8</sup> R. Gulianotti and R. Robertson (eds.), *Globalization and Sport*, Oxford, 2007.

as well, and this differentiates it from all other forms of law”.<sup>9</sup> Sports rules are genuine “global law”, because they reach across the entire world, involve both international and domestic levels, and directly affect individuals (such as athletes): this is, for example, the case of the Olympic Charter, a private act with which all States comply;<sup>10</sup> or of the abovementioned World Anti-Doping Code, a document that provides the framework for harmonization of anti-doping policies, rules, and regulations within sports organizations and among public authorities.<sup>11</sup>

These rules include not only transnational norms established by the International Olympic Committee (IOC) and International Federations (IFs) – i.e. “the principles that emerge from the rules and regulations of international sporting federations as a private contractual order” –,<sup>12</sup> but also “hybrid” public-private norms approved by WADA and international law (such as the UNESCO Convention Against Doping in Sport). Sports law is highly heterogeneous, and, above all, it is “global”: it consists not only of norms given by States, but also of the regulations of central sporting institutions (such as the IOC, IFs and WADA) and of national sporting bodies (such as National Olympic Committees and National Anti-Doping Organizations).

Sport has thus generated a set of institutions and rules that amounts to an autonomous legal *corpus*, which legal scholarship has varyingly referred to as “International Sports Law”, “Global Sports Law” and *lex sportiva* (thus drawing a patent analogy with the *lex mercatoria* governing international trade).<sup>13</sup>

## 2. Global Governance of Sport and the Emergence of A Global (Administrative) Sports System

Parallel to the worldwide growth of the sports phenomenon, most strikingly evidenced by the evolution of the Olympic games,<sup>14</sup> there has been a progressive “globalization” of sports law and its organizational apparatus – a process that originates from the Olympic Movement.<sup>15</sup>

<sup>9</sup> M. Beloff, T. Kerr, M. Demetriou, *Sports Law* 5 (1999). According to these authors, the term “sports law” is “a valid description of a system of law governing the practice of sports”. They also note that “the public’s limitless enthusiasm for sport and its importance to our cultural heritage makes sports law more than mere private law” (*Id.*, 4).

<sup>10</sup> See J.-L. Chapelet, B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The governance of sport* (2008), and A.M. Mestre, *The Law of the Olympic Games* (2009).

<sup>11</sup> P. David, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport* (2008).

<sup>12</sup> K. Foster, ‘Is There a Global Sports Law?’, 2 *Entertainment Law*, vol. 2, n. 1, spring 2003, 1, 4, who describes “global sports law” as a “transnational autonomous legal order created by the private global institutions that govern international sport”, “a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federation” and not “governed by national legal systems” (*ibidem*, p. 2). This author considers “global sports law” a significant example of spontaneous global law without a State, according to the definition provided in *Global Law Without a State* (Gunther Teubner ed., 1997), and Gunther Teubner, *Un droit spontané dans la société mondiale*, in C.-A. Morand (ed.), *Le droit saisi par la mondialisation*, p. 197 (2001).

<sup>13</sup> On these issues, see now R.C.R. Siekmann and J. Soek (eds.), *Lex Sportiva: What is Sports Law* (2012), and J.A.R. Nafziger and S.F. Ross (ed. by), *Handbook on International Sports Law*, Cheltenham, 2011. See also J.A.R. Nafziger, *International Sports Law*, 1 (2<sup>nd</sup> ed., 2004), J.-P. Karaquillo, *Droit international du sport*, in *Recueil des Cours* – collected courses of the Hague Academy of International Law 2004, Tome 309, (2006), A. Wax, *Internationales Sportrecht: Unter besonderer Berücksichtigung des Sportvölkerrechts*, 173 (2009), M. Greppi ad E. Vellano (eds.), *Diritto internazionale dello sport* (2<sup>nd</sup>, 2010); formerly, M.S. Giannini, *Ancora sugli ordinamenti giuridici sportivi* (1996), in *Id.*, *Scritti. Volume Nono. 1991-1996*, 441 (2006), who wrote that the term “international” refers, in sport, to a “diritto superstatale”, such that it does not mean the “diritto proprio di un ordinamento giuridico a sé”, but “una normativa interstato e superstato” (444).

<sup>14</sup> See A. Tomlinson, *Olympic survivals: The Olympic Games as a global phenomenon*, in L. Allison (ed.), *The Global Politics of Sport. The Role of Global Institutions in Sport*, London, 2005, p. 46 et seq. To give an example, in 1896, in Athens, there were about 250 participating athletes, 14 Countries represented and 43 programmed events; in Rome, in 1960, over 5,000 athletes attended, representing 83 Countries for 150 events; in 2008, in Beijing, more than 10,000

Since the end of the 19th century, an organizational structure began to develop around the Olympics. This structure, which has become increasingly complex, has the IOC at its apex and International Federations (IFs) and National Federations (NFs), on one hand, and National Olympic Committees (NOCs), on the other hand, at its base. For both of these sub-structures, a “monopolistic” regime exists, as the IOC recognizes only one IF per sport, and one NOC per country. National Federations (also founded upon the principle of monopoly) are associated to each IF. Such a structure has been described as a double pyramid, one comprising the IOC and National Committees, and the other the International and National Federations.<sup>16</sup> However, the structure may be defined more accurately as a group, as a “network” of several pyramids: indeed, in addition to the pyramid of IOC and Olympic Committees, there are as many pyramids as international-level federations (i.e. about one hundred); furthermore, each pyramid is connected to the rest by multiple organizational relationships, of both vertical and horizontal nature.

Between the 1980s and 1990s, following the extraordinary development of the Olympic Movement – enhanced by the economic and financial success of sponsorships and by the end of the Cold War – the links between the international sports legal order and States became increasingly close. This led to a series of institutional effects: the number of sport organizations multiplied; international level public/private agencies, such as the World Anti-Doping Agency (WADA), were created; national entities to concretely perform the functions of international institutions proliferated; an international Court of Arbitration for Sport (CAS) was established and played a key role in ensuring uniform application of global sports law. As a result, the institutional framework no longer appears to include only the IOC, IFs, Olympic Committees and National Federations, but also the world anti-doping authorities, (WADA and related national organizations (NADOs)), and the global system of sport justice, headed by the CAS.

In seeking to describe such a complex structure, the notion of “international regime” developed by political scientists may be useful.<sup>17</sup> As far as international regimes consist of “sets of implicit and explicit principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area”,<sup>18</sup> sports legal orders can be likened to the international-level “private regimes”, i.e. those regimes that are voluntarily formed and should be conceptually located beyond the

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athletes competed, representing over 200 Countries, in 302 events: see D. Wallechinsky e J. Loucky, *The Complete Book of the Olympics*, London, 2008.

<sup>15</sup> Governed by the International Olympic Committee (IOC), the Movement's Olympic Charter represents almost a “constitution”, in which the fundamental principles and rules on the organization and functioning of the Olympics are established. However, the aims of the Charter are not restricted to the Olympic games alone. The Charter accomplishes three main tasks: first, it is a “basic instrument of a constitutional nature”, which establishes the Olympic principles and values; second, the Charter is the Statute of the IOC; third, the Charter defines the rights and duties of the three principal components of the Olympic Movement - the IOC, the International Federations (IFs), and the National Olympic Committees (NOCs) – and of the Organizing Committees for the Olympic Games (OCOGs).

<sup>16</sup> M.R. Will, ‘Les structures du sport international’, in P. Cendon (ed.), *Scritti in onore di Rodolfo Sacco*, Milano, 1994, p. 1211 et seq.

<sup>17</sup> See J.G. Ruggie, ‘International responses to technology: concepts and trends’ (1975) 29 *International Organization* 557, who defined regimes as “set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of States” (p. 570), and S.D. Krasner (ed.), *International Regimes*, London, 1983, particularly S.D. Krasner, *Structural causes and regime consequences: regimes as intervening variables*, p. 1 et seq., and R.O. Keohane, *The demand for international regimes*, p. 141 et seq.; see also K. Raustiala, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law’ (2002) 43 *Vanderbilt Journal of International Law* 1, A. Hasenclever, P. Mayer and V. Rittberger, *Theories of International Regimes*, Cambridge, 1997, and V. Rittberger (ed.), *Regime Theory and International relations*, Oxford, 1993. As to sports law, the expression “regulatory regimes” is adopted by S. Gardiner et al., *Sports Law*, 3<sup>rd</sup> edn., Oxford, 2006, p. 38 et seq.

<sup>18</sup> Krasner, above, p. 2, who clarifies that “Principles are beliefs of facts, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice”.

mechanisms typically arising in international law.<sup>19</sup> A common feature to all private regimes is their foundation upon one or more international organizations. An example in this respect is the International Organization for Standardization (ISO), an association constituted by national agencies for standardization for the approval of technical standards eventually adopted in the rest of the world; this activity is similar to the legislative tasks performed by international sport federations and by WADA. Other examples are the Internet, or financial markets, both governed by special international organizations of a private nature.

In many private regimes, however, the role of international and national public authorities has recently begun to expand. In the case of sport, “pressure” from States and the EU on sports institutions appears to be increasing.<sup>20</sup> Other than the Olympic Movement, governed by the IOC, and the technical-sporting regimes of the individual legal orders regulated by IFs, new international sports regimes have emerged, in which public authorities play a pivotal role: examples are the world anti-doping regime, led by WADA and having national terminals that, in the majority of cases, are public administrative bodies; or the regime governing the organization of Olympic Games, which is regulated by the IOC but concretely performed by special national bodies appointed by domestic public authorities for the purpose (i.e. the Olympic Games’ Organizing Committees).

The connections between these regimes have thus generated a global “network”.<sup>21</sup> Not only is this structure based on soft norms – soft insofar as these rules are not produced according to the means traditionally used in international law – but it is also characterized by a considerable number of institutional relationships. The organization of sporting institutions consists of multiple pyramidal structures alongside horizontal-type relationships, which are formalized to varying degrees.<sup>22</sup>

Therefore, although the notions of “regime” and “network” are taken from other fields of scholarly pursuit, they appear nevertheless to be extremely useful for understanding most of the legal relationships between the various international sporting institutions, and between these institutions and national bodies. But – for historical, political and socio-economic reasons – sport, unlike other regimes or networks, displays a much more advanced degree of legal and institutional development. The proliferation and diversification of the functions performed by sporting institutions, for example, have triggered the need to affirm the principle of the separation of “powers” – or a variation thereon – in international-level sport.

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<sup>19</sup> G. Teubner, ‘Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?’, in K.H. Ladeur (ed.), *Public Governance in the Age of Globalization*, Aldershot, 2004, p. 71 et seq., and H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Market*, Oxford and Portland, 2005.

<sup>20</sup> J.A.R. Nafziger, ‘The Future Of International Sports Law’ (2006) 42 *Willamette Law Review* 86.

<sup>21</sup> See K.-H. Ladeur, ‘Der Staat der „Gesellschaft der Netzwerke“. Zur Notwendigkeit der Fortentwicklung des Paradigmas des „Gewährleistungsstaates“’ (2009) 48 *Der Staat*, n. 2, 162, M.O. Jackson, *Social and Economic Networks*, Princeton, 2008, and M. Castells, *The Rise of the Network Society*, Oxford, 1996. On transgovernmental networks, see A.-M. Slaughter, *A New World Order* (2004), S. Picciotto, ‘The Regulatory Criss-Cross: Interaction Between Jurisdictions and the Construction of Global Regulatory Networks’, in *International Regulatory Competition and Coordination: Perspective on Economic Regulation in Europe and the United States*, ed. by W. Bratton, J. McCahery, S. Picciotto e C. Scott, New York, 1996, p. 89 et seq., and K. Jayasuriya, ‘Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance’ (1999) 6 *Indiana Journal of Global Legal Studies* 425. More recently, see P.-H. Verdier, ‘Transnational Regulatory Networks and Their Limits’ (2009) 34 *Yale Journal of International Law* 113, M. Amstutz e G. Teubner (eds.), *Networks. Legal Issues of Multilateral Co-operation*, Oxford, 2009, focused on “private” and “contractual” networks, and M.J. Warning, *Transnational Public Governance. Networks, Law and Legitimacy*, New York, 2009.

<sup>22</sup> F. Ost e M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, 2002, p. 23 et seq. With regard to public administration, P. Bogason e T.A.J. Toonen, ‘Introduction: networks in public administration’ (1998) 76 *Public Administration* 205, A.L. Oliver e M. Ebers, ‘Networking Network Studies: An Analysis of Conceptual Configurations in the Study of Inter-organizational Relationships’ (1998) 19 *Organization Studies* 549, and W.J.M. Kickert, E.H. Klijn and J.F.M. Koppenjan (eds.), *Managing Complex Networks*, London, 1997.

This requires consideration of the regulatory and institutional issues on which the notions of regime and network rest, but also of the nature of the activities carried out by sporting bodies. It is thus possible to identify two phenomena that have marked sports' legal dimension in recent decades. First, the degree of proceduralization is ever-increasing: from the production of norms to the execution of anti-doping tests and the selection of Olympic Games' host cities, each activity now follows a well-defined and detailed procedure. Second, since the 1980s and due to the growing role of the Court of Arbitration for Sport (CAS), sport has developed a sophisticated system of dispute resolution, which can be defined as a system of truly global sport justice.

The development of international sport regimes, together with a multi-level network organization, thus enables new hypotheses to be advanced for describing the legal dimension of sport. In particular, the interrelationship that exists – at regulatory, organizational and procedural levels – between the various sport regimes prompts reference to the concept of “system”, also borrowed from other social sciences.<sup>23</sup> The notions of regime, network and system are closely interconnected;<sup>24</sup> and it is revealing that the Italian scholar Santi Romano, in defining the meaning of the term “institution”, at the very foundation of his conception of legal orders, made frequent use of words such as “organization”, “structure” and the term “system” itself.<sup>25</sup>

The set of international sports institutions (namely the IOC, WADA, CAS and the over one hundred IFs) and national institutions (such as the hundreds of Olympic Committees and national anti-doping agencies and the thousands of National Federations), which is regulated in detail by documents such as the Olympic Charter and the World Anti-Doping Code, features structural elements that begin to assume a clear systemic shape. In particular, this emerging system displays three main features: the rise of an institutional network; the growth of administrative tasks and procedural mechanisms; the key role of (quasi-)judicial bodies.

### **2.1. The Rise of an Institutional Network**

The global sport system is the product of the interaction between a large number of institutions that each creates different regimes, each of which features both a superior body located at the international level and domestic terminals operating at the national level. This structure is excellent matter for a case study on the operational mechanisms of international organizations and their relationships with national bodies. As may be known, this is not a new subject, but rather one that can, to a certain extent, be traced back to Georges Scelle's intuition on the “*dédoulement fonctionnel*”.<sup>26</sup> Furthermore,

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<sup>23</sup> See M.G. Losano, *Sistema e struttura nel diritto*, Milano, 2002 – I. *Dalle Origini alla Scuola storica*, II. *Il Novecento e III. Dal Novecento alla postmodernità* –, Id., *Sistema e struttura nel diritto*, Torino, 1968, N. Bobbio, *Teoria dell'ordinamento giuridico*, Torino, 1960, p. 74 et seq., J. Raz, *The Concept of a Legal System. An Introduction to the Theory of Legal System* (1970; 1973), and L.M. Friedman, *The Legal System. A Social Science Perspective* (1975). See also T. Parsons, *The Structure of social action*, New York, 1939, Id., *The Social System*, Chicago, 1951, and Id., *On Building Social Systems Theory: A Personal History*, in *Daedalus. Journal of the American Academy of Arts and Science*, 1970, p. 826 et seq., and N. Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie*, Frankfurt am Main, 1984, and Id., *Das Recht der Gesellschaft*, Frankfurt am Main, 1993.

<sup>24</sup> T. Parsons, *The Social System*, *ibid.*, p. 25: who referred to “system of processes of interaction between actors, it is the structure of the *relations* between the actors as involved in the interactive process which is essentially the structure of social system”, so that a system is a “network of such relationships”. R. Keohane and J. Nye, *Power and Interdependence*, Boston, 1977, p. 19, clarify that the notion of “regime” includes “networks of rules, norms, and procedures that regularize behavior and control its effects”.

<sup>25</sup> See S. Romano, *L'ordinamento giuridico* (2<sup>nd</sup> edn, 1946), Firenze, 1951, p. 42 et seq. This point is highlighted by N. Bobbio, *Teoria e ideologia nella dottrina di Santi Romano* (1975), in Id., *Dalla struttura alla funzione. Nuovi studi di teoria del diritto* (2007), p. 146 et seq.

<sup>26</sup> G. Scelle, *Précis de droit des gens*, I, Paris, 1932, p. 43, 54 et seq. and 217), who also stated that “*les agents dotés d'une compétence institutionnelle ou investis par un ordre juridique utilisent leur capacité 'fonctionnelle' telle qu'elle est organisée dans l'ordre juridique qui les institue, mais pour assurer l'efficacité des normes d'un autre ordre juridique*”.

these issues have also been abundantly examined with reference to EU law, since the execution of European-level decisions necessarily involves an examination of the relations between supranational bodies and national administrative authorities.<sup>27</sup>

Moreover, in national sport law, institutional solutions influenced by public law are progressively spreading, both in relation to organizational structures and to the system of rules which govern national sporting bodies. Cases differ according to the traditions of each State, as occurs for example with NOCs.<sup>28</sup> Nevertheless, in this respect, it is possible to identify features that are common to all national legal systems such as, for example, the conferral of a public law nature to national anti-doping entities, or, in the context of the Olympic games, the involvement of the public authorities of a host city's country in the Board of the Organizing Committee.

## 2.2. *The Growth of Administrative Tasks and Procedural Mechanisms*

The increasing political, social and economic significance of sporting institutions has triggered a rise in the number of functions performed by these bodies and a rise in the corresponding rate of procedures: the case of the Olympic games' bidding process is emblematic in this respect.

This trend, linked to globalization, can be seen in most regimes derived from private law. Some scholars suggest that these regimes have developed such a high complexity of norms, institutions and procedures as to appear extremely similar to regimes of public law derivation.<sup>29</sup> However, additional factors surround this phenomenon. First, the circumstances in which decisions taken by sports institutions produce effects on both public interests and individual rights, whether protected by national or supranational legal systems, are increasingly expanding: be it sufficient, in this connection, to cite the European anti-doping measures, or anti-trust regulation. Second, issues concerning the legitimacy and accountability of sports institutions have become all the more relevant, especially in light of the legal and economic effects of decisions taken by sports institutions.

The issues listed above have drawn attention to the need to improve the procedural mechanisms followed by sporting institutions, to provide affected parties with participatory mechanisms and also to enable the review of actions taken by sport institutions. Consequently, typical principles of national legal systems, such as fairness, due process and the right to be heard, have often been invoked and applied.

Extremely significant examples to this effect may be found in the decisions given by the CAS, which has often referred to such principles and likened IFs as to public administrations. In the *Pistorius v. IAAF* case, for example, the CAS evaluated the IAAF's decision-making process to verify whether the decision challenged by the athlete was "procedurally unsound".<sup>30</sup> Previously, the CAS

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*privé des organes nécessaires à cette réalisation, ou n'en possédant que d'insuffisants*" (G. Scelle, *Le phénomène juridique du dédoublement fonctionnel*, in W. Schätzel and H.-J. Schlochauer (eds.), *Rechtsfragen der Internationalen Organisation – Festschrift für Hans Wehberg zu seinem 70. Geburtstag*, Frankfurt am Main, 1956, p. 324 et seq., here p. 331). On Scelle, H. Thierry, 'The Thought of Georges Scelle' (1990) 1 *European Journal of Integrational Law* 193, and A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in *International Law*', *ibid.*, 210; see also M. Koskeniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge, 2004, p. 327 et seq.

<sup>27</sup> P.P. Craig, *EU Administrative Law*, Oxford, 2006, and *Droit Administratif Européen*, sous la direction de J.-B. Auby et J. Dutheil de la Rochère, Bruxelles, 2007, and J. Schwarze, *Europäische Verwaltungsrecht*<sup>2</sup>, Baden-Baden, 2005.

<sup>28</sup> See J.-L. Chappelet e B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The governance of sport*, above, p. 49 et seq. and 54.

<sup>29</sup> A. Riles, 'The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State' (2008) 56 *Am. J. Comp. L.* 605, for instance, observes that "global private law" is "not a radical departure from state law, but really more of the same" (p. 629).

<sup>30</sup> CAS 2008/A/1480, especially para. 56 et seq.

highlighted “an evident analogy between sports-governing bodies and governmental bodies with respect to their role and functions as regulatory, administrative and sanctioning entities”.<sup>31</sup>

Once again, a clear example of the increasing procedural dimension of sport legal orders may be seen in the world anti-doping regime, where we can identify both rulemaking activities (specifically, the creation of the World Anti-Doping Code) that take place through consultations open to public bodies and sporting institutions, and adjudication activities (i.e. decisions related to doping, from exemptions to penalties) in which procedural safeguards and fair hearings are accorded to affected parties.

### **2.3. The Key Role of (quasi-)Judicial Bodies**

The increase in norms, institutions, functions and procedures in the sports context inevitably requires review mechanisms and dispute settlement bodies to be instituted, to face the ever-more frequent (and complex) number of controversies. Thus, the sport system developed tools for reviewing the decisions taken by sports institutions and arbitration or (quasi-)judicial bodies.

For example, the anti-doping regime requires the establishment of dedicated tribunals for deciding appeals against the penalties imposed by National or International Federations. Furthermore, there are instances in which a central international body retains the power of verifying – and eventually modifying – decisions taken by national bodies, as in the case of the Therapeutic Use Exemption. Thus, a trend toward the establishment of centralized systems of review emerges, with the aim of ensuring uniformity in decision-making. The clearest example in this respect is the CAS.<sup>32</sup>

Unlike other transnational realms, such as the *lex mercatoria*, where the norms or principles applied in arbitration proceedings are essentially borrowed from private law, sports-related disputes feature an extensive application of public law principles – more precisely, of principles peculiar to criminal and administrative law.<sup>33</sup> In this framework, the issue of the role of national courts, and, in particular, the feasibility of judicial review of the activities of international sport institutions, remains, as yet, undefined.

## **3. Framing Global Sports Law and Its Hybrid Public and Private Nature: The Administrative Law Perspective**

If sports legal orders can be usefully framed within the theory of regimes, networks and systems, the foregoing analysis shows that an approach based on public and administrative law may be even more fruitful.<sup>34</sup> There are several analogies between the activities undertaken by international sporting

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<sup>31</sup> CAS 98/2000, *AEK Atene & S.K. Slavia Praga v. UEFA*, award of 20 August 1999, par. 58.

<sup>32</sup> I.S. Blackshaw, R.C.R. Siekmann e J. Soek (eds.), *The Court of Arbitration for Sport 1984–2004*, The Hague, 2006; A. Rigozzi, *L'arbitrage international en matière de sport*, Basilea, 2005, p. 132; A. Merone, *Il Tribunale arbitrale dello sport*, Torino, 2009; e S. Stebler, *Court of Arbitration for Sport (CAS)*, in P. Gola, C. Götz Staehelin e K. Graf (eds.), *Institutional Arbitration. Tasks and Powers of Different Arbitration Institutions*, Zurich-Basel-Geneva, 2009, p. 255. Lastly, see R.H. McLaren, *The Court of Arbitration for Sport*, in *Handbook on International Sports Law*, *ibid.*, 32 et seq., and L. Casini, ‘The Making of a Lex Sportiva by the Court of Arbitration for Sport’ (2011) 12 *German Law Journal* 1317.

<sup>33</sup> F. Latty, *La lex sportiva. Recherche sur le droit transnational*, above, p. 320 et seq. In CAS-JO[-TUR] 06/008, *Isabella Dal Balcon v. Comitato Olimpico Nazionale Italiano (CONI) & Federazione Italiana Sport Invernali (FISI)*, for example, the activity of the Italian National Olympic Committee and Italian National Skiing Federation, which excluded an athlete from the Olympic team, was judged “arbitrary” and “unfair”.

<sup>34</sup> See B. Kingsbury et al., “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* (2005) pp. 15–62. The website of the Global Administrative Law Project, which includes papers and symposia, is <http://www.iilj.org/GAL>. Symposia on Global Administrative Law have been published in 68:(3–4) *L. & Contemp. Probs.* (2005); 37(4) *N.Y.U. J. Intl. L. & Pol.* (2005); 17 *Eur. J. Intl. L.* 1 (2006). See also *Global Administrative Law in*

institutions and by public authorities. In many cases – similarly to what occurs today in other international regimes – States are directly involved (as in the case of WADA), and the national bodies within the sport system are mostly of public nature (as are the majority of anti-doping authorities). Furthermore, international sporting organizations rely on solutions borrowed from public and administrative law to an ever-increasing extent: this phenomenon is common not only in sports, but also in many other ultra-state contexts.

An administrative law perspective can also productively interact with other legal disciplines that may have more experience with studying ultra-state phenomena, such as international law and the law of international organizations. In addition, an administrative law approach can be combined with other projects aimed at delineating the global legal context, such as, for example, “global constitutionalism”<sup>35</sup> or the theory based on the exercise of international “public authority”.<sup>36</sup>

Moreover, the administrative law perspective appears better equipped to deal with supranational phenomena than one based on the notion of “legal order”.<sup>37</sup> Italian legal scholarship has applied this notion to sport since the 1920s, because, *inter alia*, sport is an excellent subject for a case study, since all the features of a “legal order” can be traced: these features – identified by Massimo Severo Giannini in elaborating the hypothesis originally conceived by Santi Romano – are plurality of actors/addressees, organization, and norms.<sup>38</sup> As a consequence, sports law became one of the best fields for investigating the theory of legal orders, which thus rapidly turned into the main conceptual reference for the sector.<sup>39</sup> Furthermore, the notion was also recalled by courts and, subsequently, cited in legislation.<sup>40</sup> The theory of legal order was used to preserve sports from interference by national forces, of both political and judicial kind; a necessity that, in several cases, is no longer as urgent

(Contd.)

*the Operations of International Organizations* (L. Boisson de Chazournes, L. Casini, and B. Kingsbury ed.s), 6 *International Organizations L. Rev.* (2009), and S. Cassese *et al.* (eds.), *Global Administrative Law: Cases, Materials, Issues* (2<sup>nd</sup> edition, 2008; 3<sup>rd</sup> edition 2012) More recently, see G. Anthony *et al.* (eds.), *Values in Global Administrative Law* (Hart, Oxford, 2011).

<sup>35</sup> On “global constitutionalism”, see C.E. J. Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff, The Hague, 2011), J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009); and J. Klabbbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009), and the *Journal Global Constitutionalism*, published since 2012 by Cambridge University Press (see the editorial on *Global constitutionalism: Human Rights, democracy and the rule of law*, by A. Wiener, A.F. Lang Jr., J. Tully, M. Poiars Maduro and M. Kumm).

<sup>36</sup> A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law*, Heidelberg, 2010

<sup>37</sup> S. Romano, *L'ordinamento giuridico*, Pisa, 1918, A.E. Cammarata, *Il concetto del diritto e la “pluralità degli ordinamenti giuridici”* (1926), in *Id.*, *Formalismo e sapere giuridico*, Milano, 1963, p. 185 et seq., specialmente p. 211 et seq., W. Cesarini Sforza, ‘La teoria degli ordinamenti giuridici e il diritto sportivo’ (1933) *Foro italiano* c. 1381 et seq., and M.S. Giannini, *Sulla pluralità degli ordinamenti giuridici* (1950), now in *Id.*, *Scritti, volume terzo 1949-1954*, Milano, 2003, p. 403 et seq., and *Id.*, *Prime osservazioni sugli Ordinamenti giuridici sportive* (1946); F. Modugno, ‘Ordinamento giuridico (dottrine generali)’ and ‘Pluralità degli ordinamenti’, both in *Enc. dir.*, XXX, Milano, 1980, p. 678 et seq., and XXXIV, Milano, 1983, p. 32 et seq., and F.P. Luiso, *La giustizia sportiva*, Milano, 1975, particularly p. 363 et seq.

<sup>38</sup> M.S. Giannini, *Gli elementi degli ordinamenti giuridici*, in *Riv. trim. dir. pubbl.*, 1958, p. 219 ss., now in *Id.*, *Scritti. Volume IV. 1955-1962*, Milano, 2004, p. 337 et seq.

<sup>39</sup> Lastly, see G. Manfredi, *Pluralità degli ordinamenti e tutela giurisdizionale. I rapporti tra giustizia statale e giustizia sportiva*, Torino, 2007, F. Goisis, *La giustizia sportiva tra funzione amministrativa ed arbitrato*, Milano, 2007, and R. Morzenti Pellegrini, *L'evoluzione dei rapporti tra fenomeno sportivo e ordinamento statale*, Milano, 2007. A different perspective is adopted by L. Ferrara, ‘L'ordinamento sportivo: meno e più della libertà privata’ (2007) *Diritto Pubblico* 1.

<sup>40</sup> See, for instance, Cassazione 2 aprile 1963, n. 811, in *Foro it.*, 1963, I, c. 894 et seq., but, above all, article 117 of Italian Constitution, as amended in 2001, which mentions the “ordinamento sportivo”, and Italian Law no. 280/2003, art. 1.

today, due to the need, instead, to involve supranational and national public powers in the pursuit of common goals (for example, in the field of anti-doping).<sup>41</sup>

The transformations that took place in the last thirty years, especially the development of the international sports legal order and of its connections to national sport legal orders, made it almost impossible to clearly distinguish between separate legal orders at world and national levels. This led to the conceptualization of the existence of a single global sports legal order.<sup>42</sup> This legal order – which would be of a “transnational” nature, due to its private law – and voluntary – roots, would not be represented by one legal order alone: given the rule-making power enjoyed by IFs, it may be possible to identify as many legal orders as there are sports.<sup>43</sup>

Although this approach may, on one hand, allow for both international and national profiles to be examined, on the other, it does not seem capable of fully encompassing sports law’s current developments. Describing the phenomenon of world sport in terms of legal order alone focuses excessively on the autonomy of sport in relation to the “sovereign” legal order, whether this be of an international, or single-State, nature:<sup>44</sup> there is a risk of neglecting important international-level legal aspects, especially those in which public authorities constitute an integral part of the sport system.<sup>45</sup> This is why a perspective based exclusively on legal order theory may not be the most appropriate for explaining global sports law exhaustively.<sup>46</sup> The sport system can therefore be appropriately analyzed by integrating such perspective with other approaches taken from international and administrative law.

One may question, however, why public law tools should be more suitable for investigating a phenomenon that originates from – and is traditionally linked to – private autonomy. In other words, we should explain why we would need to adopt an administrative law perspective to deal with issues that could be explored with a private law lens.

The answer is that sports law is now far from being understood from a private law perspective alone, because it presents, rather, a mixed nature, in which a regulatory framework based on private autonomy constantly interacts with public law norms. This phenomenon can be seen at national level especially, where dialogue between public and private law has always been intense. Furthermore, the Olympic regime, itself of private law derivation, has been flanked by other regimes in which States participate actively. On a national level, the domestic terminals of international sports regimes are often regulated by public law. From this point of view, the case of doping control measures offers a prime example, because the establishment of WADA and the adoption of the World Anti-Doping Code led to the creation of a uniform regulatory system, and, at the same time, of a dense network of

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<sup>41</sup> The theory of plurality of legal orders was adopted essentially to shed light on the relationships between sports and the national legal system, such as conflicts of norms or the relations between sports justice and national justice. These studies, while recognizing the relevance of the links between national and international spheres, were nevertheless mostly focused on domestic contexts and on the relationships between sport and the national legal orders. This happened also in French legal scholarship: see G. Simon, *Puissance sportive et ordre juridique étatique. Contribution à l'étude des relations entre la puissance publique et les institutions privées*, Paris, 1990.

<sup>42</sup> See the work by F. Latty, *La lex sportiva. Recherche sur le droit transnational*.

<sup>43</sup> F. Latty, *La lex sportiva. Recherche sur le droit transnational*, p. 32 et seq.

<sup>44</sup> M.S. Giannini, *Prime osservazioni sugli Ordinamenti Giuridici Sportivi*, *ibid.*, p. 101.

<sup>45</sup> And, paradoxically, the very presence of all the elements typical of a legal order – plurality of actors/addressees; organization; norms – confers uniqueness and originality to the sports phenomenon, which in itself is not amenable to straightforward comparison with other experiences. As a matter of fact, terms for comparison used in describing the global sports legal order have been found in the canon law of the Roman Catholic Church, or, to highlight the transactional element, the *lex mercatoria*. On these issues, see A. Röthel, ‘Lex mercatoria, lex sportiva, lex technica – Private Rechtsetzung jenseits des Nationalstaats?’, in *JZ*, 62, 2007, p. 755 et seq.

<sup>46</sup> In Europe, for instance, the European Court of Justice’s interventions aimed at censoring the sport norms that conflict with European law has raised several issues regarding the true nature of the sports legal order and the relationship between the sports legal order and other supranational legal orders, thereby casting doubt on the comprehensiveness of a theoretical approach based on the application of the notion of “legal order” to sport.

national bodies, mainly of a public nature: see, for example, the French anti-doping agency (*Agence française de lutte contre le dopage*), «*autorité publique indépendante dotée de la personnalité morale*», which is entrusted with defining and implementing actions to fight doping in France, and which must cooperate with WADA and the IFs.<sup>47</sup>

In broader terms, the law of international sports orders no longer appears to fall within the sphere of private law alone. Also, the ways in which private autonomy and the public sphere interact are very often anchored to paradigms and institutions typical of administrative law. This is mostly due to the growing socio-economic relevance of sports, which is capable of having profound impact on several public interests such as, for example, the protection of health, the protection of human rights and other fundamental rights of athletes.

Therefore, administrative law – the branch of law in which the dialectic between public and private is clearest –<sup>48</sup> plays a crucial role in framing global sports law.<sup>49</sup> First, it enables better comprehension of the relations between legal orders. “The majority of legal orders (from the most ancient, pertaining to territorial groups, to the most recent, such as the sports legal system and sectoral legal orders) operate in the context of administrative law” and the latter, therefore, “must address them”.<sup>50</sup> Second, the dynamics linked to the dialogue between private autonomy and public powers give rise to an ever-increasing degree of direct involvement of governments and domestic authorities in this field; this indicates that the significance of public administration and their law is constantly growing within sport legal orders.<sup>51</sup> Third, the administrative law perspective allows better investigation of sporting institutions, in terms of the organizational and procedural aspects and review mechanisms. Fourth, as mentioned above, sporting institutions themselves refer, increasingly often, to administrative law tools (as shown by the CAS awards).<sup>52</sup>

#### 4. The Development of Global Administrative Systems

The idea of conceptualizing global sports law as a global administrative system is a work in progress, which must necessarily consider that the phenomenon under examination is still on-going. The concept of “system” employed here, therefore, must be understood in both its meanings – that of “external” system (that is, in a “subjective” sense) and of “internal” system (in an “objective” sense).<sup>53</sup> On one hand, the “chaotic” state of the multiple relations – both regulatory and procedural – between the various sports legal orders requires huge effort of the interpreter, who must systematize this articulated mass of rules, bodies and procedures; on the other, the proliferation of sport regimes and the development of their respective apparatuses have followed a design that may have been

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<sup>47</sup> *Code du Sport*, Art. L232-5.

<sup>48</sup> M. Ruffert (ed.), *The Public-Private Law Divide: Potential for Transformation?*, London, 2009, and G. Napolitano, *Pubblico e privato nel diritto amministrativo*, Milano, 2003.

<sup>49</sup> A first attempt was made in in A. Van Varenbergh, *Regulatory features and administrative law dimensions of the Olympic movement's anti-doping regime*, IILJ Working Paper 2005/11 (Global Administrative Law Series); see also L. Casini, *Il diritto globale dello sport*, above. However, many sports legal issues can be approached from different perspectives. In several cases, the same problem can be explained either through the application of administrative law tools or through private law. In case of dispute resolution through arbitration, for example, one may investigate sports justice with sole regard to private law, civil procedure and private international law, without any need to turn to public law: on these issues, see L. Ferrara, *L'ordinamento sportivo: meno e più della libertà privata*, above, p. 20 et seq.

<sup>50</sup> M.S. Giannini, *Diritto amministrativo*<sup>3</sup>, Milano, 1993, I, p. 97 (translation by the Author).

<sup>51</sup> A. Wax, *Internationales Sportrecht. Unter besonderer Berücksichtigung des Sportvölkerrechts*, above, p. 83 et seq.

<sup>52</sup> On these issues, L. Casini, ‘The Making of a Lex Sportiva by the Court of Arbitration for Sport’, above.

<sup>53</sup> See M.G. Losano, *Sistema e struttura nel diritto*, *ibid.*, I, p. 42 et seq.; formerly, F.C. de Savigny, *System des heutigen Römischen Rechts* (1840), Italian translation by Vittorio Scialoja, Turin, 1886, p. 21.

spontaneous, but also consistent, to the extent that structures of a global sports legal system are emerging, with a sufficiently well-defined shape.<sup>54</sup>

In particular, the global character of such a system derives from the fact that it exists on a global scale and, at the same time, is not limited to the international or supranational level, but also involves the national sphere and is directly relevant to private entities and individuals.

Thus, sports law illustrates the emergence of “global administrative systems”, which display the three main features above examined: the rise of an institutional network; the growth of administrative tasks and procedural mechanisms; the key role of (quasi-)judicial bodies. The administrative nature of these systems derives from three factors in particular. First, these systems present a high degree of interpenetration (in regulatory, institutional and procedural terms) between private autonomy and the public sphere. Second, States and national public administrations are actors operating within the system, and act in accordance with mechanisms for both consensus and authority. Third, the institutional models, procedures adopted and review mechanisms all follow models that are typical of – if not directly subject to – administrative law. It can be further stated that global administrative systems provide for the direct application, to private entities or individuals, of norms and decisions made by ultra-state bodies, usually without any intermediation on part of States.

An administrative law perspective can facilitate comprehension of most sport-related phenomena: from the forms of cooperation between public and private actors to powers of oversight. Also, administrative law mechanisms have by now deeply penetrated into sports legal orders. This is evident from an examination of both the activities of sports institutions, and of the ways in which the latter interact with supranational and national public powers.

Such an analysis allows the analogies and differences between global sports law and other global administrative systems to be highlighted. The development of a network-type organization composed of several regimes, the “proceduralization” of the system, the differentiation of functions and the definition of a (quasi-)judicial activity are features that tend to be present, albeit in varying forms, in cases other than sport, and also in other international regimes. The global sport system, which clearly presents these elements, is a significant example of the development of administrative law mechanisms beyond the State.

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<sup>54</sup> The term “system” is used by J.-L. Chappelet e B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The governance of sport*, above, and is adopted in other international contexts: see B. Buzan and R. Little, *International Systems in World History. Remaking the Study of International Relations*, Oxford, 2000, and P.F. Diehl and C. Ku, *The Dynamics of International Law*, Cambridge, 2010.



# GAL and EU administrative law. A research agenda

Edoardo Chiti\*

## 1. Purpose

This paper aims at identifying a specific field of research, that of the relations between global and EU administrative law, at outlining the main research questions that should be tackled by legal science, and at assessing the state of advancement of legal reflection on the subject.

## 2. The Manifold Relations between Global and EU Administrative Law

Far from being two separate bodies of law, global administrative law and European Union (EU) administrative law come to contact and establish many types of relationships in an ever increasing number of policy areas. These relationships take a great variety of forms, are characterized by variations and differences, raise uneasy legal issues.

Two examples may give a taste of the variety, complexity and problematic character of the interplay between global and EU administrative law. The first refers to the relations between global and EU environmental management systems, the second to the EU Atalanta military operation implementing the United Nations (UN) Security Council Resolutions concerning piracy on the high seas off the coast of Somalia.

As for environmental management systems, the EU has developed in the Nineties an Eco-Management and Audit Scheme (EMAS). EMAS is a voluntary management tool for organisations aiming at improving their environmental and financial performance and at communicating their environmental achievements to stakeholders and society in general<sup>1</sup>. It is part of the EU strategy towards a sustainable growth based on a more resource-efficient, greener and more competitive economy. It reflects the attempt of the EU institutions to reach such objectives through instruments based on collaboration and partnership with enterprises rather than on legislative requirements, as well as a general tendency to establish environmental management systems in the global legal space<sup>2</sup>.

EMAS interacts with other environmental management systems developed by non-EU actors. Environmental management systems are rapidly spreading in the global legal space. One remarkable example is provided by EN ISO 14001:2004, a certifiable standard adopted by the International Standards Organisation (ISO). It provides the most important requirements for an environmental management system and it is used worldwide by public and private organisations.

Interestingly enough, the relationship between EMAS and EN ISO 14001:2004 is not an easy one. EMAS and ISO/EN ISO 14001 share the same objective, i.e. to provide good environmental management. Yet, EU institutions consider EMAS more advanced than ISO/EN ISO 14001 and

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\* Professor of Administrative Law, Tuscia University of Viterbo.

<sup>1</sup> Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC, OJEU 2009 L 342. See also Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains, in OJEU 2006 L 393.

<sup>2</sup> An account of the EMAS is provided by J. Clausen (with M. Keil and M. Jungwirth), *The State of EMAS in the EU. Eco-Management as a Tool for Sustainable Development*, 2002 ([http://ec.europa.eu/environment/emas/pdf/general/literature\\_study\\_020506\\_en.pdf](http://ec.europa.eu/environment/emas/pdf/general/literature_study_020506_en.pdf)); and M.S. Wenk, *The European Union's Eco-Management and Audit Scheme (EMAS)*, Heidelberg, Dordrecht, London, New York, Springer, 2005.

encourage EU and non-EU organisations that are already ISO/EN ISO 14001 certified to “step-up” to EMAS. EMAS is considered more rigorous because the environmental performance of the organisation is continuously improved, legal compliance is required and checked throughout the whole process before and after registration, a strict internal environmental auditing is carried out. As for the move from ISO/EN ISO 14001 to EMAS, the Commission has issued a number of guidances to facilitate organisations in taking all the necessary additional steps.

Are EMAS and EN ISO 14001:2004 two functionally complementary schemes, serving the same purposes through equivalent regulatory frameworks? Can one consider EMAS as a scheme implementing and further developing on a regional level a regulatory tool increasingly used in the global legal space? Or do EMAS and EN ISO 14001:2004 coexist in a less peaceful way, competing one with the other? If their relation is a competitive one, what is the rationale for competition?

A very different interplay between global administrative law and EU administrative law is illustrated by a second example, that of the Atalanta military operation of the EU.

The Atalanta military operation was launched by the EU Council in the late 2008 with the view of contributing to the implementation of several Security Council Resolutions concerning piracy and robbery against vessels on the high seas off the coast of Somalia<sup>3</sup>. Several actors were involved in the operation: the Security Council and the Secretary-General of the United Nations; the EU institutions and bodies competent in the field of ESDP (such as the Council, the Political and Security Committee and the Military Committee), together with the EU bodies set up in connection with the Atalanta operation, such as the Operation Commander; governments and military administrations of the EU Member States as well as those of the third countries participating in the operation; and, lastly, the Transitional Federal Government of Somalia.

The implementation of the Atalanta operation does not only require that EU administrative regulation and national administrative law combine in a single regulatory framework. It also implies that EU administrative regulation comes to contact with the UN regulation. Differently from the case of environmental management systems, what is at stake here is not a direct interaction between an instrument of EU administrative law and an instrument of global administrative law, but an interaction between EU administrative law and a body of regulation belonging to traditional public international law. What is interesting, however, is that EU administrative regulation and UN regulation seem to combine one with the other in a quite coherent way and to establish a unitary regime: while the UN regulation provides the general framework of the administrative implementation of the operation, the EU regulation sets forth the details of the operation Atalanta, governing operational and tactical command and control, and national law regulates the service relationship between military staff and national administrations, such as, for example, the exercise of disciplinary powers.

What is the nature of such emerging unitary regime? Does it respond to the traditional features of public international law? Or would it not be preferable to analyze this regime instead as a branch of global administrative law, taking into consideration the essentially unitary character of that regime; its reliance on sources other than exclusively conventional ones; and its main function of regulating, by means of administrative tools, the combined action of a plurality of different public powers, both national and non-national, in a specific sector of the global legal space? If so, what is the contribution specifically provided by EU administrative law to the emergence of such global administrative law by sector?

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<sup>3</sup> On the Atalanta operation, see S.J. Hansen, *Piracy in the greater Gulf of Aden. Myths, Misconception and Remedies*, Norwegian Institute for Urban and Regional Research Report 2009:29 (<http://www.nibr.no/uploads/publications/26b0226ad4177819779c2805e91c670d.pdf>). See also G. Grevi, D. Helly, D. Keohane (Eds.), *European Security and Defense Policy. The First Ten Years (1999-2009)*, EU Institute for Security Studies, 2009 ([http://ddata.over-blog.com/xxxyyy/2/48/17/48/Fichiers-pdf/Europe/ESDP\\_10-web.pdf](http://ddata.over-blog.com/xxxyyy/2/48/17/48/Fichiers-pdf/Europe/ESDP_10-web.pdf)).

### **3. The Research Questions**

The cases of the environmental management systems and of the Atalanta operation are only two of the many examples that may illustrate the great variety and complexity of the interplay between EU administrative law and global administrative law. Other examples might be taken from sectors ranging from competition to economic regulation (e.g. public procurements, accounting and auditing, and banking supervision) and social regulation (e.g. environmental protection and consumer protection). These further examples would confirm that the interactions between EU and global administrative law determine the emergence of a legal and institutional space rich of variations and tensions.

Notwithstanding its institutional and legal richness, though, the interplay between EU and global administrative law has not yet been identified as an autonomous and relevant field of research.

This lack of recognition has no clear explanation. One might suggest, however, that it reflects a specific understanding of the nature of the EU. Admittedly, the study of global administrative law has requested scholars to engage in the investigation of the relationships between different sets of administrative law, in two main directions: first, the “vertical” relationships between global administrative law and national administrative law; second, the “horizontal” relationships among different global administrative regimes, that is among the global administrative laws governing specific sectoral global regulatory systems<sup>4</sup>. It may be that the relationships between global administrative law and EU administrative law have been considered to fall in one of these two boxes, and not to deserve autonomous consideration. EU administrative law, in other terms, might be considered as the administrative law either of a State-like body or of a regulatory system beyond the State, with the consequence that the relationships between global and EU administrative law do not deserve to be explored and analyzed as such. Such relationships may be investigated either as “vertical” relationships between global administrative law and a specific type of national administrative law or as “horizontal” relationships among the administrative laws governing specific regulatory systems beyond the State.

Should this be the implicit reason behind the tendency to over-look the interplay between global and EU administrative law, yet, it would be an unconvincing one. Neither representation of the EU is indeed correct. The EU is not a regulatory system beyond the State homogeneous to the global regulatory systems as identified by the global administrative law studies: for example, it is not a sectoral system, but it has a quasi-general jurisdiction; and it relies on a constitutional architecture that is simply absent in the global regulatory systems. Nor is the EU a federal State, as it ambiguously combines federal, intergovernmental and governance elements in a post-national polity. Whatever our precise understanding of the European polity is, the peculiarities of the EU suggest that the relationships between global and EU administrative law might take forms and be carried out through processes different from those that are typical both of the vertical relationships between global and national administrative law and of the horizontal relationships among different global administrative regimes. The interplay between EU and global administrative law represents an autonomous field of research, deserving specific attention.

Within this field of research, many research questions may and should be raised. Two sets of questions, though, are prominent.

The first set of questions is oriented to an analytical understanding of the interactions between global and EU administrative law. Which game of forces characterizes, in the sectors where such relationships take place, the interactions between EU administrative law and global administrative law? To which extent and through which legal techniques are EU administrations subject not only to EU law but also to global administrative law? And to which extent and through which legal techniques

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<sup>4</sup> The point is developed in the framework paper by S. Cassese, *What is Global Administrative Law and Why Study it?*, in this working paper, *passim*.

are global regulatory systems subject to the influence of EU administrative law? Is there opposition or communication among the two legal systems? And what principles or rules govern the co-existence and the interplay between EU and global administrative law?

The second set of questions aims at reconstructing the result of such game of forces. Does the interplay produce an extension of EU administrative law beyond the EU formal boundaries? Does it produce an extension of global administrative law? Does it give place to a specific body of administrative law, different both from EU and global administrative law? If so, what are its distinguishing features? And what is the specific contribution provided to the new body of administrative law respectively by EU administrative law and by global administrative law? Provided that EU and global administrative laws are two bodies of law having rather different features (for example, in terms of formalization, mechanisms of compliance, public-private distinction, administrative powers), how do they exactly combine in a coherent overall framework?

#### 4. An Unexplored Field of Research

Admittedly, these are, at the time of writing, questions without an answer. Legal science has devoted some attention to certain aspects of the interplay between global and EU administrative law. This is the case, for example, of the studies on the EU participation to international organizations, which provide very useful insights on certain fundamental channels of interpenetration between the EU and global regulatory systems<sup>5</sup>. It is also the case of the literature exploring the forms and rationales of the dialogue between the European Court of Justice and the courts of some regulatory systems beyond the State, such as the system established by the European Convention of Human Rights<sup>6</sup>. Moreover, the interaction between EU and global administrative law seems to be at the centre of an increasing number of essays dedicated to single policy-fields<sup>7</sup>. With the exception of some remarkable works on judicial dialogue<sup>8</sup>, however, these studies are rarely carried out by making recourse to the analytical tools of administrative law, they reflect very different understandings of the global legal space, and they never tackle the overall questions lying at the heart of the interplay between global and EU administrative law.

Against this background, a possible way forward is indicated by a volume on the relationships and comparison between global administrative law and EU administrative law published in 2011<sup>9</sup>. This book represents only a very preliminary attempt to explore a dense area of new legal issues, which

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<sup>5</sup> See, e.g., the essays collected in Julia Lieb/Nicolai von Ondarza/ Daniela Schwarzer (Eds.), *The European Union in International Fora*, Baden-Baden, Nomos, 2011; see also the articles collected in the special issue of the *Journal of European Integration* dedicated to “The Performance of the EU in International Institutions”, Vol. 33, No. 6, November 2011 (the various papers are introduced by the framework paper by K.E. Jørgensen, S. Oberthür and J. Shahin, *Introduction: Assessing the EU’s Performance in International Institutions – Conceptual Framework and Core Findings*; among the various articles, see the horizontal analysis carried out by R.A. Wessel, *The Legal Framework for the Participation of the European Union in International Institutions*).

<sup>6</sup> See, e.g., S. Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, in *Common Market Law Review*, 2006, p. 629 ff.

<sup>7</sup> See, e.g., C. Secchi and A. Villafranca (Eds.), *Global Governance and the role of the EU*, Cheltenham, Edward Elgar, 2011, dedicated to economic growth.

<sup>8</sup> We are here referring to Sabino Cassese’s reflections on judicial dialogue within the global legal space, including the specific case of the relations between the Luxembourg Court and the Strasbourg Court: see, in particular, S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Roma, Donzelli, 2009, p. 71 ff. and p. 80 ff. See also E. D’Alterio, *La funzione di regolazione delle corti nello spazio amministrativo globale*, Milano, Giuffrè, 2010, at p. 87 ff.

<sup>9</sup> I am taking the liberty to refer to my own work, and in particular to the following volume: E. Chiti and B.G. Mattarella (Eds.), *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison*, Heidelberg, Dordrecht, London, New York, Springer, 2011.

further research should develop and systematize. Yet, it may be regarded as a useful first step, for two reasons.

First, it proposes a method to analyze the new legal field of research. This method is based on two different strands: one is comparison, the other is exploration of the linkages and connections between EU administrative law and global administrative law from a variety of viewpoints (organizational, procedural, functional, and so on). This double approach is promising as it tries at the same time to consider the distinguishing features of each of the two bodies of administrative law and to catch the ongoing processes of their convergence and conflict. It might also lead to enrich and refine the analytical tools of EU and global administrative law, as it is not interested in applying to a number of sectors a predefined set of EU and global administrative law categories, but it asks whether it is possible to develop further analytical tools.

Second, the volume proposes some preliminary conclusions, which might be tested and verified by further research.

As for the comparative dimension of the inquiry, the analysis carried out in the book indicates that differences between the EU and the global legal systems can be easily depicted for administrative organization, ways of action and instruments of review. EU law is well settled in its principles, bodies and procedures, while the global one is so diverse, as to make it often impossible to draw general conclusions. The former has very efficient and secure ways to affect national law, while the latter is unsteady and adaptable. More generally, the former relies strongly on national public authorities, while the latter looks more freely for partners, even in the private sector, and often is itself the product of private bodies. Moreover, the EU has a large scope of action and performs several different functions, while the global legal systems tend to focus on specific yet important policies and to act mainly as regulatory regimes.

However, there are similarities and exceptions to these tendencies. EU and global regulations are often similar, at times converge and reinforce each other. Global law uses organizational models and manners of action typical of the EU law, which in turn adjusts to many global regulations, making its own law similar to the global one. Convergence is particularly strong for some aspects, such as the principles regulating administrative procedures, and in some sectors, like the environmental protection. Also global law often relies on national governments, while EU law does not neglect private enforcement. They both are largely western systems of law.

As for the interactions between global and EU administrative law, the volume shows that the interplay between these two bodies of administrative law does not respond to a single overall rule.

EU and global regulations are sometimes similar, and they converge and reinforce each other for certain aspects (e.g., the principles regulating administrative procedures). In certain sectors, they seem to coexist easily, as their harmonization or coordination efforts are directed towards common or connected purposes and the instruments used are sometimes the same. In other policy-fields, EU and global administrative law not only coexist peacefully, but even pursue common goals and tend to reinforce each other through cross implementations and integrated organizations.

At the same time, however, the two bodies of administrative law maintain important differences, for example as for the values they encapsulate, the way in which they deal with compliance, the way in which they manage authority and power, the way in which they develop a constitutional anchorage. Moreover, they may also conflict one with other, directly or indirectly, for example because the EU administrative instruments may be conceived as alternatives to functionally equivalent global administrative law instruments. If “cooperation, division of labor and dialogue are common among global regimes and their constituent institutions”<sup>10</sup>, the interplay between EU and global administrative law may be an exception in so far as it may give rise to competition, non-cooperation,

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<sup>10</sup> As pointed to by S. Cassese, *What is Global Administrative Law and Why Study it?*, cit., § 4.

reciprocal impermeability and even clash between the two sets of administrative laws. And this is not without implication, as it implies that the interplay between EU and global administrative law does not always facilitate the emergence of a general body of law at the global level.

## **5. The Possible Implications of the Study of the Relations between Global and EU Administrative Law**

This paper has pointed to a specific field of research, that of the relations between global and EU administrative law; it has outlined the main research questions that should be tackled by legal science; and it has assessed the state of advancement of legal reflection on the subject. The main conclusion is that the relations between global and EU administrative law represent a promising field of research, but such field has been so far largely ignored by legal science, and its features, tensions and issues have just started to be explored.

While waiting for further research, capable to provide a more accurate and convincing account of the matter, it should be observed that the study of the various forms of the interplay between EU and global administrative law is an important exercise, with possible broad implications.

Three main implications should be mentioned here, by way of conclusion.

To begin with, tackling the research questions previously identified could shed light on the distinguishing features respectively of EU administrative law and global administrative law. The inquiry of the forms, modalities and effects of the interactions between global and EU administrative law is first of all a fruitful way to deepen our understanding of each body of administrative law beyond the State, to recognize its distinguishing features and specificities, to refine the analytical tools for its study.

Second, the inquiry of the relations between global and EU administrative law could usefully contribute to the reflection on the overall features of administrative law. In particular, it might allow us to reflect on the functional adaptability of administrative law. Processes of hybridation, cross-fertilization, transplants and the like are well known to administrative lawyers interested in comparison. Yet, they have been studied mainly with reference to national administrative laws. The study of the interplay between EU and global administrative law provides a case-study to reflect on the administrative law resulting from the interaction between two administrative laws developed outside the nation-State, which might make a difference.

Finally, the research questions are relevant in so far as they could permit to advance in the reconstruction of the features and dynamics of the global legal space. They could shed light, in particular, on a number of underlying and inherent tensions of the global legal space: this is the case of the tensions between unity and fragmentation, between politics and administration, and between local and universal, which represent some fundamental fault lines of the global legal space. And they could provide legal science with helpful insights to engage in the reconstruction of the overall features of the legal space, an effort which is crucial for the advancement both of global administrative law and EU law studies.

# The Transgovernmental Power in the EU and Beyond: A Dangerous Branch?

Mario Savino\*

## 1. Introduction

For some scholars, the transgovernmental phenomenon<sup>1</sup> amounts to a technocratic nightmare<sup>2</sup> and constitutes an opaque source of intergovernmentalism.<sup>3</sup> Such bodies – so the criticism runs – are composed of like-minded faceless bureaucrats, all using the same kind of ties and after-shave, who meet in Brussels or in Geneva behind closed doors and take decisions that affect the lives of millions of citizens without being accountable to anybody.

Other scholars, by contrast, associate transgovernmentalism with a non-hierarchical system of governance, dependent upon persuasion, argument and discursive processes, rather than on command, control and/or strategic action. Within such bodies high-level national officials and (more rarely) scientists discuss problems that are common to various states and address them by arguing rather than bargaining. Due to their deliberative style, a «shift from “power to reason”» occurs and a new kind of democratic experiment – «*deliberative supranationalism*»<sup>4</sup> – gradually emerges.

Who is right? This paper argues that none of them is. The association between transgovernmentalism and democracy (whatever the latter may mean) is often misleading. Many scholars misunderstand the transgovernmental phenomenon because they overlook its inherently administrative dimension. I will try to qualify my claim by addressing three questions: *a)* How widespread is the transgovernmental phenomenon? *b)* Why is it so widespread? *c)* Is it democratic or not?

## 2. The rise of transgovernmentalism

Transgovernmental networks are everywhere. Within the EU institutional setting, there are around 1500 such bodies, usually referred to simply as committees.

About thousand *committees of government experts* are established (most of them by the Commission itself) to assist the Commission’s directorate generals in drafting legislative proposals.

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\* Associate Professor of Administrative Law, Tuscia University of Viterbo.

<sup>1</sup> Though often used interchangeably, the terms “transgovernmentalism” and “transnationalism”, in their strict meaning, point to two different concepts: “Transnational interactions necessarily involve nongovernmental actors,” while transgovernmental relations are “interactions between governmental subunits across state boundaries”: J.S. Nye and R.O. Keohane, *Transnational Relations and World Politics: A Conclusion*, 25 *International Organization* (1971) 733; see also R.O. Keohane and J.S. Nye, *Transgovernmental Relations and International Organizations*, 27 *World Politics* (1974) 43. In this paper I refer to transgovernmentalism *stricto sensu*.

<sup>2</sup> M. Shapiro, “*Deliberative, “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?*”, 68 *Law & Contemp. Probl.* (2005) 314.

<sup>3</sup> J.H.H. Weiler, *The Community System: the Dual Character of Supranationalism*, 1 *Yearbook of European Law* (1982), 267 ff. See also Id., *Epilogue: “Comitology” as Revolution – Infranationalism, Constitutionalism and Democracy*, in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford, 1999) 343-346.

<sup>4</sup> C. Joerges e J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology*, 3 *European Law Journal* (1997), 273. See also, among the numerous responses to criticisms, C. Joerges, “*Deliberative Supranationalism*” – *Two Defences*, 8 *European Law Journal* (2002), 146, e Id., “*Good Governance*” in *the European Internal Market – Two Competing Legal Conceptualisations of European Integration and their Synthesis*, in A. von Bogdandy, P.C. Mavroidis e Y. Mény (eds.), *European Integration and International Coordination* (Kluwer, 2002) 219.

These colleges are usually chaired by the Commission (less frequently, by the Council) and are composed of experts sent to Brussels by the relevant national administrative units.<sup>5</sup>

In the legislative phase, a second group of transgovernmental bodies intervenes, namely *Council working groups* or *groupes de travail*. Their number approximates two hundred.<sup>6</sup> Under the coordination of the Committee of permanent representatives (COREPER), these auxiliary bodies prepare Council decisions. The agreements achieved at committee level are double-checked by the Coreper and merely rubber-stamped by the ministers in their Council meetings.

Moreover, more two hundred-fifty *comitology committees* make sure that Member States' administrative apparatuses are involved in the executive or implementing stage of the EU decision-making<sup>7</sup>. National delegations composed of administrative officials take part in the meetings, under the chair of the Commission. A specific piece of EU legislation – Regulation n. 182/2011 – analytically defines the procedures according to which such transgovernmental bodies issue (binding and non-binding) opinions on the implementing acts that the Commission wants to adopt.<sup>8</sup>

The transgovernmental paradigm has, thus, reached a high level of specialization and refinement in the European system, probably higher than in any other international organization<sup>9</sup>.

Nonetheless, transgovernmental networks also spread across the global order. They can be found in every sort of international organization, from those having a general competence to highly specialized ones, from universal or open organizations to non-universal or closed ones. Here again, such bodies are composed of national delegations of administrative officials and are typically chaired by a supranational institution (a secretariat).

From a structural viewpoint, those bodies can be divided into two broad categories.

Within the first one fit “horizontal” transgovernmental bodies, whose main features are three. To begin with, these committees are autonomous or “headless”, not being incorporated into an international organization. In addition, there are not disciplined by treaties, but rather by informal agreements between independent or quasi-independent national agencies. Finally, they do not adopt formal decisions, binding to States, and are set up for different reasons – to coordinate or facilitate information-sharing among national regulators, to draft guidelines and spread best practices, to set (legally non-binding) international standards. The most well-known examples are the International Organization of Securities Commission (Iosco), the International Association of Insurance Supervisors (Iais), the G-10 committees, such as the Committee on the Global Financial System, the Committee on

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<sup>5</sup> In this heterogeneous category, fit also “high-level” government expert committees, whose specific job is policy formation, and other committees (the European Regulatory Groups) that bring together the heads of national independent regulatory agencies.

<sup>6</sup> In Council of the European Union, *List of Council preparatory bodies* (doc. n. 5269/12, 11 January 2012), 189 active working groups are mentioned (the total rises if one considers the different forms in which many Council committees actually meet).

<sup>7</sup> According to the last official assessment, EU comitology committees are 266: see European Commission, *Report from the Commission on the working of committees in 2009*, 2 July 2010, COM(2010)354 final, at 4, tab. I.

<sup>8</sup> Article 291 TFEU and Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

<sup>9</sup> J. Trondal, *An Institutional Perspective on EU Committee Decision Making*, Ces, WP n. 6, 2003, p. 21 ([www.hia.no/oksam/ces/](http://www.hia.no/oksam/ces/)), also in B. Reinalda and B. Verbeek (eds.), *Decision Making within International Organizations* (London, 2004) 154 (asserting that «few international organizations have institutionalized a committee system that integrates external expertise and national civil servants to the same extent as the EU. Accordingly, there is greater interaction between community institutions and domestic administrations in the EU than in traditional intergovernmental organizations»), and A. M. Slaughter, *A New World Order* (Princeton, 2004) 350 (stating that “the EU has many features that make its distinctive form of government by network exportable to other regions and to the world at large”).

Payment and Settlement Systems and the Basel Committee on Banking Supervision (or Basel Committee).

The other category includes “vertical” transgovernmental bodies. These are auxiliary or secondary bodies that operate within an international organization and typically set harmonization or standardization rules or monitor the correct domestic implementation of international decisions. Also these bodies are composed of national (middle or high-level) officials and supranational official, i.e. civil servants working within international secretariats. Thus, these *fora* open national systems both “laterally”, to promote dialogue between domestic administrations, and “vertically”, to foster cooperation among supranational apparatuses and national implementing terminals. Within this group of “mixed” or “vertical” transgovernmental networks fit, just to mention a few, WTO secondary bodies administering multilateral or plurilateral agreements, the UN “functional committees”, exercising consultative and initiative tasks, and the so-called *Codex Committees*, assisting the *Codex Alimentarius Commission* in the drafting of food-safety standards.<sup>10</sup>

The omnipresence of transgovernmental networks in the EU and global institutional settings shows the limits of the multi-level metaphor: far from being separated by a void, the national and the European/international levels are linked by a densely populated area of inter-administrative colleges. Beside intergovernmental and supranational institution, the transgovernmental dimension represents a third kind of executive power beyond the State.

### **3. The virtues of transgovernmentalism**

Having ascertained that transgovernmental networks stretch everywhere in the global and European arenas, the next question concerns the reasons for this success. I will mention three of them.

First, this institutional model provides a viable tool for national executives to cope with the Europeanization and globalization of regulatory decision-making. The rules concerning meta-national phenomena, from global warming to international terrorism, increasingly de-nationalize, being adopted by supranational and international institutions. Transgovernmental bodies offer a way to re-nationalize decisions that are taken beyond the State, insofar as they enable member States to make their “voices” heard in all the phases of the ultra-national decision-making process (even when intergovernmental bodies are not directly involved). Government officials that sit on such committees pursue the interest defined by their domestic administration and make sure that this interest is adequately considered and protected by the European or global decision. The consensus rule prevails and the joint-decision making, in turn, erodes the margins for agreements that frustrate national interests, thus reinforcing one of the distinguishing features of the global polity: transactionalism.<sup>11</sup>

A second reason is the “lateral” opening they allow between national administrations. Through such colleges, in fact, domestic bureaucracies jointly investigate and discuss common problems, share information and exchange best practices. Therefore, they set in motion a mechanism of inter-administrative coordination and gradual approximation of administrative “styles” at both the European and global levels<sup>12</sup>. Moreover, some bodies also consult with independent experts (e.g. scientists,

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<sup>10</sup> On auxiliary or secondary bodies in international organizations, still important is P. Reuter, *Les organes subsidiaires des organisations internationales*, in *Hommage d’une génération de juristes au président Basdevant* (Paris, 1960) 415. See also J. Makarczyk, *La création des organes subsidiaires et les statuts des organisations internationales*, 6 *Polish Yearbook of International Law* (1972-1973) 183, and M. Savino, *The Role of Transnational Committees in the European and Global Orders*, 6 *Global Jurist* (2006), at <http://www.bepress.com/gj/advances/vol6/iss3/art5/>.

<sup>11</sup> On “transactionalism” or governance by agreement, S. Cassese, *The Global Polity* (Sevilla, 2012) 32.

<sup>12</sup> See S. Cassese, *Divided Powers: European Administration and National Bureaucracies*, in S. Cassese (ed.), *The European Administration*, Bruxelles, 1987.

academic professors) and private stakeholders, thus enhancing the “quality” (in terms of technical consistency) and the participatory nature of the decision-making.

Thirdly, the transgovernmental dimension helps to bridge the gap, endemic to legal systems based upon indirect rule, between legislation and execution. In both the European and global legal systems, national administrations usually have the task of applying ultra-state norms. The implementation of these norms is thus facilitated by the participation of state administrators in the formation of European and global norms. Moreover, it also requires that conflicts between the supranational law (*ius commune*) and domestic laws (*iura particularia*) be avoided. This need exists in the European Union, where the model of indirect administration is still prevalent, being the execution of supranational legislation typically entrusted with domestic authorities. The same need is even more pressing in the global system, where international organizations have no autonomous executive power and where there is no general principle of supremacy and direct effect of the ultra-state law in the domestic systems.

In short, transgovernmentalism is an essential tool for legitimizing the action of European and global institutions, for reconciling national and supranational interests and for connecting the activity of ultra-state legislative bodies with the activity of state executing administrations<sup>13</sup>.

#### 4. Is transgovernmentalism undemocratic?

One way to address this question is to look at the recent developments of EU comitology. Before the Lisbon Treaty, Article 202 of the EC Treaty simply provided for the conferral on the Commission of powers for implementing legislative acts. The Commission exerted that power with the assistance of comitology committees, which issued opinions on all the executive measures: in case of negative opinion, the Council might have the opportunity to intervene and settle the issue<sup>14</sup>.

A major reform occurred in 2006, when a specific comitology procedure – the so-called “regulatory procedure with scrutiny” – has enabled the Parliament (and the Council) to veto executive measures of general scope that are designed to amend legislative texts and are, thus, considered as quasi-legislative acts<sup>15</sup>. This reform was introduced to meet the parliamentary quest for institutional parity *vis-à-vis* the Council. Comitology, after all, is a creation of the Council. National officials participating in comitology meetings are accountable to the Council, via their national ministers. Put simply, the Parliament – once achieved a full legislative status with the co-decision – could not accept the quasi-legislative power be delegated to the Commission-comitology pair, unless it could control them directly.<sup>16</sup>

Since the Lisbon Treaty entered in force, things have radically changed. The main innovation is the sharp exclusion of comitology from the quasi-legislative sphere. According to Article 290 TFUE, delegated acts are adopted by the Commission under the direct and exclusive control of the legislative

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<sup>13</sup> See, *amplius*, M. Savino, *I comitati dell'Unione europea* (Milano, 2005) and Id., *The Role of Committees in the EU Institutional Balance: Deliberative or Procedural Supranationalism?*, in Thomas Christiansen, Johanna Oettel and Beatrice Vaccari (eds.), *21st Century Comitology: The Role of Implementation Committees in the Wider European Union* (Maastricht, 2009) 19-47.

<sup>14</sup> Articles 4 (management procedure) and 5 (regulatory procedure) of Council Decision 1999/468/EC of 28 June 1999, laying down the procedures for the exercise of implementing powers conferred on the Commission.

<sup>15</sup> Council decision 2006/512/EC of 17 July 2006, amending Decision 1999/468/EC.

<sup>16</sup> For an historical appraisal of comitology, C.F. Bergström, *Comitology - Delegation of Powers in the European Union and the Committee System* (Oxford, 2005). On the 2006 reform, K.S.C. Bradley, *Halfway House: The 2006 Comitology Reforms and the European Parliament*, 31 *West European Politics* (2008) 837 ff.

authorities. What was the purpose of the segregation of comitology in the lower executive sphere?<sup>17</sup> Behind this important change in the European institutional balance, there is – beside Parliament’s hostility for comitology – a democracy-enhancing purpose, that is, the intention to strengthen EU democracy by reducing the relevance of its technocratic components.

Has this purpose been achieved? Has transgovernmentalism been really excluded from the quasi-legislative area? Surprisingly enough, the answer is negative. Article 290 TFEU entrusts the Parliament and the Council with a veto power over Commission’s measures and the power to revoke the delegation altogether. Both these powers presuppose the ability of the legislative authorities to perform a proper scrutiny over the each delegated act. However, as the post-2006 experience with the regulatory procedure with scrutiny has shown, both the Parliament and the Council are ill-suited to control the heavy flow of quasi-legislative decisions stemming from the Commission<sup>18</sup>.

This is why, two days after the Lisbon Treaty had entered in force, the Council stressed «the importance of a strong commitment from the Commission to ensure that the experience and the concerns of experts of the Member States are heard and taken into account to create confidence in the new procedure» and, while acknowledging that «no reintroduction of comitology is possible, since it would be incompatible with the Treaty», asked the Commission to reflect on the opportunity to make the consultation of national experts «systematic»<sup>19</sup>.

If the Council misses transgovernmentalism, the nostalgia of the Commission is not weaker. Despite the usual image of comitology as a hostile watchdog on the Commission, consultation with national official is important for the Commission too: throughout committees, the supranational institution borrows technical solution from national administrative best practices, builds a pre-political consensus which facilitates the approval of its proposals in the Council, and establishes cooperative relations with domestic administrative authorities, which are in charge for the implementation of EU law. Here again, the virtues of transgovernmentalism reappear and help to explain why, seven days later, the Commission accepted the Council offer: it confirmed that it «intends systematically to consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted»<sup>20</sup>.

After a long negotiation, also the Parliament surrendered and signed, in April 2011, a *Common Understanding on EU delegated acts*, whose anodyne wording states that «The Commission, when preparing and drawing up delegated acts, will (...) carry out appropriate and transparent consultations well in advance, including at expert level».<sup>21</sup> This implies that the Commission will elaborate EU delegated acts in close cooperation with national administrations, as represented (not anymore in comitology, but) in the already mentioned committees of government experts<sup>22</sup>.

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<sup>17</sup> Comitology is now confined in the lower executive sphere, concerning the adoption of implementing acts (Article 291 TFEU).

<sup>18</sup> M. Keating and A. Hardacre, *Delegated & Implementing Acts: The New Comitology*, Eipa paper, 2 March 2011; Id., *The execution of delegated powers after Lisbon: a timely analysis of the regulatory procedure with scrutiny and its lessons for delegated acts*, EUI working paper, RSCAS 2010/85; V. Georgiev, *Commission on the Loose? Delegated Lawmaking and Comitology after Lisbon*, EUSA paper, 3-5 March 2011.

<sup>19</sup> Report of the Council of the European Union to the Coreper, *Implementation of the Treaty of Lisbon - Delegated acts* (16998/09, 2 December 2009) 3.

<sup>20</sup> Communication from the Commission to the European Parliament and the Council, *Implementation of Article 290 of the Treaty on the Functioning of the European Union* COM(2009) 673 final (9 December 2009) 6.

<sup>21</sup> *Common Understanding on EU delegated acts*, para. 4, unpublished, yet available at <http://register.consilium.europa.eu/pdf/en/11/st08/st08640.en11.pdf>.

<sup>22</sup> See above, § 2.

Moreover, the Council itself has clarified that its veto power over delegated acts, provided for in Article 290, will be exercised by means of its *groups de travail*<sup>23</sup>. Just like legislative proposals, quasi-legislative proposals put forward by the Commission will fall under the scrutiny of Council working groups, which are – as observed – just another variant of European transgovernmentalism.

The overall outcome of this silent institutional adjustment is that, in the quasi legislative sphere (Article 290 TFEU), the transgovernmental oversight over the Commission is not exercised anymore by comitology, but by other two types of EU transgovernmental colleges. Both the governmental expert committees and the Council working groups are much less formalized and, hence, much less transparent than comitology. Not surprisingly, EU lobbyists complain that they will not even know when and where to lobby, being it difficult also for Brussels' insiders to understand which committee will help the Commission defining the proposal, when it will meet and who will sit at that table<sup>24</sup>.

Assessed in a “democratic” perspective, this institutional parabola seems to be quite paradoxical. A reform aimed at marginalising comitology, understood as a source of undemocratic decision-making, ends up with a shift of quasi-legislative decisions from a more transparent and accountable transgovernmental realm (comitology, now operating under Regulation 182 of 2011) to much less transparent, formalized and accountable ones (Council working groups and committees of government experts).

From this European tale a good lesson for global transgovernmentalism can be drawn. Questioning the democratic pedigree of this administrative reality represents a false start. Technocracy and democracy might well be at odds with each other. Yet, technocracy is an unavoidable piece of the democratic game, just like transgovernmentalism is an irredeemable face of the executive power beyond the State – as the EU case patently shows. This relatively new phenomenon poses an old question: how to check administrative regulatory power? If approached from this perspective, transgovernmentalism becomes a tractable issue. The administrative law toolbox might, then, be helpful in the search for the right answer, provided that we put the right question.

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<sup>23</sup> On this silent development, see European Scrutiny Committee, *Common Understanding on EU delegated acts*, 13 luglio 2011, par. 10.15-10.17, available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xxxiii/42812.htm>.

<sup>24</sup> For a telling lobbyist perspective, D. Guéguen, *Comitology: Hijacking European Power?* (Brussels, 2011).

