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This contribution proposes – once it has brought the incommensurability of governance and international law into focus – to reconstruct a different interpretation of the very real phenomena that lie at the roots of this false question. First of all, it is necessary to focus briefly on the nature of international law, although without any pretense of resolving the theoretical battles resurfacing between legal monism and dualism within the internationalist doctrine. Such a boast would, in any case and in this author's opinion, be futile since the vitality of the roots of dualism[1] is evident in the present climate at the beginning of the millennium.

Unlike the State of the internal legal order, which exists solely as a legal personality moulded by the constitutional order, the State of international law is a *de facto* entity; at its beginnings there lies a concrete historical fact of which subjectivity in the international order is a specific consequence. Therefore, "unlike the State of national law, whose establishment coincides with

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[1] See G. Arangio-Ruiz, "Dualism Revisited: International Law and Inter-individual Law" in *Rivista di Diritto Internazionale*, (2003) 910-999; this text should be consulted for an ample discussion including the positions of the principle "monist" authors (in particular Kelsen) and the fathers of the dualist doctrine (Triepel, Anzilotti and their successors); for the evolution of this author's theory, see L. Picchio Forlati and G. Palmisano, "La lezione di una vita: cos'è e com'è il Diritto internazionale" in *Studi di Diritto Internazionale in onore di Gaetano Arangio-Ruiz*, (Naples: Editrice Scientifica, 2004) I, XVII-LVIII. Finally, see F. Salerno, "Il neo-dualismo della Corte Costituzionale nei rapporti tra diritto internazionale e diritto interno" in *Rivista di diritto internazionale* (2006) 340-383

the formation of the community's legal system, States as international persons come into being *de facto*, continue to exist *de facto* and are eventually modified or dissolved *de facto* from the standpoint of international law"[2]. This renders the State of international law (the State as international person) subject to obligations and rights in its relations with other entities endowed with similar qualities – effectiveness and independence – where the movements and relations of these persons become entwined within the same horizontal dimension. We are, of course, speaking of a flat social universe, barren and limited (at least in its first approximation) – a sort of two-dimensional universe if you will. Before moving on, two observations stem from this standpoint.

Sovereignty is, first and foremost, an inherent attribute of the State as a legal entity of national law, in the same manner as all the features to which sovereignty refers belong to that order and only that order: with no offence to the hardy "constitutionalising" constructions seen as of paramount importance in the current debate amongst social scientists, and to some extent also among scholars of law[3]. In such a context, indeed, the expression "external sovereignty" is used instead of independence – despite its being theoretically correct and long employed by scholars of international law, it ends up as dangerous and involuntarily ambiguous. At a time when multilevel governance is a commodity dispensed of without parsimony on the market of ideas, we risk that the State as a factual entity (of international law) can no longer be evoked as the owner of "external sovereignty", so much as the articulation of the State as legal entity (of internal law) is constitutionally appointed to entertain relations with other legal persons (of internal law).

[2] G. Arangio-Ruiz, *ibid.*, 950

[3] Constructions which often differ deeply from one another in various aspects (beginning with the fact that they often relate to opposite political points of view, or even projects), but all having in common the unacceptable theoretical assumption indicated.

Secondly, the international subject is characterised, not so much by being a territorial State, as by being an independent entity capable of exercising, to a limited but decisive extent, the power of *imperium.* In other words, in a globalised world international subjectivity is being steadily separated from the territorial dimension. This means that – again, in a globalised world – and in the light of the developments that followed 11 September 2001, the much-talked about weakening of the territorial State only affects the domestic sphere of the legal person; in the international order the corresponding phenomenon has more to do with the concrete possibility of factual non-territorial entities acquiring the status of subjects, that is acquiring effectiveness and independence.[4] The consequences of these phenomena appear to be capable of affecting the subjectivity of IGOs (at least the principal ones): these entities, traditionally considered *sui generis* international subjects insofar as they lack the exclusive control over a territory that characterises the national State, see their *status* as being reinforced in light of the diminishing importance of this particular limiting feature.

The result of contemporary events is thus the virtual increase in the number of players participating in international law, in the sense that the number of factual entities apparently capable of operating in the horizontal dimension of international law without any sort of (vertical) controls has increased.

In other words, there is nothing particularly nice about international law. Its passing will not be mourned. It remains, however, that none of the "vertical" constructions, neither the federalist or constitutionalist approaches (it would, incidentally, be preferable to define these

[4] See, for example, L. Picchio Forlati, "The Legal Core of International Economic Sanctions" in L. Picchio Forlati & L. Sicilianos (eds.) *Economic Sanctions in International Law* (Leiden/Boston: Hague Academy of International Law, 2004) 202-207; see also L. Zagato, *La protezione dei beni culturali in caso di conflitto armato all'alba del secondo Protocollo 1999* (Turin: Giappichelli, 2007) 201-202.

approaches as organic in order to contrast the necessarily *unorganic* character of international law) recently offered by the doctrine is convincing[5]. This is because they confuse the plane of inter-individual relations (the plane on which structures of vertical control operate) with the purely horizontal plane of international law.

As government functions do not exist in international law, the phenomenon of the multiplication of relations and inter-individual networks between the organs of inter-governmental organisations, the organs of territorial States, and physical and legal persons (whether transnational or not) – a phenomenon to which we may refer in extremely general terms as governance[6] - must find an explanation as a response to current developments in internal legal orders. That is, the phenomenon, it is useful to repeat, is related to the plane of internal legal relations (vertical / inter-individual), and not to international law.

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[5] The reference, it goes without saying, is above all relative to the theory of M. Hardt and A. Negri, presented in *Impero* (Milan: Rizzoli,2002) 1-451, and in *Moltitudine. Guerra e democrazia nel nuovo ordine imperiale*, (Milan: Rizzoli, 2004) 1-487. I permit myself to recall the "systemic" disagreement expressed in this regard in L. Zagato, *La guerra iugoslava, ovvero: il sistema westfaliano è davvero morto in Kosovo?*, in *Altreragioni* (2000) 63ff.

[6] Given the open-endedness of the term, and its employment in relation to highly diverse phenomena, it is impossible to reach a shared notion of governance that would move beyond the "art of steering societies and organizations." Governance refers in particular, according to the definition of the *Institute on Goverance*, to the strategic aspects "of steering, making the larger decisions about both direction and roles". See "What is governance? Getting a definition", available on line at www.iog.ca/boardgovernance/html/gov_wha.html. See also the observations of C. Joerges in *Integrazione attraverso la de-giuridicizzazione? Un intervento interlocutorio* (presented in the workshop seminar held at the EUI, Florence, in June 2007, and included in this volume), in particular part 1. The notion of European governance, on the other hand, is more precise and exacting: see below, paras. 6-7.

Before continuing, we may give some space to the most "virtuous" of the organic theories, given ample credit over the last decade: namely, that a real vertical international community, albeit a 'soft' one, exists. The statute of the UN is said to form the constitutional Charter of this order, a Charter so special that (inevitably in this logic) the attribution of international subjectivity to INGOs would require no other evaluation criterion apart from coherence with the objectives of the Charter.[7] The fact that the strongest States, despite their own continual indulgence in terrorist practices, stigmatise governments who are not friends, or who at any rate cause them trouble every now and again, and only those, as rogue states, would not constitute a *diktat* based on nothing more than hard hegemony, but indeed the opposite, a legitimate decision by the world 'governing' organ. And so on and so forth. We can only say that *les onusiens* (and their variations), despite being motivated by the best of intentions, would deliver up – if only they had the strength – a nightmarish world.

The inter-state element should be held as distinct from the inter-individual element, even when referring to international organisations. The international agreements that institute these entities do not represent the elements of "constitutionalisation" of a hypothetical public law of humanity. On the contrary, as long as the organisation carries out – or within the limits in which it carries out – activities related to international subjects (member States or third States and other IGOs), it will continue to operate in a relational dimension of coordination with, rather than the subordination / overruling of, other subjects of the international order.

[7] See P. Alston, "L'era della globalizzazione e la sfida di espandere la responsabilità per i diritti umani*"* in P. Alston and A. Cassese, *Ripensare i diritti umani nel XXI secolo* (Turin: EGA-Ed. Gruppo Abele, 2003) 55-56. The author calls for an end to the use of "dated" criteria (!) for attributing international subjectivity, considering "the capacity to contribute ... to the promotion of effectiveness in a certain sector of the international legal order" as more decisive, with particular regard to the contribution made to the accomplishment of the goals and objectives of the UN charter.

When, on the other hand, the organisation carries out internal state activities[8] as a direct function of its founding treaty or through the *de facto* growth of its competences as uncontested by member States, the organs of the international organisation develop government activities "in State territories, with regard to the population and local activities". In an immediate sense, this is the case for peace-keeping activities, or for the reconstruction of States following armed conflicts. We shall not focus on these aspects here. More interesting for the present analysis are the situations in which the (vertical) government activities of an IGO move away from a dimension encumbered by the presence of State organs (as assumed in the former hypothesis of the post-collapse management and reconstruction of a determined State institutional mechanism), and find themselves cohabiting with the continuing activities of State organs on the territory and/or field of action in question.

In order not to go too far, this is the case for the organs provided for in the UNESCO conventions for the protection of cultural heritage: their activities produce increasingly complex networks of control and management in which we can see phenomena of governance in action. This is the case for the activities of the inter-governmental committees that manage the lists[9]: the ever-closer involvement, on the one hand, of the larger INGOs in roles central to

[8] The doctrine traditionally spoke of operational activities. On this subject see L. Picchio Forlati and G. Palmisano, *op.cit.,* XXXIV-XXXVI.

[9] These came about in the following order: *Inter-Governmental Committee on Cultural and Natural Heritage*, constituted on the basis of articles 8 ss. of the *Convention Concerning the Protection of Cultural and Natural Heritag*e (Paris, 16 November 1972, in UNTS, v. 1037, 151 ss.); *Inter-Governmental Committee for the Protection of Cultural Property in the Event of Armed Conflict,* provided for by articles 23 ss. of the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (The Hague, 26 March 1999, in ILM, 1999, 769 ss.); *Inter-Governmental Committee for the Safeguarding of*

the international activities of the organs in question[10] and, on the other hand, of sub-State entities, both public and private, as well as of single experts operating on the territories of the States concerned, have not been without consequence. The inter-governmental committees in question have, so to say, outgrown the role assigned to the first of them (and to the Director-general of UNESCO) in the 1972 Convention, which may be broadly defined as the notaries of the will of the strongest States. The functioning of the sector thus constitutes a clear example of governance. However, this does not contradict but rather confirms the observations made thus far on the non-commensurability of international law and governance. In fact, the phenomenon described belongs exclusively to inter-individual law: the internal legal order of the organisation, woven in with the internal law of the States that are Parties to the Conventions and, in particular, the State affected.

Turning to the plane of international law then, there should be nothing left but to note the successful effort for autonomy by the IGO in question (UNESCO) in respect of its constraints as posited by the founding Treaty. The conditional tense is, however, necessary. The biggest victory secured by UNESCO in the last few years on the basis of the two Conventions

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Intangible Cultural Heritage, provided for by articles 5 ss. of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, Paris, 17 October 2003.

[10] This is the case for participation in the International Committee of the Blue Shield (ICBS) in the activities of the *Inter-Governmental Committee for the Protection of Cultural Property in the Event of Armed Conflict*; if in material terms the ICBS is part of the groove made by the *International Council of Monuments and Sites* (ICOMOS) and the IUCN so far as the activities of the *intergovernmental committee on cultural and natural heritage* are concerned, it differentiates itself by the fact that its role is directly foreseen in the text of the treaty (in this case the Second Protocol of the 1954 Convention). For a thorough examination of the role of non-governmental organizations in the administration of the UNESCO instruments, see L. Zagato, *La protezione dei beni culturali in caso di conflitto armato all'alba del secondo Protocollo 1999* (Turin: Giappichelli, 2007) in particular, 112-118 and 228 ff.

dedicated to the protection of intangible heritage, a victory represented by a much stronger involvement in its affairs than previously seen by the emerging Asian powers (China, Japan, India, Vietnam), has meant a drastic re-organisation of the process described. The Asian powers in question do not seem disposed to attribute committees charged with administrating the functioning of the new Conventions with competences comparable to those conquered over time from sister organs. Above all, these powers are unwilling to concede, either to UNESCO or any other inter-governmental organisation, any more than they have already obtained in terms of carrying out government roles in the sector. On the contrary, they are working to defuse the governance mechanisms created over the years by the organisation, and bring the directorate under control. A return – temporary, one hopes – to a situation more responsive to classical international law, with the partial dismantling of the governance mechanism operating in the sector, is thus anything but improbable. Indeed, nothing can ever be taken as given on this ground.

Sectoral networks of transnational cooperation in which vertical elements are present operate in other sectors also covered by international law, sectors that range from human rights to transnational economic cooperation. These are sectors in which, by no coincidence, the presence of INGOs is most evident in terms of both numbers and incidence[11]. We shall avoid the specific field of human rights here in order to leave space for the baffling but widely diffused image of economic relations dominated by a network of private transnational subjects completely removed from State control, a network in which vertical elements are at work. It appears licit to doubt the relevance of such an image; in reality this recalls the theoretical, as

[11] This is not, however, a decisive criterion. If this were the case, international environmental law would also take the centre stage in our discussion: but it is still difficult, in light of the jealously of States on this subject, to include the environment as one of the areas in which we see a fully formed governance mechanism.

well as the political, climate of the 1990s, following the arrangement created at the international level with the end of the Cold War and the imposition of a single superpower.[12] This arrangement was toppled by the rude awakening in international relations and balances, including economic one, that are identified in the imaginary with the aftermath of 11 September.[13] Some features in the interpretative scheme under discussion seem to indicate the presence of a similar error. Without claiming completeness, some of these may be listed.

In some strategic economic sectors (aerospace, logistics, satellites, related industries), globalisation and liberalisation saw a drastic turnaround starting from the middle of the second Clinton presidency – around 1997 or 1998, in any case well before 2001 – in relation to the first reemergence of asymmetrical armed conflict[14] at the international level. From this sprang an impetuous process towards the militarisation of space, in defiance of the international Treaties in force on the subject, and of the project for a space frontier to be the

[12] Without recalling theoretical constructs that today only make us smile – the famous end of history predicted by F. Fukuyama in *The End of History and the Last Man* (New York: The Free Press, 1992) 1-418 – many theories, erring on the presence at the end of the millennium of a single economic and military superpower, preferred to follow the monist utopia, when it would have been better to reflect more modestly on the more solid theoretical foundations of the notion of hegemony.

[13] Resistance to the possibility of new scenarios is still (too) strong not only among scholars of law, but also among political scientists. One must welcome the recent provocations of L. Canfora, *Esportare la libertà*, (Milan: Mondadori, 2007), where the author, having noted that with the growing international role of China new premises are created for unprecedented [scenarios] that will arise over the next decades, exhort us to concentrate on the emergence of new and unprecedented forms of "antagonism" following the collapse of the Soviet Union.

[14] L. Zagato, "L'innovazione militare nella competizione economica fra sistemi" in L. Picchio Forlati (ed.), *Controllo degli armamenti e lotta al terrorismo tra Nazioni Unite, NATO e Unione europea* (Padua: CEDAM, 2007) 115-149.

"common heritage of humanity":[15] a notion elaborated in the era of the new world economic order in the 1970s, of which it represents the extreme legacy.[16] Not that examples of mix-ups between articulations of the State and private businesses in these sectors are lacking: on the contrary.[17] Moreover, control remains firmly with the internal dimensions of the State-institution.

Of more pertinence are the parallels with the saga of the pharmaceutical (and biopharmaceutical) sector concomitant with the HIV pandemic that culminated, but was not concluded, with the Doha Declaration.[18] But the interest here is better highlighted by the Anthrax crisis and the post-Doha fallout. To begin with the former, States that had always

[15] See *Trattato sui principi che regolano le attività degli Stati nell'esplorazione e nell'uso dello spazio extraatmosferico, ivi compresi la Luna e gli altri corpi celesti*, adopted in London, Moscow and Washington on 27 January 1967 (UNTS vol. 610, pp. 205 ss.), entered into force at the international level on 10 October 1967 and in Italy on 4 May 1972 .

[16] The Declaration concerning the inauguration of a new economic order is contained in the Res. GA 3201 (S-VI) of May 1, 1974.

[17] Behind the American success is the strong articulation created between the Department of Defense and its articulations, other Ministries and Federal Agencies, Congress and its committees, States and the Agencies of single States, Universities, public and private research laboratories, suppliers privileged by the DOD, private businesses operating traditionally on the national and transnational markets. This is the model currently propagated, with varying results, in the EU, China, and Russia. See L. Zagato, *op.ult.cit*., *passim*.

[18] For a reconstruction of the first part of this tale, characterised in particular by the attempted appeal against the South African government before the High Court in Pretoria by the principal global pharmaceutical companies, led by the Pharmaceutical Manifacturers' Association of South Africa (MPA), see P. Acconci, "L'accesso ai farmaci essenziali. Dall'Accordo TRIPS alla Dichiarazione della quarta Conferenza ministeriale OMC di Doha", in *CI,* (2001) 637-664. On the features linked to the discussion developed here, see L. Zagato, *Nuovo ruolo di alcune clausole di salvaguardia dopo l'11 settembre*, in Piccio Forlati & Palmisano, *Studi.. Arangio-Ruiz*, *supra* note 1, 2323-2340.

been resolutely opposed, even at the height of the HIV emergency, to every hypothetical concession to obligatory licences for undeveloped countries, resorted when necessary to a wider and looser use of the exceptions contained in Art. 31 of TRIPS,[19] without disagreement from any one of the supposedly omnipotent multinationals. As for the post-Doha fallout, this refers not only to the difficulties encountered in the course of implementing the results but, even more so, to the reactions of the US and, sadly, the EU. These powers, once they had overcome the crisis that immediately followed 11 September (including Anthrax), and thanks to the skilled re-launching of the technique of bilateral agreements,[20] managed to call into question the few effective results obtained in Doha at the multilateral level concerning health rights. In any case, these events showed us how the sector's major multinationals were reminded swiftly and rather brutally of their role as mere pressure groups, the far-reaching hand of one national Government or another on the global chess board, rather than the forerunners of a new order.

Finally, and most importantly, the revival of a logic of confrontation between state blocs in international trade negotiations should be noted with the emergence of an alliance between India, Brazil, China and others. Should this tendency be confirmed in the immediate future, a decisive blow would be dealt to the theory foreseeing a group of private transnational subjects, emancipated or in the process of being emancipated from State control, dominating the stage of international economic and trade relations.

[19] See L. Zagato, *op.ult.cit*., *passim*. for a more exhaustive bibliography.

[20] On the use of techniques borrowed from bilateralism in intellectual property rights see L. Zagato, "Sul trattamento dei PVS in materia di diritto d'autore" in L. Picchio Forlati and L. Zagato (eds.), *Cultura e innovazione nel rapporto tra ordinamenti,* (Milan: Giuffré, 2000) 29-100.

We have so far reasoned on the basis of sectoral phenomena. There is no doubt that the phenomenon of European governance, in comparison, presents specific and marked features. Community law, it is useful to recall, lies at the crossroads between three different legal orders. These present themselves, so to say, in pairs: the first is the relationship between *international law* and *internal law*. International law still plays a decisive role in the key passages of the European Union's life, as demonstrated all too well by the vicissitudes of the European Constitutional Treaty. But which internal law? Here too there is a bifurcation: on one side the internal legal order of the Community/Union (EU-institution), on the other side the internal legal orders of the member States (in turn articulated in something like twenty seven sub-types). Of course, in elementary terms an analogous discourse can be made for every inter-governmental organisation: the provisions of the Treaties that give life to each single IGO establish their competences and discipline their activities, they represent the *constitution* of the international subject in question. But in this case the scale is simply too large. It is difficult to find other cases in international relations in which the institutional body,[21] constituted according to its founding Treaties, has managed over time and operating in the shadow of these Treaties and in the spaces left vacant by its member States, to conquer[22] such a dimension as allows it to stand alongside the latter as an equal. It could be said that the

[21] With the expression "EU (or EC)-institution" we refer to the inter-individual structures composed not only of the members of the Organization's organs and their staff, but also of "any other persons involved in the organs' activity". See G. Arangio-Ruiz, *supra* note 1*,* 988

[22] For a reflection on Community law as a collection of heterogeneous norms, simultaneously participating in the dimensions of international, state, and community legal orders see, in particular, L. Picchio Forlati, "Il diritto dell'Unione europea fra dimensione internazionale e transnazionalità" in *Jus* (1999) 461-473. For a thorough discussion following the European Constitutional Treaty, see "Il fondamento giuridico dell'Unione europea: Trattato o Costituzione?", in *Scritti di diritto internazionale in onore di Gaetano Arangio-Ruiz*, vol. II (Naples: Morelli, 2004) 1377-1386.

EU-institution has successfully followed, sometimes using the instruments offered by the situation, but above all by availing itself of the creative contribution of the Court of Justice, the road that every inter-governmental entity tries, almost always in vain, to take: to wrest the control – and, in sectors of direct competence, even the management – of economic and social life from States.

European governance, therefore, operates in a space touching on the relationship between the internal law of member States and the internal law of the Community/Union, not unlike other IGOs, but on a larger scale and with a very different level of impact. The starting point appeared simpler. It was only in the (very few) areas of exclusive competence that the EC-institution enjoyed supranational power, in the sense that it was capable of directly addressing individuals, physical and legal persons, living in the member States, as a real social base, thereby bypassing the State organs. For the rest, the EC-institution had to content itself with the modest role typical for IGOs when operating in a relational dimension for coordination between international subjects (member States, third States or other IGOs).[23]

[23] See above, paragraph 4

But things went differently: not only have the competences of the EC increased over time,[24] whether exclusive or shared with member States; moreover it cannot be denied that the relations between the two (internal) legal orders have become more complex, entailing a closer cooperation than originally intended between EC and State organs[25]. This cooperation also involves, amongst private citizens, *in primis* those already operating on a transnational basis, then multinational companies based in Community territory;[26] lastly it has come to include, with the Maastricht Treaty, the issue of the relations between the EU-institutions and sub-State public organs. This brings us to the Prodi Commission, pushing in their White Paper[27] with a determination bordering on recklessness for the inclusion of direct relations with the sub-state organs of the member States and with the Committee of the Regions, in an explicit attempt to avoid (some would say to destroy) the filter of national authorities.[28] From this, however, followed a tough play-off with the national Governments of the member States

[24] In virtue of the closure mechanism guaranteed by art. 308 (ex 235) of the ECT. On this, in terms of the Italian doctrine, see: L. Ferrari Bravo and A. Giardina, "Commento all'art. 235", in R. Quadri, R. Monaco and A. Trabucchi, eds., *Commentario Cee* (Milan: Giuffrè, 1965) II; A. Giardina, *The Rule of Law and Implied Powers in the European Communities*, in *Irish Yearbook of International Law* (1975) 99-111; G. Olmi, "La place de l'article 235 Cee dans le système des attributionsde compétence à la Communité" in *Mél. F.Dehousse*, Paris (1979) 279-295; L. Rossi, *Il "buon" funzionamento del mercato comune* (Milan: Giuffrè, 1990) 65-71; A. Tizzano, "Lo sviluppo delle competenze materiali delle Comunità europee" in *RDE* (1981) 139-210; L. Zagato, *La politica di ricerca delle Comunità europee* (Padua: CEDAM, 1993) 24-27.

[25] This dates back to 1963 - CJ 5 February 1963, case 26/62, *Van Gend en Loos*, in *Racc*., pp. 1 ss. - with the pre-judicial sentence passed down by the Court in the *Van Gend en Loos* case, the first theorisation of the "Community of law", with the consequent verticalisation of the relationship between Community and national judges.

[26] See below, paragraph 7.

[27] *European governance – A White Paper*, COM (2001) 428, in OJ n. C 287 of October 12, 2001.

[28] B. Nascimbene, "Governance, Enti locali e tutela giurisdizionale" in A. Lang and C. Sanna (eds.), *Federalismo e regionalismo* (Milan: Giuffrè, 2005) 143-161 in particular,144ff

subsequently partially called off, but which influenced at least to some extent the fall of the European Constitutional Treaty.

One of the relapses of the strategy in question was the presence, in the Commission document, of a definition of governance more precise than usually found. By governance, the Commission intended to denote the set of norms, processes and behaviours that "affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence".[29] In other words, European governance should be characterised, passing over the links between the law of the EU-institution and the member State's legislation, by the participation in the decision-making process of regional and local authorities, and of local authorities' organisational networks, including transnational or trans-border, to which should also be added the networks of exponential entities, in turn often transnational in nature.

The notion of EU governance at which we have arrived nevertheless still needs some clarifications, above all in light of the parallel line of development currently unfolding. Beginning with the clarifications, it is necessary to shed light on the myths surrounding the EU governance*:* often this term denotes the advantages that a more agile system based on soft law would present with respect to the functioning of the rusty institutional mechanism laid out in the Treaties. We are obliged to hope for a certain level of caution: first of all, and remaining in the field of inter-governmental relations, international law is the very realm of "more agile" practices, considering the freedom with which agreements between international subjects may be expressed. When it is said that diverse forms of governance avoid "legal constraints", the spheres of inter-individual relations and international law must once again be kept separate.

[29] For a deeper discussion, B. Nascimbene, *ibid.* 135 ff.

Only in the first of these two spheres does this discourse make sense; as for the second, the affirmation is erroneous in that international subjects dispose of far more agile instruments than those offered by governance for avoiding rigid constraints.

This affirmation is of value when applied to the internal legal dimension; in this case, to the internal law of the EU in the double sense described above. At this point, however, the discourse must shift to the European Constitutional Treaty. The project expounded by the Commission's White Paper finds itself acknowledged in some of the provisions of this text, particularly in articles 7[30] and 8[31] of the second Protocol on the application of the subsidiarity and proportionality principles. It thus seems credible to read into the European Constitutional Treaty an attempt to block the process of continual revision that characterises the system of the EU Treaties, in the effort to formalise and clarify, and thereby render more rigid, relations between subjects – in the final analysis between the internal law of the member States and the (internal) legal order of the EU-institution. The fact that actors nostalgic for the once unquestionable primacy of the State-institution (so-called "euroscepticism") played an important role in the failure of the Treaty should not lead us to forget how, in the situation of uncertainty that had characterised the previous two years, the (vertical, inter-individual) network of cooperation between the EU-institution and the member State institutions developed hugely, and in terms much less transparent than would have occurred had the Treaty been adopted. "Greater agility", in the final analysis, could mean nothing more than the reinforcement of the dark side of European governance.

[30] Establishing the obligation for Community organs to take note of the opinions sent by national parliaments or by the houses of those Parliaments in relation to draft legislative acts. After a fixed threshold (calculated on the basis of the criterion established in paragraph. 2) the draft must be reexamined.

[31] Paragraph. 2 of this article also foresees the possibility for the Committee of the Regions to appeal to the Court of Justice against acts for which its consultation is foreseen.

With these clarifications in place, we may agree with the prevalent doctrine, which sees in the mechanism of governance built for the functioning of the internal market one of the major successes of the EU-institution. However, this vision is partial – in fact, a phenomenon of governance with markedly divergent characteristics has for a long time been developing in the EU. The reference is the European judicial area (title IV TEC); here too, a significant increase in competences and power on the part of the EU-Institution has recently been seen. In this case, however, the types of relations with the organs of the member States are different to those valid for the internal market and theorised in the White Paper. In the European judicial area the EU-institution functions instead, to recall an old distinction,[32] as a common organ of the Community-group of the member States. The vertiginous growth of European organs and sub-organs, with their most mysterious and elusive acronyms as compared to the structures of the organs of national executive power, supplies an example of fully developed governance, but with frankly worrying aspects.

Above all, between the two experiences of governance there is by now *contaminatio*. The first – that is, the governance built for the functioning of the internal market – also includes the whole of the Europe of research and innovation.[33] The most recent Framework Programs (FP)

[32] A. Giardina, *Comunità europee e Stati terzi*, (Naples: Jovene,1964) *passim*.

[33] The author would have chosen, had he been charged with the deepening of the development of European governance in the internal market, to depart from the facts following the second oil crisis of 1980-81, when the perception of the technological gap accrued by the Community industries with regard to the US and Japanese poles, had matured amongst European big businesses, especially those operating in technologically advanced fields. The two poles are the US and Japan; the businesses operating in such sectors (the definition of the big twelve roundtable created in Brussels by the major European computer companies is famous) then intervened alongside the community authorities to plead for the support of the member states for the then nascent

in particular saw the development of a capillary network: in addition to the central organs of the EU-institution and the central and peripheral organs of the member States there operates a vast network of committees, which is more-or-less sub-dividable into three groups. The first group is constituted by the so-called comitology committees, highly politicised bodies in that they are composed of political representatives from the member States, usually civil servants responsible for scientific fields.[34] The second group is constituted by committees (or of specialized sections of committees)[35] foreseen in the founding Treaties of the European Communities, to which are added the expert groups that assist COREPER in the preparation of Council decisions and the STOA (*Scientific and Technological Options Assessment*), which in turn assists the EP. As for the last group of organs operating in the community R&D network, this is formed by a panoply of 'horizontal' committees, almost all created by the Commission with the *ex* art. 211 of the Treaty, and composed of member State experts chosen

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community R&D activities. See L. Zagato, *Il contratto comunitario di licenza di know-ho*w, (Padua: CEDAM,1997) 71-72; *idem*., *La politica di ricerca*.., *supra* note 24, 206 ff.

[34] These committees were originally set up on the basis of the notable Coucil Decision 87/373/Cee of 13 July 1987 which fixed the conditions for the exercise of execution comptences entrusted to the Commission (in OJ n. L 197 18 July 1987), then substituted by Council Decision 99/468/CE of 28 June 1999 bringing in conditions for the exercise of execution competences entrusted to the Commission (in OJ n. L 184 of July 17, 1999). The legal base is art. 202 par. 3 of the Treaty; in particular the final part of the provision which establishes that the "the above modalities must respond to the preliminary principles and norms that the Council, deliberating unanimously on the proposal of the Commission prior to the opinion of the European Parliament, will establish". The modalities in question must conform to either the *consultation committee* formula – or to those, more pervasive, for *management committees* or *regulatory committees.*

[35] Among these are: the Committee for Science and technology (art. 134 EAEC Treaty); the energy and research section of the Economic and Social Committee (ECOSOC) – which, following the extinction of the ECSC Treaty, also assumed the functions of the consultative Committee for coal and steel (sub-committee for research projects: art. 18 ECSC Treaty) – disciplined by articles 257-262 of the EC Treaty.

by the Commission itself for their personal capacities[36]; to these we must also add the groups created, and being created, to handle the comparative evaluations of national research policies, and the results arrived at in carrying out FP.

I have focused on this complex articulation of coordination/subordination in order to dramatise the importance of the fact that community R&D has been charged, with the VII FP, with "research in the field of security", which brings with it (as has been hinted) its own organisational / administrative plot. In the administration and execution of the next FPs, different types of governance that began in different fields are destined to live alongside one another. Fatally, between these two phenomena new levels of complexity are destined to be reproduced.

The principle of security[37] is progressively permeating all community policies. In light of this, we are required to review our overall evaluations of the direction and operation of European governance. European governance built for the functioning of the internal market grasps, it has been affirmed, the internal / inter-individual dimension of community law but not its

[36] Only the first, CREST (Committee for scientific and technical research) was set up by a Council Resolution in 1974; it is composed of member state civil servants and members of the Commission.

[37] From the jumble of instruments offered by title IV of the Treaty, the EC Council extrapolated at Tampere (European Council of 15 and 16 October 1999) and confirmed with the Hague Programme (European Council of Brussels of November 5, 2004) "an autonomous principle of the collective right to security of the citizens of the European Union, built around a specific policy applicable to all others". See F. Pastore, *Visa, Borders, Immigration: Formation, Structure and Current Evolution of the EU Entry Control System,* in N. Walker, ed., *Europe's Area of Freedom, Security and Justice* (Oxford: OUP, 2004) 97-98; L. Zagato, "Le competenze della UE in material di asilo dopo i Trattati di Amsterdam e di Nizza, e nella prospettiva del Trattato su una Costituzione per l'Europa" in *idem.,* ed., *Verso una disciplina comune europea del diritto d'asilo* (Padua: CEDAM, 2006) 198.

international dimension. This latter dimension, we must however note in conclusion, presents itself with surprising tenacity; it is almost as if international law – with its manifestations of horizontality/coordination among subjects, which are set against one another and leave no free space for vertical manifestations of hierarchy – was amusing itself by "shuffling cards", and thus sending the internal market, perhaps too hastily considered as definitively integrated into a vertical/inter-individual dimension, into crisis.