

SABINO CASSESE

THE GLOBAL POLITY

GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW



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CHAPTER I

THE GLOBAL POLITY

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I. WHO RUNS THE WORLD?

WHO runs the world? The customary answer to this question is that the world is run by national governments (States), by common agreement, in different territories. States have different degrees of influence, and therefore power is not balanced¹; they establish links among themselves, giving rise to international law.

This answer overlooks two important facts. The first is that States have gone through a complex process of aggregation and disaggregation over time; the second is that they have been joined, during the last twenty years, by a growing number of non-State bodies.

If we examine the trends in the numbers of polities in Europe over the course of the last thousand years or so, we see that there has been a process of aggregation. In two centuries they halved (from 1000 in the 14th century to 500 in the 16th), and then diminished by a further 30% in the two hundred years that followed, leaving some 350 by the end of the 18th century². By the early 20th century there were only 25 such polities in existence. The British historian Mark Greengrass has summarized this process in his claim that “*swal-*

[1] See J.-J. Roche, *Théories des relations internationales*, Paris, Montchrestien, 8th edition, 2010.

[2] It should be noted that during this 400-year period, these political bodies were progressively integrated within larger, hierarchically organized institutions (empires).

lowing' and 'being swallowed up' were fundamental features of Europe's political past"³.

If, however, we ask the same question of the 20th and 21st centuries, we are immediately struck by the extent to which the opposite process of disaggregation has occurred. In half a century, the number of polities in existence has increased fourfold. In 1945, there were 50 (the 50 States that attended the San Francisco Conference, at which the United Nations Charter was drafted); by 2010, there were approximately 200⁴.

Moreover, from the middle of the 20th century onwards, national governments have increasingly been accompanied by other actors, such as multinational corporations, international governmental organizations (IGOs) and non-governmental organizations (NGOs), that challenge the capacity of the States to lead. In this neo-medieval system⁵, an important role is played by the approximately 2000 existing global regulatory regimes⁶. Among them, “[f]ive main types of globalized administrative regulation are distinguishable: administration by formal international organizations; administrations based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administra-

[3] M. Greengrass, *Introduction: Conquest and Coalescence*, in M. Greengrass (ed.), *Conquest and Coalescence: The Shaping of the State in early modern Europe*, London, Edward Arnold, 1991, p. 2.

[4] For example, there are 192 members of the United Nations (UN); 183 members of the International Labour Organization (ILO); and 153 members of the World Trade Organization (WTO).

[5] P. Khanna, *How To Run the World: Charting a Course to the Next Renaissance*, New York, Random House, 2011.

[6] On international regulatory regimes, S.D. Krasner (ed.), *International Regimes*, Ithaca NY and Cambridge MA, Cornell University Press, 1983 and M. Noortman, *Enforcing International Law. From Self-Help to Self-contained Regimes*, Aldershot, Ashgate, 2005.

*tion by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions. In practice many of these layers overlap or combine [...]*⁷.

International governmental organizations⁸ are – as a rule – established by national governments: States integrate in larger bodies that incorporate diversified “local” legal orders. But IGOs sometimes reproduce themselves (many IGOs, such as the Codex Alimentarius Commission, are established by other IGOs). Moreover, they are not mere agents of the States, from which they have become increasingly autonomous. On the contrary, they have a role in guiding and constraining State behaviour: they conclude treaties and make rules; they create standards⁹; they help transform the

[7] B. Kingsbury, N. Krisch, R. Stewart, *The Emergence of Global Administrative Law*, in *Law and Contemporary Problems*, 2005, vol. 68, Summer-Autumn, n. 3-4, p. 20. These authors are still puzzled by mutual recognition and cooperative standards: are they distributed administrative regulation, or (bilateral) network regulation, or a “sui generis” category? On the variety of global regimes, E. J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, in *Chicago Journal of International Law*, 2010, vol. 11, Summer, p. 242

[8] Including minor organizations, IGOs numbered 7530 in 2006 (in 1981, 1039; in 1960, 154; in 1951, 123). To give one example of their growth in size: There were 75,282 United Nations officials in 2007 compared to only 52,107 in 1997. For these data, see S. Cassese, *Relations between International Organizations and National Administrations*, in International Institute of Administrative Sciences, XIXth International Congress of Administrative Sciences, *Proceedings*, Deventer, Kluwer, 1985, p. 165 and B. Kingsbury and L. Casini, *Global Administrative Law Dimension of International Organizations Law*, in symposium on “Global Administrative Law in the Operations of International Organizations (eds. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), *International Organizations Law Review*, 2009, vol. 6, n. 2, p. 326, nt. 23. On international organizations, see H.G. Schermers and N.M. Blokker, *International Institutional Law, Unity within Diversity*, IV ed., Boston, Martinus Nijhoff Publishers, 2003; J. Klabbers, *An Introduction to International Institutional Law*, Cambridge, Cambridge University Press, 2002, and C.F. Amerasinghe, *Principles of the Institutional Law of International Organisations*, II ed., Cambridge, Cambridge University Press, 2005.

[9] J. E. Alvarez, *International Organizations as Law-makers*, Oxford, Oxford University Press, 2008.

internal structure of national governments; and they establish rules that are directly binding on private parties. Many global regulators were established as mission-oriented bodies, but subsequently evolved in a sector- or field-oriented direction (for example, the UN refugee agency (UNHCR) was established to protect refugees, but has expanded its remit to deal with issues relating to displaced persons in general).

An example of an intergovernmental network of national regulators is the Basel Committee on Banking Supervision, which includes representatives of 27 national banking supervisory authorities (usually the central banks).

A remarkable model of hybrid public-private global organization is provided by the International Organization for Standardization (ISO), whose members are the national bodies “*most representative of standardization in their countries*”. Therefore, the ISO is a “*non-governmental organization that forms a bridge between the public and private sectors*”¹⁰, within which some bodies are entirely private, while others are part of the governmental structure of their countries or have some form of governmental mandate¹¹.

Another example of hybrid private-public organization is the Internet Corporation for Assigned Names and Numbers (ICANN). It is a non profit partnership, established in 1998 under California

[10] See <http://www.iso.org/iso/about.htm>. On ISO membership, see http://www.iso.org/iso/about/structure/members_categories.htm.

[11] See E. Shamir-Borer, *The Evolution of Administrative-Law Norms and Mechanisms in the International Organization For Standardization*, paper presented to the second GAL Seminar, June 2006, Viterbo, available at <http://www.iilj.org/GAL/documents/ShamirBorerISO.doc>, at 9. This paper points out that over 70% of the national standardization bodies taking part in the ISO are governmental in nature. On private governance in general, H. Schepel, *The Constitution of Private Governance. Product Standards of Integrating Markets*, Oxford, Hart, 2005.

law¹². Its structure conforms to a “multi-stakeholder” or “multi-organizational” model, characterized by the existence of multifarious entities and institutions¹³. Nevertheless, it differs from the ISO in that it displays a particular form of hybridization: it is composed of private entities, but it performs a public function; in other words, it has a private “façade”, but the substance of its activities is public in nature¹⁴.

The International Chamber of Commerce (ICC) is, on the other hand, a perfect example of an entirely private global regulator. It brings together only private bodies and its main tasks involve the promotion of “international trade, services and investment”¹⁵. Furthermore, the enforcement of its standards is completely entrusted to the Chamber itself, without any interference from public or national authorities. The ICC, however, collaborates with several States and governmental organizations, by concluding agreements and providing recommendations¹⁶.

To these global institutions must be added the large – and increasing – number of international NGOs (of which there were

[12] ICANN must abide by the laws of the United States and can be called to account by the judicial system, i.e. ICANN can be taken to court. It is headquartered in Marina del Rey.

[13] These entities are the “Board of Directors”; three “supporting organisations” that deal with IP addresses (ASO), domain names (GNSO) and country code top-level domains (CCNSO); four “advisory committees”; a “Technical Liaison Group”; and the President and the Chief Executive.

[14] See E. Brousseau, M. Marzouki, C. Meadel (eds.), *Governance, Regulations and Powers on the Internet*, Cambridge, Cambridge University Press, 2009 and L. B. Solum, *Models of Internet Governance*, Illinois Public Law Research Paper no. 07-25 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136825.

[15] See the Preamble and article 1 of ICC Constitution (http://www.iccwbo.org/uploadedFiles/ICC/ICC_Home_Page/pages/ICC_Constitution_EN_8_June_2009.pdf).

[16] Note that the ICC is the main business partner of the UN and its agencies. Moreover, it collaborates with WTO.

61,345 in 2006; 14,752 in 1981; 1,422 in 1960; and only 955 in 1951)¹⁷ and numerous different epistemic communities (for example, those of environmentalists, of physicists, of biologists).

Such global regulatory regimes operate in so many areas that it can now be said that almost every human activity is subject to some form of global regulation. Global regulatory regimes cover fields as diverse as forest preservation, the control of fishing, water regulation, environmental protection, standardization and food safety, financial and accounting standards, internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labour standards, antitrust regulation, regulation and finance of public works, trade standards, regulation of finance, insurance, foreign investments, international terrorism, war and arms control, air and maritime navigation, postal services, telecommunications, nuclear energy and nuclear waste, money laundering, education, migration, law enforcement, sport, and health.

There are significant differences between regulatory regimes. Some merely provide a framework for State action, others establish guidelines in order to guide domestic agencies, and others still impact upon civil society at a national level. Some regulatory regimes create their own enforcement mechanisms, while others rely on national or regional authorities for implementation. To settle disputes, some regulatory regimes have judicial bodies, while others resort to different forms of dispute resolution, such as negotiation, conciliation or mediation. Many areas are covered by more than one regulatory regime (leading to an overlapping of regulators)¹⁸.

[17] B. Kingsbury and L. Casini, *Global Administrative Law Dimension of International Organizations Law*, cit., p. 326, nt. 23

[18] For example, the International Maritime Organization (IMO) and the International Seabed Authority (ISA) regulate the use of the sea, as does the International Tribunal for the Law of the Sea (ITLOS). The following international organizations exist in – and do

Global regulatory regimes are established because a growing number of issues and problems cannot be addressed or resolved by national governments alone. These issues themselves are global in nature, and as such are beyond the power of individual governments to regulate: internet governance, environmental control, the Olympic Games, and the recent economic crisis provide example¹⁹.

The process of globalization is comprehensive and has a powerful impact on national governments, as the following comments by a German philosopher, a Dutch-Argentine sociologist and by a Swiss-German political scientist indicate: “By ‘globalization’ is meant ‘the cumulative processes of a worldwide expansion of trade and production, commodity and financial markets, fashions, the media and computer programs, news and communications networks, transportation systems and flows of migration, the risks generated by large-scale technology, environmental damage and epidemics, as well as organized crime and terrorism’”²⁰. “A good part of globalization consists of an enormous variety of micro-processes that begin to denationalize what had been constructed as

not exhaust – the environmental area alone: the International Whaling Commission, the Secretariat of the United Nations Framework Convention on Climate Change, the United Nations Environment Programme(UNEP) Ozone Secretariat, the Secretariat of the Convention on Biological Diversity, the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Secretariat of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the United Nations Secretariat of the Convention to Combat Desertification, the FAO/UNEP Secretariat of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Secretariat of the UNEP Convention on Migratory Species, and the International Tropical Timber Organization.

[19] See S. Charnovitz, *Addressing Government Failure through International Financial Law*, in *Journal of International Economic Law*, 2010, vol. 13, n. 3, p. 743.

[20] J. Habermas, *The Divided West*, Cambridge, Ciaran Cronin, 2006, p. 175.

national”²¹. “[...] I suggest that we think of statehood as a product which is produced by the state in association with other actors [...]”²².

II. THE BASIC FEATURES OF THE GLOBAL POLITY

In the global space there are – as already noted – many regulators. It is impossible, therefore, to deny that there is a global political organization, even a global polity; and it is important to identify its particular characteristics²³.

In what follows, I will set out the main features of this global polity, and subsequently analyse the most important ones.

a. There is no single global and comprehensive legal order and no global government, but rather several global regulatory regimes²⁴, without one hierarchically superior regulatory system (the United Nations Organization is more comprehensive than others, but it is

[21] S. Sassen, *Territory, Authority, Rights: from Medieval to Global Assemblages*, Princeton University Press, 2006, p. 1.

[22] C. Zürcher, *When Governance meets troubled States*, in M. Beisheim-G. F. Schuppert (hrsg.), *Staatszerfall und Governance*, Baden-Baden, Nomos, 2007, p. 11. Zürcher continues by saying: “It is sufficient to think of who provides security in Afghanistan or Tajikistan, domestic authority in Kosovo or Bosnia, or public services in Mozambique or Burundi. There are also international institutions and organizations in place to assume these functions – think of the UN transitional administration, the international forces in Afghanistan, or of the World Bank’s suggestion to set up so called ISAs (Independent Service Authorities) in low income countries under stress (LICUS)”.

[23] For the point of view of a political scientist, see A.M. Slaughter, *A New World Order*, Princeton, Princeton University Press, 2004.

[24] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN General Assembly, A/CN.4/L.682 13 April 2006 and T. Treves, *Fragmentation of International Law: The Judicial Perspective*, in *Comunicazioni e studi*, 2007, vol. XXIII, pp. 821-875.

less developed, as – for example – it lacks an efficient dispute settlement mechanism open to private parties²⁵). The global polity is the empire of “ad-hoc-crazy”: global regulatory regimes do not follow a common pattern; they are not uniform because they have to balance, area by area, national diversity and global standards.

This system has been nicely encapsulated in the formula “governance without government”²⁶. It is also possible to interpret this as a global composite constitution, with many “feudal lords”, either territorial and general (national governments), or functional and specialised (IGOs). National governments retain the monopoly over the use of force, but surrender their sovereignty. Like the “feudal anarchy”²⁷, the global polity is not “systematic”, unitary and centralized and therefore does not fit into the State paradigm.

Genetically, the global polity is the result of a piecemeal approach. National governments have promoted – or at least allowed – the development of their competitors (global regulatory regimes that exercise public power, and frequently constrain the behavior of States). It would have been impossible to establish one single and unitary legal order, because this would have replaced national governments with a cosmopolitan government.

[25] On the main features of the United Nations Organization, see M. W. Doyle, *A Global Constitution? The Struggle over the UN Charter*, paper presented to the Hauser Globalization Colloquium Fall 2010, NYU Law School.

[26] J. N. Rosenau and E.-O. Czempiel (eds.), *Governance without Government. Order and Change in World Politics*, Cambridge University Press, 1992. See also K Nicolaidis and G. Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in *Law and Contemporary Problems*, 2005, vol. 68, Summer – Autumn, n. 3 – 4, p. 263.

[27] K. F. Werner, *Naissance de la noblesse. L'essor des élites politiques en Europe*, Paris, Fayard, 1998 (Italian translation *Nascita della nobiltà. Lo sviluppo delle élites politiche in Europa*, Torino, Einaudi, p. 58).

b. Vertically, there is continuity and no clear dividing line between the global and the national levels²⁸. National governments are at once principals (because they establish and control global institutions) and agents of IGOs (insofar as they implement international regimes). Global organizations are subject to the control of national governments even as they supervise them. Global institutions have also in many cases established direct links with national civil societies. The global legal space, therefore, is neither hierarchical, nor layered, but rather “marbled”: global, transnational, supranational and national are intermixed.

c. Horizontally, the diverse global regulatory regimes are self-contained (leading to the fragmentation of the global legal space)²⁹, but they establish mutual interconnections and linkages³⁰; together, they constitute an enormous conglomeration of interdependent legal orders. This interconnection has been called a “regime complex”: “[...] *a collective of partially overlapping and non hierarchical regimes*”³¹

.

[28] On the integration of States in the global space, J. McLean, *Divergent Legal Conceptions of the State: Implications for Global Administrative Law*, in *Law and Contemporary Problems*, 2005, vol. 68, Summer – Autumn, n. 3 – 4, p. 167 and S. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, in *Journal of international law and politics*, 2005, vol. 37, Summer, n. 4, p. 663.

[29] A. Lindroos, M. Mehling, *Dispelling the Chimera of Self-Contained Regimes: International Law and the WTO*, in *European Journal of International Law*, 2006, vol. 16, n. 5, p. 858 and E. Benvenisti – G. W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International law*, in *Stanford Law Review*, 2007, vol. 60, November, pp. 595-631.

[30] See D.W. Leebron, *Linkages*, *American Journal of International Law*, 2002, vol. 96, p. 5 ff..

[31] K. Raustiala and D. G. Victor, *The Regime Complex of Plant Genetic Resources*, in *International Organization*, 2004, vol. 58, Spring, p. 277, reprinted in B. Simmons and R. Steinberg (eds.), *International Law and International Relations: An International Organization Reader*, Cambridge University Press, 2007. On the “connecting regimes”, see also the very important contribution by S. Battini, *Amministrazione senza Stato – Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003, p. 232 ss.

d. The public-private divide is blurred and does not follow the domestic paradigm of government regulating business³².

e. Compliance, while compelled in national legal orders through enforcement and the legal exercise of power (“*covenants, without the sword, are but words*” (Hobbes³³)), in the global space is “induced”.

“[...] [*T*]he Codex Alimentarius Commission (CAC) has changed after the World Trade Organization (WTO) referred to it as the reference point for the elaboration of international food standards”. Before 1995, “it was entirely voluntary for member states to base their national regulations on Codex standards”. After 1995, a State wishing to go beyond the global food standards must demonstrate the scientific basis of its measure and how it complies with the level of protection established by the Codex Alimentarius Commission (F. Veggeland and S. Ole Borgen, *Negotiating International Food Standards: The World Trade Organization’s Impact on the Codex Alimentarius Commission*, in *Governance*, 2005, vol. 18, October, n. 4, pp. 683 and 701; R.A. Pereira, *Why Would International Administrative Activity Be any Less Legitimate? A Study of the Codex Alimentarius Commission*, in *The Exercise of Public Authority by International Institutions*, eds. A. von Bogdandy et al., Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 210, Berlin, Springer-Verlag, 2010, pp. 541-571). The two global regulatory regimes thus reinforce each other. The decoupling of standard setting and standard enforcement produces new problems of accountability: “If third parties enforce standards, it will be especially difficult for the standard users to hold the standard setters accountable for the consequences of those standards”. “decoupling rule making and enforcement is the key to the accountability deficit of standards” (D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, in *Governance*, 2005, vol. 18, October, n. 4, pp. 623 and 624).

The principle that WTO rules are not to be interpreted in isolation from other rules of general public international law was established by the first WTO Appellate Body decision (WTO Appellate Body, *US Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996, p. 17).

It follows from this that the different regulatory regimes are not entirely self-contained, because they do not exist in isolation from other rules of global law.

[32] On global private governance, see W. Mattli and T. Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, in *Law and Contemporary Problems*, 2005, vol.68, Summer – Autumn, n. 3 – 4, p. 225 and E. Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, in *European Journal of International Law*, 2006, vol. 17, n. 1, p. 47. On public-private bodies in the global space, see L. Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, in *International Organizations Law Review*, 2009, vol. 6, n. 2, p. 421.

[33] T. Hobbes, *Leviathan* (1651), London, J. M. Dent & Sons Ltd., 1962, Part II, Chapter XVII, par. 2, p. 87.

Global bodies use surrogates to implement their standards. One such surrogate, noted above, is that of the “regime complex”, linking one regime to another: trade and labour, trade and human rights, environment and human rights (for example, allowing the imposition of trade penalties for non-implementation of labour or environmental standards). Another possibility is retaliation, authorizing controlled self-enforcement: it induces one party (one State) to obey to the law because of the threat that another party (another State) will be authorized by a third party (the WTO Dispute Settlement Body) to react. Still another option is to introduce incentives for compliance: for example, to provide additional rights as a “prize” for fulfilling obligations³⁴. Implementation and enforcement may also be left to national governments acting as instruments of global institutions³⁵.

f. Global regulatory regimes impose the rule of law and democratic principles on national governments. A body of administrative law principles has developed in the global space: due process, the right to be informed and consulted, the right to a hearing, the duty to give reasons, the right to a judge; both procedural fairness and judicial review are influenced by the new context and thus open to change³⁶. Some democratic principles (free elections, freedom of

[34] For instance, see IATA standards enforcement: in this case, compliance with IATA rules opens up market incentives for carriers, by including code-sharing, wet lease, and aircraft leasing opportunities.

[35] See the example of the food standards implementation. On this issue, F. Cafaggi, *Private Regulation, Supply Chain and Contractual Networks: the Case of Food Safety*, RSCAS 2010/10 (Robert Schuman Centre for Advanced Studies - Private Regulation Series), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554329.

[36] On global administrative law in general, B. Kingsbury, N. Krisch, R. Stewart, *The Emergence of Global Administrative Law*, cit.; E. D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, in *Administrative Law Review*, 2002, vol. 54, Winter, n. 1, p. 415; B. S. Chimni, *Co-Option and Resistance: Two Faces of Global Administrative Law*, in *Journal of international law and politics*, 2005, vol. 37, Summer, n. 4, p. 799; C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, in *European Journal of International Law*, 2006, vol. 17, n. 1, p. 187; A. von Bogdandy, R. Wolfrun, J. von

association, free speech) are imposed by global actors (such as the European Union) on national governments³⁷.

g. There is no representative democracy at the global level; but a surrogate, deliberative democracy emerges through participation in the decision making processes.

The existence of the global polity raises many analytic and normative questions. The most salient of the former are: do global rules bind national administrations and private individuals within States, or do global administrations only have the power to make recommendations? Is there a core of command-and-control (i.e. regulatory instruments that rely on public orders, which must be obeyed and enforced with recourse to police power) in the global administrative system? Are disputes settled through judicial (or quasi-judicial) procedures, or are they mainly settled through negotiation?

The most important normative questions are: Should there be direct or indirect democratic legitimation of the global polity? Should global administrative bodies (agents) be accountable to governments (principals)? Should it be possible to participate in the administrative process and obtain a review of the decisions? Should

Bernstorff, P. Dann, M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, Heidelberg, Springer, 2009; B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, in *European Journal of International Law*, 2009, vol. 20, n. 1, pp. 23-57; B. Kingsbury and L. Casini, *Global Administrative Law Dimensions of International Organizations Law*, cit., p. 319. See also, in the French literature, J.-L. Halperin, *Profils des mondialisations du droit*, Paris, Dalloz, 2009 (tracing the history of legal globalization, from Roman law to constitutionalism and codification), but mainly J.-B. Auby, *La globalisation, le droit et l'Etat*, Paris, L.G.D.J., II edition, 2010. In the Italian literature, M. R. Ferrarese, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Roma – Bari, Laterza, 2006 and S. Cassese, *Il diritto globale*, Torino, Einaudi, 2009.

[37] On global democracy, J. Cohen and C. F. Sabel, *Global Democracy?*, in *New York University Journal of International Law and Politics*, 2005, vol. 37, Summer, n. 4, p. 763.

participation and review mechanisms be made available to only national administrations or also to private parties?

III. A TWO-LAYER SYSTEM?

The global legal space is frequently described as a multilevel system of governance. This common view posits the first level as that of the State, and the second as that of global governance, with a basic division of labour: the former dealing with “high” and the latter with “low” politics. The reality, however, is more complex.

From a formal point of view, States, as members of the international community, are legal equals: “*A small republic is no less a sovereign State than the most powerful kingdom*”³⁸. But “*the world’s economic fragmentation arises from its political divisions. Lack of ‘jurisdictional integration’ sustains bad government: in effect, there are too many countries*”³⁹; “*more than half the world’s countries have fewer people than the State of Massachusetts, which has about 6 million*”⁴⁰; “*of the 10 richest countries in the world in terms of GDP per head, 6 have fewer than 1 million people*”⁴¹. States such as Saint Vincent and the Grenadines or Antigua and Barbuda had an estimated population of 100,000-120,000 in 2008, yet they are full members of the United Nations. Moreover, in addition to fragmentation and differences in size, there are also important differences in terms of power and influence. The

[38] E. De Vattel (1758), quoted in A. Cassese, *International Law*, Oxford Univ. Press, 2005 (II ed.), p. 52.

[39] M. Wolf, *Why Globalisation Works*, Yale University Press, 2004 (see *The Economist*, July 17, 2004).

[40] A. Alesina – E. Spolaore, *The Size of Nations*, MIT Press, 2005, p. 1.

[41] *The Economist*, December 20, 2003.

proposition that States enjoy sovereign equality is a legal principle that does not correspond with reality.

Global actors include not only States, but national agencies as well. Many global regulations derive from the interaction between domestic agencies and global regimes. There is, in the global arena, a dis-aggregation of the State. The paradigm of “the State-as-a-unit” is lost.

Members of international organizations include not only States, but also non-national institutions (such as the European Union, which is a party to the International Olive Oil Council and the World Trade Organization), as well as private non-governmental bodies (as in the case of the ICANN⁴²). Many international organizations also allow a range of bodies to participate as “observers” in their activities. It is, therefore, often better to avoid the common denomination of such organizations as “intergovernmental”.

Recent initiatives are “*designed to include civil society – defined as all interest and identity associations outside the state – in the governance activity of international organizations*”; “[...] *when the [World]Bank issues a loan for a specific development project such as a dam, it requires that the recipient government consult with the local residents and NGOs to design relocation plans and environmental preservation measures*”⁴³. “[...] NGO

[42] R. Uerpmann-Witzack, *International Regulation by International Regulatory Organisations: a Model for ICANN?*, in *The Global Community: Yearbook of International Law and Jurisprudence*, 2008, n. 1, p. 113; E. Schweighofer, *Role and Perspectives of ICANN*, in *Internet Governance and the Information Society: Global Perspectives and European Dimensions*, Utrecht, Eleven, 2008, p. 79; D. Drazner, *The Global Governance of the Internet: Bringing the State Back In*, in *Political Science Quarterly*, 2004, vol. 119, n. 3, p. 477; J.P. Kesan e A.A. Gallo, *Pondering Politics of Private Procedures: The Case of ICANN*, *University of Illinois College of Law, Law and Economics Working Papers*, n. 74, 2007 (<http://ssrn.com/abstract=1120489>)

[43] F. Bignami, *Civil Society and International Organizations: A Liberal Framework for Global Governance*, in “Duke Law Faculty Scholarship”, Paper 1126 (2007) (<http://scholarship>.

*involvement in all processes of IGO activities, ranging from monitoring treaty obligations, treaty-generation processes, and treaty implementation processes at the national level, has been crucial and indispensable. [...] they have creatively fed their knowledge and expertise into the decision-making processes at all levels*⁴⁴.

Finally, the global legal polity, while so pervasive, is not universal. Some States are not members of all international organizations. Some institutions that are regarded as global because they operate beyond the State have, in fact, a regional area of influence (for example, the European Union).

The activities of global regulators – who cannot be regarded as mere agents of States – impact upon domestic agencies, which thus lose their independence; moreover, these regulators do not rely on State institutions alone because they often establish – as already noted – a direct dialogue with civil society actors within the State in question.

On the other hand, States are more powerful than is often claimed, as they play a double role in the global legal order: they act both according to the State-as-unit paradigm and also through their individual agencies, according to the fragmented-State paradigm. But States are also less powerful than we commonly think, in that they share their role inside the global institutions with a variety of NGOs.

law.duke.edu/faculty_scholarship/1126).

[44] E. Riedel, *The Development of International Law: Alternatives to Treaty-Making? International Organizations and Non-State Actors*, in R. Wolfrum – V. Roeben (eds.), *Developments of International Law in Treaty Making*, Berlin, Springer, 2005, p. 317; see also the comment of S. Hobe on the Riedel article, *ibidem*, p. 328. For a variety of reasons, some authors, such as R. Stewart, prefer to include pervasive differences with regard to collective action issues and accountability mechanisms in making a consistent and strong distinction between economic actors and “social” NGOs.

In conclusion, national and global governance cannot be presented as simply a two-level system of governance; civil society organizations, domestic agencies and supranational organizations all play a role as global actors.

International and regional organizations, States and non-State actors are mutually implicated within global governance structures and follow the logic of collective action⁴⁵. This “[...] *is becoming a heterogeneous, multilayered logic, derived not from one particular core structure, such as the State, but from the structural complexity embedded in the global arena. Globalization does not mean that the international system is any less structurally anarchic; it merely changes the structural composition of that anarchy from one made up of relations between functionally differentiated spheres of economic activity, on the one hand, and the institutional structures proliferating in an ad hoc fashion to fill the power void, on the other*”⁴⁶. “*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*”⁴⁷.

[45] P. G. Cerny, *Globalization and the Changing Logic of Collective Action*, in *International Organization*, 1995, vol. 49, n. 4, Autumn, p. 595.

[46] P. G. Cerny, *Globalization and the Changing Logic of Collective Action*, in *International Organization*, 1995, vol. 49, n. 4, Autumn, p. 620 (reprinted in C. Lipson and B.J. Cohen (eds.), *Theory and Structure in International Political Economy*, MIT Press, 1999 and in J.A. Frieden and D.A. Lake (eds.), *International Political Economy: Perspectives on Global Power and Wealth*, London, Routledge, IV ed., 2000).

[47] R. Stewart, *The Global Regulatory Challenge To U.S. Administrative Law*, in *New York University Journal of International Law and Politics*, 2006, Vol. 37, p. 703.

IV. GOVERNANCE BY AGREEMENT

There is no higher authority in the global polity. Therefore, the kind of hierarchy that characterizes domestic governments is simply non-existent. Nor there is uniformity, as some global regimes are more developed than others, while others are less so. Given these conditions, the global polity relies heavily on governance by agreement (transactionalism⁴⁸): contracts, consensus, transnational cooperation, mutual recognition agreements, and shared powers. An example is in Article 16.1 of the Convention for the conservation of Southern Bluefin Tuna (20 May 1994): “[i]f any dispute arises between one or more of the Parties concerning the interpretation or the implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice”. Notice the importance of governance by agreement: a convention provides for subsequent contractual means of conflict resolution⁴⁹.

[48] J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2004, vol. 64, n. 3, p. 547 ss.

[49] See also Art. 33.1 of the United Nations Charter. All six ways of solving disputes are worth studying, but the handling of international disputes by means of inquiry is especially interesting, as shown by the “Red Crusader” case between Denmark and the United Kingdom (1962). In this case, “[t]wo traditionally friendly countries, members of the same military alliance, searching for a speedy way to settle their dispute [...], found that the setting up of a commission of inquiry would be the most suitable method of meeting the exigencies of the situation. The commission lived up to their expectations by providing them with the basis for a satisfactory settlement”. See Nissim Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry*, Oxford Univ. Press, 1974, p. 195; see also *International Law Reports*, H. Lauterpacht ed., London, Butterworths, 1967, vol. 35, p. 485.

The global polity also operates on a mixture of consensus, unanimity and different kinds of majoritarian principles⁵⁰. For instance, all intergovernmental bodies of the United Nations Conference on Trade and Development (UNCTAD) take decisions by consensus. Article 11 of the International Agreement on Olive Oil and Table Olives (1986) prescribes consensus as the means of decision-making of the International Olive Oil Council. Article 15 of the Rules of Procedure of the Committee for Environmental Protection (part of the Antarctic Treaty System) provides that “*where decisions are necessary, decisions on matters of substance shall be taken by consensus of the members of the Committee participating in the meeting*”. Where decisions relate to procedural matters, a simple majority is enough. If the Committee has to decide whether a question is substantive or procedural, such decision must be taken by consensus.

In some global institutions unanimity is required. For instance, the Rules of Procedure of the Commission for the Conservation of the Southern Bluefin Tuna (21 April 2001), provide, in Article 6.1, that “[...] *Decisions of the Commission shall be taken by a unanimous vote of the Members present at the Commission meeting*”.

Consensus is a rigid rule that can produce inertia or rigidity. But the rules that govern the functioning of global institutions also often provide means for softening or escaping such rigidity. For example, what is usually required is a consensus of those members participating in the meeting in question, not of all the members⁵¹.

[50] For a general perspective, see A. Kuper, *Democracy Beyond Borders. Justice and Representation in Global Institutions*, Oxford, Oxford University Press, 2004.

[51] The Rules of Procedure (1997) of the Executive Committee of the High Commissioner’s Programme of UNHCR provide, in Article 26, that “[...] *the Chairman will, in the ordinary course of business, ascertain the sense of the meeting in lieu of a formal vote. If the Committee proceeds to a vote, each representative shall have one vote. Decisions of the Committee shall be made by a majority of the members present and voting [...]*”. The Rules of Procedure of the Codex Alimentarius Commission, Article X.2, provide that “*The Commission shall make*

Consensus can also be used for a different purpose, as in the case of reverse consensus. For example, the WTO Dispute Settlement Body has to reach consensus in order to reject a WTO Appellate Body Report.

Finally, consensus is not the rule for every organization. The General Rules of the Office International des Epizooties, Article 6, require that decisions be taken by a simple majority (only modifications of the Agreement establishing the Office and of its Organic Statutes require “common consent”). A majority of the members is required for decisions not regarding the adoption or amendment of standards at the Codex Alimentarius Commission (Rules of Procedure, Article VI.2), while a two-thirds majority is required by Article 15 of the Constitution of the International Civil Defence Organization (1966). Article 2(9)(c) of the Montreal Protocol on Substances that Deplete the Ozone Layer states that for adjustments to the agreement’s reduction schedule, “(..) *the Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement reached, such decisions shall, as a last resort, be adopted by a two-third majority vote of the Parties present and voting representing a majority of the Parties operating under Paragraph 1 of Article 5 present and voting and a majority of the Parties not so operating present and voting*”⁵².

every effort to reach agreement on the adoption or amendment of standards by consensus. Decisions to adopt or amend standards may be taken by voting only if such efforts to reach consensus have failed”. Article XI.5 of the International Plant Protection Convention (1997), provides the following for the Commission on Phytosanitary Measures: “*the contracting parties shall make every effort to reach agreement on all matters by consensus. If all efforts to reach consensus have been exhausted and no agreement is reached, the decision shall, as a last resort, be taken by a two-third majority of the contracting parties present and voting*”.

[52] Some bodies take decisions by reverse consensus, meaning that decisions are adopted unless there is a consensus against them.

Thirdly, while the usual picture of global governance focuses on vertical links – global versus national – the reality of global governance is made up of many horizontal relations, among international agencies and between national governments and agencies (or what is sometimes referred to as “transnationalism”). This transgovernmental cooperation produces administration by agreements. It has been noted that “[i]nter-agency co-operation in international economic law is a central element of global economic governance”⁵³. As for governmental networks, they “[a]t the most general level [...] offer a new vision of global governance: horizontal rather than vertical, decentralized rather than centralized, and composed of national government officials rather than a supranational bureaucracy”⁵⁴.

A good example of horizontal links is provided by mutual recognition agreements. Article 2 of the 1997 Agreement on Mutual Recognition between the United States of America and the European Community provides that “[...] each Party will accept or recognize results of conformity assessment procedures, produced by the other Party’s conformity assessment bodies or authorities, in assessing conformity to the importing Party’s requirements [...]”. Mutual recognition “consists in intermingling domestic laws in order to ‘constitute’ the global”⁵⁵.

It is important to highlight both the causes and effects of transnationalism. With regard to the former, the more national markets open up to each other, the more evident the asymmetries become. To reduce these asymmetries and level the playing field, global rules

[53] C. Tietje, *Global Governance and Inter-Agency Co-operation in International Economic Law*, in *Journal of World Trade*, 2002, vol. 36, n. 3, p. 515.

[54] A.-M. Slaughter, *Governing the Global Economy through Government Networks*, in M. Byers (ed.), *The Role of Law in International Politics*, Oxford, OUP, 2000, p. 193.

[55] K. Nicolaidis and G. Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in 68 *Law and Contemporary Problems* (2005), n. 3 & 4, pp. 263-317.

can establish general principles, but cannot harmonize the details. Therefore, mutual agreements play an important role.

The reliance of the global legal space on horizontal links and networks produces three effects. It reduces the “verticality” of the global machine, because the *superioritas* of the higher authorities rests on an intricate web of horizontal and contractual relations⁵⁶; it facilitates the political transfer or transplant of institutions from one national legal order to another⁵⁷; and it stimulates research into functional analogies hidden behind formal differences in national systems⁵⁸.

Fourthly, the global polity relies on shared powers. For example, the 1970 Patent Cooperation Treaty establishes a regime of cooperation between national and global authorities⁵⁹. Article 3.1 pro-

[56] On the metaphor of “verticality”, see P. Costa, *Immagini della sovranità fra medioevo ed età moderna: la metafora della “verticalità”*, in *Scienza e Politica*, 2004, n. 31, p. 9.

[57] On the import and export of institutions, P. Pombeni, *I modelli politici e la loro “importazione” nella formazione dei sistemi politici europei*, in *Scienza e Politica*, 2004, n. 31, p. 69. Transplants, in turn, favour contagions, as legal principles and institutions, once introduced in a particular sector, spread via analogy and judicial action, becoming increasingly general.

[58] This was the purpose of the “Cornell Common Core Project”, launched and carried out in the early sixties by Rudolf Schlesinger.

The transnational component of legal globalization suggests caution in stressing the withering away of the State or the flight of power beyond the State, as the dynamic of global administrative law is largely dependent on the State or State fragments. This point is stressed by S. Battini in a seminal paper on *L'impatto della globalizzazione sulla pubblica amministrazione e sul diritto amministrativo: Quattro percorsi*, in *Giornale di diritto amministrativo*, 2006, n. 3, p. 339. See also the following contributions on international composite administrations: A. von Bogdandy e P. Dann, *International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority*, in *The Exercise of Public Authority by International Institutions*, cit. p. 883 and U. Mager, *International Composite Administration*, *ibid.*, p. 913.

[59] For more details, see J. Erstling and I. Boutillon, *The Patent Cooperation Treaty: at the Center of the International Patent System*, *William Mitchell Law Review*, 2006, vol. 32, n. 4 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619523.

vides that “[a]pplications for the protection of inventions in any of the Contracting States may be filed as international applications under this Treaty”. Article 31.1 provides that “[o]n the demand of the applicant, his international application shall be subject of an international preliminary examination [...]”. According to Article 36.3, “[t]he international preliminary report [...] shall be communicated by the International Bureau to each elected Office” (the elected Office is the national Office). According to these provisions, proceedings are half global, half domestic. The two levels of government share their powers.

To sum up, the domestic polity is dominated by hierarchies and established roles, a monopoly of relations with civil society internally and contractual relations with other States externally. The global polity, on the other hand, is dominated by networks, fluid roles and mobile alliances. In the global arena, the winners are those who establish direct links with civil society, thus breaking the monopoly of the States.

The loosely structured global polity produces much fluctuation but also a speedy evolutionary process; most of the developments that we now observe occurred in the last 15-20 years.

V. THE IMPACT ON DOMESTIC REGULATION AND ON PRIVATE PARTIES

What is the impact of the global polity on domestic regulatory powers and on private parties?⁶⁰

[60] D. Vogel and R. A. Kagan (eds.), *Dynamics of Regulatory Change. How Globalization Affects National Regulatory Policy*, Berkeley, University of California Press, 2004.

The global polity has a powerful impact on domestic regulation. Global law removes functions from the domestic setting and asserts control over national agencies. For example, many WTO agreements impose obligations on national authorities to ensure transparency, to move towards harmonization, to guarantee equivalence, and to introduce consultation and control procedures⁶¹.

As global regulation emerges out of heterogeneous and fragmented regimes, the interaction between the conflicting global regimes and the great variety of domestic regulations raises one major issue: how can such a fragmented legal order ensure the compliance of domestic governments? The answer to this question lies in the new opportunities that global regulation provides to national regulatory agencies, even as it imposes new obligations on them.

There is also another side to this coin: national legal and administrative cultures use global regulation in an attempt to capture new fields. For instance, American adversarial legalism – in particular, the requirement to consult before taking decisions, notice and comment procedures, and the right to a hearing – is conquering the world through global regulation.

Global regulation has direct effects on private parties, inasmuch as it directly affects those subject to national or local level regulation. An example is provided by the import controls and quota system for tuna fishing. Article 8(3) of the 1994 Convention for the Conservation of Southern Bluefin Tuna provides that “[f]or the conservation,

[61] S. Cassese, *Global Standards for National Administrative Procedure*, in *Law and Contemporary Problems*, 2005, vol. 68, Summer-Autumn, n. 3-4, p. 109 ff. Another example is that of International Monetary Fund and World Bank standards, such as the IMF-WB International Standards: Strengthening Surveillance, Domestic Institutions and International Markets (2 March 2003).

management and optimum utilization of SBT: a) the Commission shall decide upon a total allowable catch and its allocation among the Parties [...]"; and Article 8(7) continues by providing that "[a]ll measures decided upon under para.3 above shall be binding on the Parties" (namely Australia, Japan, New Zealand, Korea, Taiwan). Article 1(1) and 1(4) of the SBT Statistical Document Program (approved by the Commission in October 2003) states that "[f]or the importation into the territory of a Member, all southern bluefin tuna shall be accompanied by a CCSBT SBT Statistical Document [...]". "The Commission requests the appropriate authorities of exporting/fishing entities to make the requirements under this Program known to their exporters". As a consequence, domestic "fishing entities" are directly affected by the Commission's decisions⁶².

There are hundreds of global standard setting bodies, of which the global financial standard setting agencies are among the most powerful. These bodies adopt standards that are implemented directly by national firms (such as banks). Those standards penetrate into the national regulatory context and, while not legally binding, are obeyed in practice at the national level⁶³.

Global regulatory decisions are binding. Even when they are not formally so, compliance is often monitored in any event⁶⁴. And even when they are not binding and compliance is not monitored, such

[62] On the direct effect of global decisions, S. Battini, *Amministrazioni* cit., p. 246 ss.

[63] S. Battini, *L'impatto della globalizzazione*, cit. See D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, cit., p. 618 on the many ways in which global financial standards can be enforced.

[64] A remarkable example is provided by the implementation of food standards. See D. Prevost, *Private Sector Food Safety Standards and the SPS Agreement: Challenges and Possibilities*, *South African Yearbook of International Law*, 2008, vol. 33, p. 1-37 and D. Casey, *Private Food Safety And Quality Standards And The WTO*, *University College Dublin Law Review*, 2007, vol. 65. n. 7, p. 65 et seq.

decisions are often obeyed nevertheless (“*Even if it is non binding, what does it matter, if it is obeyed?*”⁶⁵).

Global regulation can affect non-members. Again, the CCSBT provides a good example of the manner in which non-members of the Convention may be affected by the decisions taken by the Commission. The Action Plan of the CCSBT (21-23 March 2000) has established the following rules: Article 1 : “[t]he Commission requests non-Members catching SBT to cooperate fully with the Commission in implementing the measures applicable to Members for conservation, management and optimum utilization of SBT [...]”. Article 3: “[t]he Chair of the Commission shall request those non-Members identified pursuant to para.2 to rectify their fishing activities so as not to diminish the effectiveness of the conservation and management measures [...]”. Article 5: “[t]he Commission will review [...] actions taken by those non-Members to which requests have been made pursuant to para. 3 and para. 4 and identify those non-Members which have not rectified their fishing activities”. Article 6: “[t]he Commission may decide to impose trade-restrictive measures consistent with Members’ international obligations on SBT products, in any form, from the non-Members identified pursuant para. 5”.

As the global polity is not subject to a systemic body of rules (i.e., there is no unitary global legal order) conflicts and reactions are governed by procedural rules. The result is a mixture of market forces and planning. Two good examples are the anti-dumping duties and the retaliatory measures in the WTO system. In terms of the former, it is provided that “*in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such products*”. As for the latter, Article 22 of the Understanding on Rules and Procedures governing the Settlement of Disputes (DSU) pro-

[65] D. Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, ILLJ Working Paper 2004/6, Global Administrative Law Series, NYU Law School, p. 38.

vides that, in the event that the recommendations and rulings of the Dispute Settlement Body (DSB) are not implemented within a reasonable period of time, decisions regarding compensation and suspension of concessions or other obligations can be adopted. Notice that in the first case a national government reacts to a decision by a foreign company, while in the second case it is the decision of a foreign government that provokes the reaction.

Neither the anti-dumping and the retaliatory measures can be established without judicial authorisation or control. Private parties and States act as enforcers of judicial decisions. As global courts cannot enforce their decisions “from above”, implementation is ensured through the reaction of the injured party, which can either obtain compensation or retaliate⁶⁶.

What helps the global polity to function, given such a confused picture, is the lack of a fixed role for global actors. This lack acts as a catalyst for their power-maximizing behaviour because it adds incentives to their action as power-seekers.

VI. THE PUBLIC-PRIVATE DIVIDE

“Standardisation is being privatised throughout the developed world to facilitate the harmonisation of technical specifications”. At the same

[66] This method of enforcing the decisions of global courts is provided by Article 22 of the WTO DSU and by the North American Free Trade Agreement (NAFTA) establishing the Commission for Labour Cooperation. In this last case, Article 41 provides that, where a party fails to pay a “monetary enforcement assessment”, determined because of a “persistent pattern of failure” to enforce labour standards, the complaining party may suspend the application of NAFTA benefits “in an amount no greater than that sufficient to collect the monetary enforcement assessment” and an Arbitral Panel determines if the suspension is “manifestly excessive”.

time, “[n]ational standards bodies themselves [...] are rapidly losing power in the emerging system of private ‘supranationalism’”. The result is “the emergence of a relatively autonomous system of law making beyond the State”, the “Constitution of private governance”. In this Constitution, “the public/private distinction ceases to make sense”⁶⁷.

How and why does globalization influence the national public-private divide? Public law is – by definition – particular to each individual State. Each State shapes its own regulatory regimes. Therefore, public law is different from one country to another.

Global regulators must balance deference to this diversity with a certain degree of uniformity. To this end, they have recourse to private law and market-conform rules that have some features common to the different national legal orders.

Private law and market-conform rules are therefore instrumental to uniformity; they thrive at the global level, and are imposed on national regulators: the granting of special or privileged status is forbidden, subsidies are prohibited, and government procurement must follow competitive tendering.

*“The use of private law instruments by national administrative bodies, and the integration of private actors in national regulatory processes, are among the characteristics of the ‘new public management’ in national administration that have been transposed in international organizations as techniques and to some extent as ideologies”*⁶⁸. Public-private partnerships are important in the global governance of areas such as public health, nuclear safety, environmental protection, the inter-

[67] H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Hart, Oxford, 2005, pp. 405 and 414.

[68] B. Kingsbury and L. Casini, *Global Administrative Law Dimensions of International Organizations Law*, cit. p. 347.

net and sports, and raise a variety of issues (should the privileges granted to international organizations be extended to the private bodies involved in the partnerships? If so, how should they be made accountable?).

Global regulatory regimes are, however, replete with quite another kind of rules. A body of public law is developing at the global level⁶⁹: global rules require that public authorities provide information to private parties, impose on them the obligation to hear and the duty to provide reasons, and make access to justice a general obligation.

These requirements are imposed on national governments vis-à-vis other national governments or private parties; and on global regulators in their relations with private parties. They derive from some core principles of administrative law, common to many national legal orders: transparency, the duty to inform and to hear, and judicial review.

In conclusion, globalization presents a contrasting picture: while promoting private law at the national level, it promotes the development of administrative law both at the national and the global levels. It seems likely that, in the global space, a “mixed” (partly public, partly private) law will emerge.

Moreover, as the mixture of global and national is particularly strong and complex, and there is continuity between the domestic and the global level, the public-private distinction at the higher level interacts with the same distinction at the lower level.

[69] A. von Bogdandy, P. Dann and M. Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities* in A. von Bogdandy, R. Wolfrun, J. von Bernstorff, P. Dann, M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions*, cit., p. 3

As one moves away from the State, up into the global space, the dividing line between public and private becomes progressively less clear. For example, ICANN is a private corporation, but, this notwithstanding, its own by-laws subject it to very strict procedural obligations, similar to those established by the US Administrative Procedure Act for public bodies; one explanation for this is that ICANN performs a public function⁷⁰.

Another interesting case concerns the implementation of the standards set by the Forest Stewardship Council (FSC)⁷¹, to which notice and comment procedures and obligations to consult with stakeholders are applied on the basis of the “Code of Good Practice for Setting Social and Environmental Standards”, elaborated by ISEAL⁷².

Due process guarantees and procedural obligations are also applied in relation to the implementation of the International Air Transport Association (IATA) standards. Article 6 of the IATA Bylaws establishes the right to be heard and the right to initiate arbitration proceedings⁷³.

[70] ICANN is a nonprofit public-benefit corporation established under Californian Law. While the core functions of the organization are included in a “hard law” instrument, as they have been set in through a Memorandum of Understanding with the US Department of Commerce, by-laws are an example of soft law, as they are modified and updated by the organization itself. The most recent version of the by-laws was adopted on January 25th, 2011 (see <http://www.icann.org/en/general/bylaws.htm>).

[71] Established in 1993, the FSC develops international standards for responsible forest management, including guidelines for certification of forest management: see FSC Bylaws, 2009, art. 5.

[72] ISEAL is an umbrella organization which encompasses a number of certification bodies, including the FSC. The latest version of the Code (2010) is available at <http://www.isealalliance.org/resources/p005-iseal-code-good-practice-setting-social-and-environmental-standards-v50>).

[73] This article states that “(...) a Member (...) may seek arbitration under IATA Arbitration Rules. Invocation of this procedure shall suspend the effective date of the termination,

Another example is provided by the public procurement regulations for IGOs, which are not less rigid than those binding national governmental bodies. One explanation for this is that national and global regulation have the same purpose: to make the best goods or services available at the lowest price (hence, they impose competitive tendering). The general blurring of the lines between public and private law⁷⁴ are indications of the emergence of a new “mixed” or “compound” legal system.

Finally, supranational or global regulations must overcome national diversities. They cannot take into account the highly variable national borderlines between the private and the public area. Therefore, they build new concepts. One example is the notion of “body governed by public law” (EU Directive 2004/18). This new legal concept was introduced out of a desire to keep the European legislation from becoming entangled with the diverse public-private distinctions employed at the national level. For this purpose, it has established one common legal “language” in the field of government contracts. Will this common “language”, this new “vocabulary”, expand and come to dominate the global space?

pending the results of the arbitration. The decision of the arbitration tribunal shall be final and binding”.

[74] P. van Ommeslaghe, *Le droit public existe-t-il?*, in *Le droit public survivra-t-il à sa contractualisation?*, Bruxelles, Bruylant, 2006, pp. 15-66, and M. Fromont, *L'évolution du droit des contrats de l'administration. Différences théoriques et convergences de fait*, in R. Noguellou, U. Stelkens (eds.), *Droit comparé des Contrats Publics - Comparative Law on Public Contracts*, Bruxelles, Bruylant, 2010, p. 263.

VII. A GLOBAL DUE PROCESS OF LAW

To understand the role of law in the global arena, we must first rid ourselves of the idea that the global polity is merely a negotiated order, not subject to law: “*we are in a supra-state, acephalous world where, leaving self-help and ultimately warfare on one side, the institutional shapes found will be the product of, and depend for their effectiveness upon, negotiated understanding*”; “*we should be very cautious in representing what are essentially negotiated orders at regional and global level as legal orders while they remain significantly different from those at the level of the state.[...] As radically different modes of ordering and decision are represented together as ‘legal’, law loses analytic purchase*”⁷⁵.

According to another sceptical view, the flaws of global legalism stem from the fact that in the global space there is legislation without legislators, enforcement without enforcers, adjudication without courts⁷⁶.

The global polity is not in such a primitive stage of development: on the contrary, we can find there binding rules addressed to private parties⁷⁷; an institutional setting with specialized bodies, and well-established links among them; a set and many sub-sets of legal and physical persons, subject to the rules and to orders stemming from global organizations; and, of course, a wide range of rights and obligations.

[75] S. Roberts, *After Government? On Representing Law Without the State*, in *The Modern Law Review*, 2005, vol. 68, n.1, pp.18 and 23.

[76] E. Posner, *The Perils of Global Legalism*, Chicago, The University of Chicago Press, 2009.

[77] A significant example of a binding enforcement mechanism is provided by the application of the IATA standards. In case of non-compliance with the standards by carriers, they can be blacklisted and banned by national or supranational bodies and suspended by IATA.

If there is a global polity, what is the role of law in the global arena? And what is the role of the rule of law⁷⁸?

The WTO Appellate Body, in a famous case, reaffirmed the relevance of the rule of law in the global context: “[...] *Article X.3 of the GATT 1994 establishes certain minimum standards of transparency and procedural fairness in the administration of trade regulation which are not met here. The non transparent and ex parte nature of the internal governmental procedures [...] as well as the fact that countries whose applications are denied do not receive formal legal procedure for review, or appeal from, a denial of application, are all contrary to the spirit, if not the letter, of Article X.3 of the GATT 1994*”⁷⁹.

In this case, the rule of law (transparency, the right to a hearing and judicial review) was recognized by a global court, but applied to “internal governmental procedures”. What about the global procedures themselves? Are global institutions required to abide by the rule of law, and thus to provide transparency, the right to a hearing and judicial review of their own decisions⁸⁰?

As more and more national powers are transferred from domestic agencies to global authorities, can those authorities avoid grant-

[78] On the rule of law in the global space, S. Cassese, *Global Standards for National Administrative Procedures*, and D. Dyzenhaus, *The Rule of (Administrative) Law in International Law*, both in *Law and Contemporary Problems*, 2005, vol. 68, Summer-Autumn, n. 34, pp. 109 and 127; S. Cassese, *The Globalization of Law*, in *Journal of international law and politics*, 2005, vol. 37, Summer, n. 4, p. 973; S. Chesterman, *An International Rule of Law?*, in *American Journal of Comparative Law*, 2008, vol. 56, pp. 331-361 and S. Cassese, *Is There a Global Administrative Law?*, in A. von Bogdandy, R. Wolfrun, J. von Bernstorff, P. Dann, M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions* cit., p. 761.

[79] WTO AB United States – Import prohibition of certain shrimp and shrimp products, 12 October 1998, WT/DS58/AB/R.

[80] See G. della Cananea, *Procedural Due Process of Law Beyond the State*, in A. von Bogdandy, R. Wolfrun, J. von Bernstorff, P. Dann, M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions*, cit., p. 965.

ing private individuals the same rights that they otherwise enjoy in their national legal orders (e.g. to transparency and disclosure of information, to consultation, to a hearing, to receive a reasoned decision, and to judicial review)⁸¹?

A second set of problems derives from the particular kind of global juridification in question. “[...] [O]ne important innovative element of the actual academic discussion about transnational governance is the application of private law categories to some classical domains of public law, to the analysis of legal institutions that claim legitimacy beyond their own will or self-interest – institutions like empires, churches, kingdoms, international organizations or states”. Global law is made up of “a private law framework of public institutions”; it is “the result of spontaneous co-ordination efforts”⁸².

The body of law that has developed beyond the States, in the global polity, is not a new natural law, as it is either established by international agreements and global rules, or by global courts. And it is not a new public law, as it is quite separate from the national legal orders, which instead act as drivers of and catalysts for the development of global law, much like the role played by common national constitutional traditions in European law.

One of the most astonishing features of the global polity is the speed with which it has developed principles in order to discipline global administrative proceedings by the rule of law. Principles like the right to a hearing, the duty to provide a reasoned decision and the duty to disclose all relevant information have developed and have been enforced in the global arena in the course of just a few

[81] This point is made by S. Battini, *L'impatto della globalizzazione*, cit.

[82] C. Moellers, *Transnational Governance without a Public Law?*, in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism*, Hart, Oxford and Portland Oregon, 2004, p. 329 and 337.

years, while their development in domestic legal orders took decades or even centuries, depending on the State in question.

The development of these procedural principles in the global arena has a twofold impact: they apply to global decision-making processes, and they may also affect domestic proceedings⁸³.

[83] Basic principles for the global procedures have been established by treaties, statutory instruments, secondary legislation and global courts.

The International Tribunal of the Law of the Sea, in the *Juno Trader* case (n. 13, 18 December 2004) established, at para.77, that “[t]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision”. Notice that respect for fairness and the due process of law is established by the court as an obligation of the domestic authorities of Guinea-Bissau. These authorities had not only detained the crew, but also failed to inform the ship owner that the bond paid was unreasonable.

Article 34 of the Patent Cooperation Treaty establishes the rights of the applicant to communicate orally and in writing with the International Preliminary Examining Authority, amend the claims, receive a written opinion from the Authority and respond to the written opinion. In this case, procedural rules are imposed on global agencies.

Article 6.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) provides that “[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered”. Article 6.4 of the same Agreement provides that “[t]he authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases [...]”. In this case, the duty to provide interested parties an opportunity to obtain the relevant information and to be heard is imposed on domestic agencies in order to favour comments from foreign enterprises which have dumped their products.

Article 3.1 of the GATT Safeguard Measures and Article XIX of the GATT establish the duty to provide a reasoned and adequate decision, with explanations, to importers, exporters and other interested parties (including foreign governments). In this case, global law imposes procedural rules on domestic agencies, and grants not only private parties but also foreign governments the right to an explanation.

Article 7 of the Sanitary and Phytosanitary Agreement provides that “[m]embers shall notify changes in their sanitary and phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B”. Para. 1 of this Annex provide that “[m]embers shall ensure that all sanitary and phytosanitary regulations which

Global rules grant participation rights to private parties vis-à-vis domestic authorities (thus strengthening the participatory rights already granted in many national legal orders), to national governments vis-à-vis global agencies or other national governments, to global institutions vis-à-vis other global institutions, and to private parties appearing before global institutions. Participation is therefore ensured both vertically (for private parties before national governments and global agencies; and for national governments before global organizations) and horizontally (that is, guaranteed to national governments before other national governments; and to global institutions before other global institutions). Thus participatory rights created at the global level establish links among the different levels of government, and between the different governmental bodies involved and civil society⁸⁴.

These and other similar provisions raise many interesting questions: how does putting domestic agencies and private parties on the same plane change the administrative procedure in question? Do hearings in the global arena play the same role as administrative hearings do in national law? How does the “interest representation model”⁸⁵ apply to the global legal order? Do particular structures and procedures perform the same function in the global environment as they do in the national context?

have been adopted are published promptly in such a manner as to enable interested members to become acquainted with them” (on this provision, see WTO Appellate Body, Japan – Measures affecting agricultural products, 22 February, 1999, WT/DSB76/AB/R). The transparency principle is, in this case, imposed on individual national authorities mainly for the benefit of national authorities in other States.

[84] S. Cassese, *A Global Due Process of Law?*, in G. Anthony-J.-B. Auby-J. Morison-T. Zwart (eds.), *Values in Global Administrative Law*, London, Hart Publishing, 2011, p. 17-60.

[85] R. B. Stewart, *The Reformation of American Administrative Law*, in *Harvard Law Review*, 1975, vol. 88, p.1667.

To sum up, the global due process of law, compared to its domestic counterpart, appears richer, but less effective. It is richer as far as openness, participation and consultation are concerned; while it is less effective because transparency, reasoned decision-making and judicial review are not always provided for, with the result that the rule of law is not fully developed in the global arena.

A global administrative law has emerged within the global space: “[...] *comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make*”⁸⁶.

VIII. JUDICIAL GLOBALIZATION

Another aspect of the juridification of the global polity is the development of dispute settlement⁸⁷. Joseph H. H. Weiler has sum-

[86] B. Kingsbury, N. Krisch, R. Stewart, *The Emergence* cit., p. 17. The word “global” was used for the first time in “The Economist” in 1959. “Globalization” was registered for the first time in 1961 in the Webster’s New International Dictionary. This word has been widely used since the mid-1980s. In 2001, H. James published a book entitled *The End of Globalization – Lessons from the Great Depression* (Harvard University Press).

[87] The judicialization of the global polity has attracted much criticism. It has, for example, been pointed out that “[i]n less than a decade, an unprecedented concept has emerged to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subjected to systematic debate, partly because of the intimidating passion of its advocates. To be sure, violations of human rights, war crimes, genocide, and torture have so disgraced the modern age and in such a variety of places that the effort to interpose legal norms to prevent or punish such outrages does credit to its advocates. The danger is that it is being pushed to extremes which risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch hunts”. The International Criminal Court, “in its present form of assigning the ultimate dilemmas of international politics to unelected jurists - and to an international judiciary at that - it represents such a fundamental change

marised this development in the following way: “[...] *one sees an initial stratum of horizontal, dyadic, self-help through mechanisms of counter-measures, reprisals and the like. This is still an important feature of enforcement of international legal obligation. Then, through the century, we see a consistent thickening of a triadic stratum – through the mechanisms with which we are all familiar – arbitration, courts and panels and the like. The thickening consisted not only in the emergence of new area subject to third party dispute settlement but in the removal of optionality, in the addition of sanctions and in the general process of ‘juridification’.* Dispute settlement, the hallmark of diplomacy, has been replaced, increasingly, by legal process especially in the legislative and regulatory dimensions of international law making. And there is, here too, a third stratum of

in American constitutional practice that a full national debate and full participation of Congress are imperative. Such a momentous revolution should not come about by tacit acquiescence in the decision of the House of Lords or by dealing with the ICC issue with a strategy of improving specific clauses rather than as a fundamental issue of principle” (H. Kissinger, *Does America Need a Foreign Policy?*, Simon & Schuster, New York 2001, pp. 273 and 279).

Another very critical perspective on judicialization is offered by Eric Posner: “[...] *I contrast two views of adjudication. One sees international tribunals as practical devices for helping states to resolve limited disputes when the States are otherwise inclined to settle them. The courts help resolve bargaining failures between states by providing (within limits) information in (within limits) an impartial fashion. On this view, courts are agents of states, and they are subject to the control of states. It follows that states will submit to the jurisdiction of tribunals where doing so serves their interest, and will withdraw or reduce cooperation if and when tribunals disappoint their expectations. The second view is that of the global legalist: international courts advance international justice. They are impartial and independent, and they do justice in the face of the efforts of states to exercise power for gain; and they are indispensable for necessary form of international cooperation. I will explain how this tension has helped shape international courts and thinking about those courts, and argue that only the first view makes sense of recent history”* (Eric A. Posner, *The Perils of Global Legalism*, cit., p. 207).

“For the global legalist, the ideal dispute resolution mechanism for international law violations is the international tribunal, but in practice, the most exciting international litigation is taking place in American domestic courts. This paradox reflects the basic tensions of global legalism: law without government exists at the international level, law normally requires courts to interpret and enforce it, effective courts cannot exist without supporting government institutions, no such institutions exist at the international level. In the absence of effective international courts, the next best thing is the domestic court, which can at least apply the law and enforce it - and maybe advance it” (Eric A. Posner, *The Perils of Global Legalism*, cit., p. 207).

*dispute settlement which may be called constitutional, and consists in the increasing willingness, within certain areas of domestic courts, to apply and uphold rights and duties emanating from international obligations*⁸⁸.

In previous times, it was generally agreed that “*law without adjudication is [...] the normal situation in international affairs*”;⁸⁹ and, according to Article 33.1 of the Charter of the United Nations, parties can choose any means they wish for the peaceful settlement of disputes. Only in the 1990s did compulsory means of quasi-judicial dispute settlement develop, whereby the complaining party can bring the case before an impartial body and the other party cannot avoid a third party decision; but “*in international law, every tribunal is a self contained system (unless otherwise provided)*”⁹⁰.

Since the 1990s, the number of international courts and tribunals has grown rapidly⁹¹. Not long prior to this, there were only six operative international courts. In the last fifteen years of the last

[88] J. H. H. Weiler, *The Geology cit.*, p. 550-551. See also J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the International and External Legitimacy of WTO Dispute Settlement*, in *Journal of World Trade*, 2001, vol. 35, p. 191 ss; P. Schiff Berman, *The Globalization of Jurisdiction*, in *University of Pennsylvania Law Review*, 2002, vol. 151, n. 2, December, p. 311; R. Teitel and R. Howse, *Cross-judging: Tribunalization in a Fragmented but Interconnected Global Order*, in *International Law and Politics*, 2009, vol. 41, p. 959 and S. Cassese, *When Legal Orders Collide*, Sevilla, Global Law Press, 2010. See also the symposium on *International Administrative Tribunals in a Changing World*, European Public Law Organization, London, Esperia, 2008.

[89] J. G. Merrills, *International Dispute Settlement*, Cambridge, Cambridge University Press, 2005, IV ed., reprinted 2007, p. 237.

[90] Appeals Chamber of the International Tribunal for the Former Yugoslavia, decision on jurisdiction, 2 October 1995 in *Rivista di diritto internazionale*, 1995, p. 1016, para. 11.

[91] For more details, see R. Mackenzie, C. Romano, Y. Shany, P. Sands, *The Manual on International Courts and Tribunals*, Oxford, Oxford University Press, 2010.

century, fifteen new permanent adjudicative mechanisms and eight quasi-judicial procedures were introduced⁹².

The global polity is not only becoming increasingly court-centred (“[t]he global law system finds its networking centres in global remedies, at the national, supranational and international level”)⁹³; its legal system is also – to a dangerous degree – drawing inspiration from American adversarial legalism; a mixture of “[...] adjudicatory systems [that] give lawyers for the competing parties a very large and creative role in gathering evidence, formulating legal arguments, and influencing decisions – and hence foster an especially entrepreneurial and aggressive legal profession; a politically selected, somewhat unpredictable, and uniquely powerful judiciary; a fragmented governmental and court system [...]”. But “[...] adversarial legalism is Janus-faced. It makes American government more responsive to individualized claims of justice and to the arguments of the politically less powerful, but it is also [...] a peculiarly cumbersome, erratic, costly, and often ineffective method of policy implementation and dispute resolution”⁹⁴.

[92] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford Univ. Press, 2003, p.3, 5, 7-8 and, more recently, *Regulating Jurisdictional Relations between National and International Courts*, Oxford, Oxford University Press, 2007.

[93] A. Fischer-Lescano, *Die Emergenz der Globalverfassung*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2003, vol. 63, p. 717 ss.

[94] R. A. Kagan, *Adversarial Legalism: The American Way of Law*, Harvard Univ. Press, 2003, p. IX and 164.

One of the most important global dispute settlement bodies is that of the WTO. Its development has been summarised by Alec Stone Sweet in the following manner: “[w]hen GATT (1948) entered into force and was institutionalized as an organization, “anti-legalism” reigned [...]. Diplomats excluded lawyers from GATT organs and opposed litigating violations of the Treaty. In the 1950s, triadic dispute resolution emerged in the form of the Panel System. Panels, composed of 3-5 members, usually GATT diplomats, acquired authority through the consent of two disputing States. In the 1970s and 1980s, the system underwent a process of judicialization. States began aggressively litigating disputes; panels began treating the treaty as enforceable law, and their interpretation of that law as authoritative; and jurists and trade specialists replaced diplomats on panels. The process generated the conditions necessary for the emergence of the compulsory system of

Who are the parties that can appear before global courts? The answer is far from uniform. Domestic authorities may appear before the International Tribunal of the Law of the Sea. Private parties and the World Bank appear before the World Bank Inspection Panel. Both private parties and domestic authorities may appear before the Article 1904 NAFTA Binational Panel. Only private parties can appear before the Administrative Panel of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Centre, but the decision has an impact on decisions taken by the relevant national registrars. The contracting State and nationals of another contracting State can appear before the International Centre for Settlement of Investment Disputes (ICSID) Arbitral Tribunals.

In the global legal space disputes are multi-polar, not bi-polar. The global space provides for judicial review of national decisions,

adjudication now in place in the WTO" (A. Stone Sweet, *Judicialization and the Construction of Governance*, in *Comparative Political Studies*, 1999, vol. 32, April, n. 2, p.164-165).

Four further examples of courts or quasi-judicial bodies can be offered here. Firstly, the World Bank Inspection Panel, which protects the rights of interested parties that have been or are likely to be affected as a result of a failure of the Bank to follow its operational policies and procedures. This body is a cross between an administrative tribunal (in the British meaning of the term) and a court. Its task is to review a decision, or set of decisions, taken by an international organization.

Secondly, Article 1904 NAFTA Binational Panels, which have jurisdiction to review decisions taken by domestic agencies. It decides disputes in accordance with domestic law, not international trade rules. It is an international court for the judicial review of domestic agencies.

Thirdly, the Administrative Panels of the WIPO Arbitration and Mediation Centre for Uniform Domain Name Dispute Resolution, which have power to review the decisions of national authorities (registrars), despite the fact that parties to the dispute are only private individuals.

Fourthly, ICSID Arbitral Tribunals, which are empowered, under the ICSID Convention, to decide "*any legal dispute arising directly out of an investment*" (Article 25). The parties must consent to the arbitration, and the award is binding on them (Articles 53 and 27). The Tribunal decides disputes in accordance with such rules of law as may be agreed by the parties; in their absence, it decides according to the law of the contracting State party to the dispute and such rules of international law as may be applicable (Article 42).

even as national courts review global decisions. Regional courts recognize global law as a higher law; links among different regulatory regimes are established by their respective courts.

The decisions of global courts can have direct effect, penetrating into domestic law and lifting the veil of national law⁹⁵.

The process of judicialization should not be over-emphasized, because there is a strong continuity between traditional diplomatic negotiation and the new forms of judicial dispute settlement⁹⁶.

Moreover, there is a division of labour: national governments retain their power to resolve highly political disputes through negotiation, or other political or military means, while global courts are entitled to solve disputes (which amount to a small proportion in some regulatory regimes – such as that governing the law of the sea – , but to a larger one in other regulatory regimes – such as world trade) in which only “low politics” are implicated. Courts thus

[95] Consider, as an example, the decision of the International Tribunal for the Law of the Sea in the *Juno Trader* case, 18 December 2004, para. 80: “[...] *the tribunal finds that the respondent has not complied with Article 73, para. 2 of the Convention, that the Application is well founded, and that, consequently, Guinea-Bissau must release promptly the Juno trader including its cargo and its crew, in accordance with para. 104*”.

[96] Consider, in this regard, Arbitral Tribunal – Annex VII of the United Nations Convention on the Law of the Sea-UNCLOS, Award on Jurisdiction and Admissibility, 4 August 2000 and the “effort to cooperate” (para. 78). This decision emphasizes the role of negotiation, mediation and consensual procedures. Article XIII of the International Plant Protection Convention provides for the settlement of disputes, consultation and the establishment of committees of experts. It then states: “*the contracting parties agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the contracting parties concerned of the matter out of which the disagreement arose*”. There is, therefore, no sharp distinction between dispute resolution and negotiation.

See also the European Court of Justice (ECJ) decision in the *Van Parrys* case (ECJ, C-377/02), which privileged reciprocity and negotiation; the Court held that adjudication may play a role only upon condition of reciprocity.

establish secondary circuits, by which they extend the rule of law in the global arena⁹⁷.

Judicial globalisation raises three important questions. Firstly, global courts exercise public authority through judicial law-making⁹⁸, but their power can neither be justified on the traditional basis of State consent, nor by functionalist narrative. In democratic contexts, judicial law-making is embedded in a political system in which a democratic legislature has the central place in creating the norms: there is no equivalent in the global space. Therefore, global courts are not *indirectly* legitimated in this manner because there is very little parliamentary participation in the selection of global judges. This argument, however, underestimates the existence of a large amount of global legislation (treaties, “constitutions”, regulations, by-laws, “policies”). On every topic, there are rules; some “soft”, others “hard”⁹⁹. This legislation establishes the framework in which global courts operate. Therefore, courts do not act in a vacuum. We might also add to this the fact that legislation at the national level can have an important impact on the global level, setting limits and establishing barriers.

[97] Compare this to the progress of national administrative law courts, once confined to low politics (in which “actes de gouvernement” were not subject to judicial review).

[98] J.L. Goldstein e R.H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, in W. Mattli e N. Woods (eds.), *The Politics of Global Regulation*, Princeton, Princeton University Press, 2009, p. 211.

[99] According to José E. Alvarez, “[t]he picture that emerges is of many International Organizations organs, not just a select few, acting as law-makers in some sense, even though few of them are given explicit authority to legislate or to recommend, and even though much of their work product does not fit easily into the classic sources of international obligation [...] In many, perhaps most ways, IO do not *subdue* governments as much as *assist* them. Yet IOs are regarded, simultaneously, as the servants, agents, or instruments of governments *and* as a challenge to their authority” (*International Organizations as Law-makers*, Oxford, Oxford Univ. Press, 2005, p. 262).

Secondly, how can jurisdictional competition be mitigated? Through forum selection or forum shopping? Or with parallel proceedings? Or through successive proceedings?¹⁰⁰.

Thirdly, how do global courts interact with domestic judiciaries? Is the relation between global and domestic courts complementary, competitive, or hierarchical? (National courts apply avoidance techniques or follow strategies of judicial deference when international organizations appear before them¹⁰¹).

IX. DEMOCRACY AND GLOBALIZATION

The global polity's relationship with democracy raises two important issues: first, there is the problem of the democratic legitimacy of the global polity itself; second, there is the question of whether the global polity may serve as a vehicle for the democratization of domestic governments.

In terms of the first issue, has the global polity established direct links with national civil societies? Is the global legal order democratic and accountable? Which "demos" lends legitimacy to the global institutions? And to whom are these institutions accountable?

[100] This problem is addressed by Y. Shany, *The Competing Jurisdictions* cit., p. 19 ss.

[101] A. Reinisch, *International Organizations Before National Courts*, Cambridge University Press, 2000, p. 35 ss. See also E. Benvenisti and G. W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, in *European Journal of International Law*, 2009, vol. 20, n. 1, p. 59 ff., followed by N. Lavranos, *National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs* and T. Ginsburg, *National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, in *European Journal of International Law*, 2010, vol. 20, n. 4, pp. 97 and 104.

In cases like the *Southern Bluefin Tuna*¹⁰², *Tokios Tokelès v. Ukraine*¹⁰³ and *Kadi*¹⁰⁴ or in the example of the Patent Cooperation Treaty¹⁰⁵, direct links were established between global bodies and civil society. The SBT Commission, for example, issued orders to national fishing vessels. And, under the Patent Cooperation Treaty, a national can directly petition an international body for an international preliminary examination on the patentability of an invention. These links are, however, limited; therefore, global regulatory regimes are not, as a whole, democratic.

One of the most powerful global institutions, the WTO, has three problems in this regard: “1. *a lack of transparency in the [...] process*; 2. *barriers to the participation of interested groups [...]*; 3. *the absence of politicians with ties both to the organization and to constituencies*”¹⁰⁶.

To study this first set of questions, we must take three features of “cosmopolitan democracy” into consideration¹⁰⁷. Unlike States,

[102] *Australia and New Zealand v. Japan*, Award on Jurisdiction and Admissibility August 4, 2000, rendered by the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea.

[103] International Centre for Settlement of Investment Disputes (ICSID), *Tokios Tokelès v. Ukraine*, ARB/02/18 (26 July 2007).

[104] European Court of Justice, General Court, Seventh Chamber, T-85/09 (30 September 2010).

[105] Patent Cooperation Treaty done at Washington on June 19, 1970, amended on September 28, 1979, modified on February 3, 1984, and on October 3, 2001 (as in force from April 1, 2002), art. 31-42.

[106] R. O. Keohane and J. S. Nye jr., *Between Centralization and Fragmentation: the Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, Working Paper of the Kennedy School of Government, 2001, p. 20 and R. B. Stewart, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, in C. Joerges and E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2nd ed, Oxford and Portland Oregon, Hart Publishing, 2011.

[107] There is a rich literature on cosmopolitan democracy. See J. Delbrück., *Exercising public authority beyond the State: transnational democracy and/or alternative legitimation strategies?*, in *Indiana Journal of Global Legal Studies*, 2003, vol. 10, p. 29; D. Archibugi, *La democ-*

the global polity is not rooted in an authoritarian legacy, which influences the quality of the democratic process¹⁰⁸, and it has only a limited police power. In the global space, the characteristic feature of the nation State – a strong executive – is missing.

The entire history of the State has been characterized by the preexistence of autocracies, ruled by kings or emperors. They were able to impose unitary and uniform rules. First liberalism had to fight kings and emperors for recognition of liberties (habeas corpus) and judicial powers. Then democracy had to struggle for the affirmation of popular participation and constitutions.

The picture at the global level is quite the opposite. There is no strong executive power (as this would undermine national governments), a large body of legislation (but without any truly legislative chambers), many trans-bureaucratic committees (where national civil servants meet and prepare global decisions) and a growing number of courts. There is no unitary and uniform rule, but on the contrary a series of legal orders, fragmented, self-contained, that make the global space a compound or composite system. In this quite different context, we cannot simply apply the same paradigms developed in the national setting. Democracy in the context of the nation-State cannot be equal to democracy at the cosmopolitan level.

razia cosmopolitica: una prospettiva partecipante, in *Rivista italiana di scienza politica*, 2005, a. XXXV, agosto, n. 2, p. 261; B. O. Bryde, *International Democratic Constitutionalism*, in R. St. John Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism*, Leiden, Martinus Nijhoff, 2005, p. 103 ss.; D. Archibugi, *Cittadini del mondo. Verso una democrazia cosmopolitica*, Milano, Il Saggiatore, 2009; *Democrazia globale. Principi, istituzioni e lotte per la nuova inclusione politica*, Milano, Vita e Pensiero, 2010 (with a proposal for world federalism) and P. Nanz, *Democratic Legitimacy in Transnational Trade Governance: A View from Political Theory*, in C. Joerges and E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* cit. p. 59.

[108] On the role of the States' authoritarian legacy, L. Morlino, *Spiegare la qualità democratica: quanto sono rilevanti le tradizioni autoritarie?*, in *Rivista italiana di scienza politica*, 2005, a. XXXV, agosto, n. 2, p. 191.

Moreover, the fragmentation of global regulatory regimes avoids the concentration of power at the global level. Dispersed powers are easier to check and keep under control. Overlapping public authorities can check each other. In many respects, this design (or at least this result of concurring and opposing forces) fulfils the same function as democracy: keeping public power under control. As the division of powers inside the State functions to check and balance powers, so the fragmentation of global regulatory regimes – though inefficient – can act as a mechanism of control¹⁰⁹.

Finally, the global polity has made use of a vast array of accountability mechanisms that were introduced and tested only relatively recently within the national context¹¹⁰. As there are no periodical elections at the global level, and there is no room for representative democracy, deliberative democracy and procedural accountabil-

[109] A different point of view is presented by E. Benvenisti and G. W. Downs: “[p]owerful states labor to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardizing the system they have created.” *The Empire’s New Clothes. Political Economy and the Fragmentation of International Law*, in “Stanford Law Review”, 2007 – 2008, vol. 60, pp. 595 – 631

[110] L. A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, in *William and Mary Law Review*, 2005, vol. 47, p. 135; R. W. Grant and R. O., Keohane, *Accountability and Abuses of Power in World Politics*, in *American Political Science Review*, 2005, vol. 99, n. 1, February, pp. 29-43; R. O. Keohane, *Accountability in World Politics*, in *Scandinavian Political Studies*, 2006, vol. 29, n. 2, p. 75 ss.; M. S. Barr and G. P. Miller, *Global Administrative Law: The View from Basel*, T. Macdonald and K. Macdonald, *Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry*, N. Krisch, *The Pluralism of Global Administrative Law*, all three in *European Journal of International Law*, 2006, vol. 17, n. 1, pp. 15, 89, and 247; J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, in *Regulation & Governance*, 2008, vol. 2, p. 137; B. Kingsbury and R. B. Stewart, *Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations*, in Spyridon Flogaitis (ed.), *International Administrative Tribunals in a Changing World*, London, Esperia, 2009.

ity play a dominant role in making global bodies responsible with respect to global society¹¹¹.

In terms of the second issue, globalization can favour the spread of democracy by facilitating the transplant or development of democratic institutions in countries where such institutions are weak or non-existent. This raises further, related questions: “[i]s military occupation likely to be the midwife of democracy? Can democracy be imposed by force from the outside? This is the assumption driving America’s intervention in Iraq and posited a potential new pillar of ambition for U.S. foreign policy elsewhere”¹¹². Multilateral institutions can actually enhance democracy¹¹³, contrary to the traditional view that democracy is dependent upon political sovereignty, and that sovereignty is undermined by participation in multilateral institutions¹¹⁴.

According to Keohane et al., “as international bodies come into interaction with national centers of power, they can check abuses by those national centers [...] and force them into a better level of democratic performance. Example. The European Convention on Human Rights provides for individual petitions and compulsory jurisdiction by the European Court of Human Rights. The two features give rise to a potentially expansive process of transnational dispute resolution”¹¹⁵.

[111] K. Raustiala, *The “Participatory Revolution” in International Environmental Law*, in *Harvard Environmental Law Review*, 1997, vol. 21, p. 537.

[112] E. Bellin, *The Iraqi Intervention and Democracy in Comparative Historical Perspective*, in *Political Science Quarterly*, 2004-2005, vol. 119, Winter, n. 4, p. 595. See also F. Andreatta, *Democrazia e politica internazionale: pace separata e democratizzazione del sistema internazionale*, in *Rivista italiana di scienza politica*, 2005, a. XXXV, agosto, n. 2, p. 213.

[113] R. O. Keohane, S. Macedo, A. Moravcsik, *Democracy-Enhancing Multilateralism*, in *International Organization*, 2009, n. 63, p. 1-31.

[114] J. A. Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States*, Princeton Univ. Press, 2007, p. 266.

[115] Keohane et al., p. 27.

X. GLOBAL GOVERNANCE OR A GLOBAL COMPOUND CONSTITUTION?

Might one conclude that, while there is well-developed administration, governed by a well-developed set of administrative laws, in the global polity, there is no constitutional law because constitutionalization applies only to national legal systems? Might there be a “non-State – or global – constitutionalization”?¹¹⁶

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 courts¹¹⁷.

But there is no government in this global constitution: in the global polity “[...] *centralized authority is conspicuously absent [...] even though it is equally obvious that a modicum of order, of routinized arrange-*

[116] See C. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism*, Oxford, Hart, 2004; R. St. John Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism*, Leiden, Martinus Nijhoff, 2005; M. Poiares Maduro, *From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance*, in *Global Governance and the Quest for Justice*, vol. I, International and Regional Organisations, Douglas Lewis (ed.), February 2006, p. 227; E. de Wet., *The International Constitutional Order*, in *International & Comparative Law Quarterly*, 2006, vol. 55, part 1, January, p. 51; N. Fraser, *Scales of Justice. Reimagining Political Space in a Globalizing World*, Cambridge, Polity Press, 2008; N. Krisch, *Global Administrative Law and the Constitutional Ambition*, LSE Law Society and Economy Working Papers, n. 10/2009 and J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, New York, Cambridge University Press, 2009 (especially M. Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, p. 258).

[117] Some of these questions are addressed, with reference to the WTO, by D. Z. Cass, *The Constitutionalization of the World Trade Organization – Legitimacy, Democracy, and Community in the International Trading System*, Oxford, Oxford Univ. Press, 2005, pp. 25-26, 48-52, and 242-243.

ment, is normally present in the conduct of global life”¹¹⁸. Global law is mostly administrative law, not constitutional law.

The following three questions remain crucial in terms of understanding the global polity: is it made up of the three powers (legislative, executive and judiciary) that characterize governance at the State level? Who profits from the global polity? Is the global polity “a machine that runs of itself”?

In what follows, I offer a tentative answer to these questions.

The three powers, or branches of government, can be observed to an extent within global governance, but there is more continuity between them rather than a true separation of powers. Also, the executive branch is less developed here than in domestic legal orders, as the global polity is reliant to a great degree upon national implementation (indirect rule).

As for legislative power (often referred to as non-contractual law-making, or non-conventional law-making, or non-treaty law-making), “[i]nternational treaty law forms only the top level of the differentiated international normative order. Underneath the primary level, there is a secondary normative level. The rules appertaining to that secondary level are non-conventional for they are not set through the traditional treaty formation processes. Rather such rules involve actors that have been imbued with public authority under an empowering treaty. In developing the secondary regulatory function, international law addresses just the States, their several organs, and international organizations. But it reaches into the private sector professional associations, major groups of civil society,

[118] J. N. Rosenau and O. Czempiel (eds.), *Governance without Government*, cit. On the basic concept of governance and modes of governance, see also O. Treib, H. Baehr and G. Falkner, *Modes of Governance: Towards a Conceptual Clarification*, in *Journal of European Public Policy*, 2007, vol. 14, n. 1, pp. 1-20.

epistemic communities, NGOs, and individuals”¹¹⁹. In the global polity there are various kinds of global administrative bodies that are by no means limited to performing “managerial” tasks, but rather, exercise significant law-making and policy-making powers.

At the global level there are also executive agencies, such as the United Nations Compensation Commission for Iraq, the Iraq-Kuwait Boundary Demarcation Commission, the Global Environmental Facility, and the Prototype Carbon Fund¹²⁰. These bodies carry out managerial tasks.

As for the judicial branch, “[...] *a growing number of courts and tribunals has emerged together with the increased number and importance of compulsory jurisdiction clauses, and [...] States are becoming accustomed to resort to courts and tribunals and to devise strategies in framing the issues they are confronted with so that they can be submitted to different adjudicating bodies [...]*”. “*International adjudicating bodies, while keen on the separate and independent status States have bestowed upon them, are very much aware of each other’s presence and activity. Not only do they rely on each other’s case-law much more than they dissent from it, but they are ready to engage in constructive dialogue that, through cross-fertilization of their views, may bring about progress in the law*”¹²¹.

Secondly, who profits from the global polity? Does the global legal polity provide additional guarantees for private parties or does

[119] V. Roeben, *Proliferation of Actors*, in R. Wolfrum and V. Roeben (eds.), *Developments* cit., p. 536.

[120] On the first two, E. de Wet, *The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions*, in R. Wolfrum and V. Roeben (eds.), *Developments* cit., p. 211 ss.; on the remaining agencies, E. Hey, *Exercising Delegated Public Powers – Multilateral Environmental Agreements and Multilateral Funds*, *ibidem*, p. 443 ss.

[121] T. Treves, *Judicial Lawmaking in an Era of “Proliferation” of International Courts and Tribunals: Development or Fragmentation of International Law?*, in R. Wolfrum and V. Roeben (eds.), *Developments* cit., p. 619.

it provide an additional shelter for developed States at the expense of the “pariah States”¹²²? Does it increase the impact of American legal imperialism in the World, by facilitating the export of American law¹²³?

Legal globalization, like globalization itself (for example, the French denounce globalization, but their companies embrace it¹²⁴), is full of ambiguities. For example, ICANN has global control of the Domain Name System, but it is an American corporation, incorporated in California, under the control of the Department of Commerce.

“[T]he rules which were intended to constrain others became constraining for their creators”¹²⁵. “International rules promoting opportunities for American companies abroad are now being used to challenge American pollution and health standards”.¹²⁶ The United States, if it wants to protect its investments abroad, has to accept that its domestic decisions are subject to those of global courts. Likewise, if it wants the environment and endangered species to be protected in the world, it must accept that global courts have the power to evaluate its own domestic policies. The strength of global law lies in the fact that the selective application of rules is difficult, as it runs against the principle of reciprocity. Global law is a two way street *par excellence*. The United States Supreme Court should not impose “foreign moods,

[122] P. Minnerop, *Paria – Staaten im Völkerrecht?*, Berlin, Springer, 2004.

[123] See N. Krisch, *Imperial International Law*, Global Law Working Paper 01/04, NYU Hauser Global Law School Program.

[124] *Demon Monde*, in *The Economist*, July 2, 2005, p. 32.

[125] P. Sands, *Lawless World, America and the Making and Breaking of Global Rules*, London, Allen Lane, 2005.

[126] P. Sands, *Lawless World* cit., p. 140.

fads or fashions”, according to Justice Scalia; “yet Americans are happy to impose their own *“fads and fashions”* on others”¹²⁷.

And the final question: is the global polity a “machine that runs of itself”?

Let us consider the machinery of the global polity as a whole. As there is no unitary global order, but rather many regulatory regimes, there is more flexibility in the global space than in national polities. This flexibility allows for new associations and alliances (trade and labour, environment and human rights).

Many procedures of IGOs are open to and can be activated by interested citizens, creating direct vertical links – unmediated by the institutions or agencies of the State – between the organization in question and civil society. In such cases, intervention is triggered by concerned citizens themselves, in what is often referred to as a “fire alarm” procedure (which can be more efficient, and less costly, than the more traditional “police patrol” method, in which intervention comes as a result of oversight by public bodies themselves): consider, for example, the request by Mumbai shop-owners made directly to the World Bank that they be consulted, both by the Bank

[127] *The insidious wiles of foreign influence*, in *The Economist*, June 11, 2005, p. 41. On the role of American legal culture and tradition in the process of globalization, U. Mattei, *Miraggi transatlantici, fonti e modelli nel diritto privato dell'Europa colonizzata*, in *Quaderni fiorentini*, 2002, vol. 31, t. I, p. 407.

“[O]n the one hand, dominant actors engage with international law, use it for their purposes and reshape it so as to better reflect their factual superiority. Yet insofar as international law doesn't bow to their demands – as it defends equality against hierarchy and stability against flexible change – powerful states withdraw: they try to limit the reach and impact of international legal rules on them and turn to the sphere of politics in order to achieve their goals. However, the simplicity of this picture, and in particular the dichotomy between international law and politics that it suggests, is misleading. Withdrawal from international law doesn't necessarily result in a rejection of law in favour of politics; instead it frequently leads to a substitution of domestic law for international law” (N. Krisch, *Imperial International Law*, cit., p. 53).

and by local authorities, in relation to an urban transport project being co-funded in Mumbai¹²⁸; and the successful attempt made by environmental associations to trigger UNECE intervention in order to compel national government bodies to provide access to relevant information¹²⁹. The global polity is not only run in a top-down manner, but allows for voluntary cooperation from the bottom. This cooperation is strengthened by associations with parallel regulatory regimes: for instance, environment and human rights in the *Kazatomprom* case.¹³⁰

This multiplicity of rules, regimes and fora presents additional opportunities to private parties and to public actors, to the extent that they have the capacity to profit from this highly unstructured polity.

While domestic rules are imposed on civil societies insofar as they are decisions of authorities exercising legitimate power (civil societies accept such decisions because the power-holders are legitimized through recurring elections), global rules are implemented by a mechanism capable of breaking down the unity of the State (and therefore the paradigm of “the State-as-a-unit”), which thus advances the process globalization. National governments and civil societies accept the progress of globalization because it disaggregates the once unitary national interest and provides advantages to some constituencies, one step at a time. For example, while European textile producers were against free trade with China, European supply

[128] World Bank, The Inspection Panel, *Investigation Report*, India: Mumbai Urban Transport Project (IBRD Loan no. 4665-IN; IDA Credit no. 3662-IN), Report no. 34725, December 21, 2005 (siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/INDIAManagementResponse.pdf).

[129] Compliance Committee, *Decision II/5° Compliance by Kazakhstan with its obligations under the Aarhus Convention* (<http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.7.e.pdf>).

[130] See footnote n. 103.

chains favoured Chinese textile imports, as it was less expensive, and they could increase their sales as a result.

Finally, as this polity is basically unstructured, it is highly imperfect and inefficient, but it also able to self-correct and improve.

CHAPTER II

GLOBAL STANDARDS FOR NATIONAL DEMOCRACIES?*

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I. THE GLOBAL LEGAL SPACE CONTAINS SEVERAL PROVISIONS THAT SUBJECT NATIONAL AGENCIES TO THE RULE OF LAW¹.

LET me take two examples. According to the Rio Declaration, the Aarhus Convention recognizes that every affected person has the right to participate in decision-making processes on environmental matters. If a domestic legal order does not guarantee such a right, the affected person can ask a quasi-judicial body, the «Compliance Committee» (a mechanism established at the First Meeting of the Parties to the Convention), to evaluate the agency's decision and to issue a declaration of non-compliance (as occurred in the well-known *Green Salvation - Kazatomprom*² case).

Under the World Bank's «Operational Policies», borrowers must consult project-affected groups during environmental impact assessment processes (concerning the environmental aspects of the project in question) and take their views into account. If this does not occur, the affected person can request a quasi-judicial body, the Inspection Panel, to evaluate the situation and to issue recommen-

[1] See *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, <http://www.iilj.org/GAL/documents/GALCasebook2008.pdf>.

[2] United Nations Economic and Social Council (UNECE), Economic Commission for Europe, Report on the Seventh Meeting, *Addendum: Findings and Recommendations with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case of information requested from Kazatomprom (Communication ACCC/C/2004/01 by Green Salvation (Kazakhstan))*, adopted by the Aarhus Convention's Compliance Committee on 18 February 2005.

dations (as happened, for example, in the *Mumbai urban transport case*³).

In these cases, global rules provide procedural standards. These standards are binding on national administrative authorities. Private parties can activate a dispute settlement mechanism in case of non-compliance.

The law that provides for consultation is global. The implementing authority is national. The reviewing «court» is, again, global.

The rule of law, a set of institutional and procedural requirements developed within national governments (in Germany, referred to by means of the expression «*Rechtsstaat*», the State under the law), is thus transplanted into the global arena (bottom-up), and national observance of the rule of law is enhanced by global standards (top-down).

Many global legal orders provide an additional set of rules in order to better hold national governments accountable, on the basis of which private parties gain a further opportunity to defend their rights.

[3] World Bank Inspection Panel, *Report and Recommendation on Requests for Inspection, India: Mumbai Urban Transport Project (IBRD Loan No. 4665-IN, IDA Credit No. 3662-IN)*, September 3, 2004, INSP/R2004-0006. See also *World Bank Inspection Panel, Report and Recommendation on Request for Inspection, Papua New Guinea: Smallholder Agriculture Development Project (SADP) (IDA Credit No. 43740-PNG)*, March 10, 2010, Report No. 53280-PG.

II. DOES A SIMILAR TRANSPLANT OCCUR FOR THE SECOND LEG OF MODERN «LIMITED GOVERNMENT», I.E. DEMOCRACY?

Almost twenty years ago, Thomas Franck noticed that «the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance»⁴ as «the community of states is empowered to compose and apply codes governing the comportment of governments toward their own citizens»⁵. As a result of this development, «the legitimacy of each government someday will be measured definitively by international rules and processes»⁶. He added that «[t]he transformation of the democratic entitlement from moral prescription to international legal obligation has evolved gradually»⁷. The democratic entitlement — according to Franck — consists of three components, self-determination, freedom of expression and electoral rights.

But this point of view is not widely shared, with opinions on the issue being, rather, polarized around two opposite perspectives. According to the first of these, globalization, by striking at State sovereignty, poses a threat to popular rule within democracies⁸: «if the United States can be subject to the will of outside powers, it cannot be governed by the scheme ordained in the Constitution»⁹. The

[4] T.M. FRANCK, *The Emerging Right to Democratic Governance*, in «The American Journal of International Law», Vol. 86, No. 1 (Jan. 1992), 91.

[5] T.M. FRANCK, *ibid.*, 78.

[6] T.M. FRANCK, *ibid.*, 50.

[7] T.M. FRANCK, *ibid.*, 47.

[8] M. GOODHART, *Democracy as Human Rights: Freedom and Equality in the Age of Globalization*, New York, Routledge, 2005, 73-91.

[9] J.A. RABKIN, *Law Without the Nations? Why Constitutional Government Requires Sovereign State*, Princeton, Princeton University Press, 2005, 266.

second point of view, however, maintains that «multilateral institutions can empower diffuse minorities against special-interest factions, protect vulnerable individuals and minorities, and enhance the epistemic quality of democratic decision making in well-established democratic states»¹⁰.

I do not wish to discuss here the more general problem of the relations between globalization and democracy (whether globalization constitutes a loss for democracy, through its attenuation of direct electoral control on national governments), nor that of the diffusion of democratic regimes through the import-export of democratic institutions from one State to another, nor that of the right of the people to democracy as guaranteed by international declarations and treaties¹¹. I wish to address only the question of the global promotion of democracy. I shall, therefore, focus on the role of global institutions as sponsors of democratic processes and institutions vis-à-vis national communities.

[10] R.O. KEOHANE, S. MACEDO, A. MORAVCSIK, *Democracy-Enhancing Multilateralism*, in «International Organization», no. 63, Winter 2009, 26.

[11] Universal Declaration of Human Rights (1948), Article 21: «(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures». International Covenant on Civil and Political Rights (1966), Article 25: «Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country». On these international documents, see L.M. DIEZ PICAZO, *I problemi della democrazia nei livelli non statali di governo*, in M. CARTABIA and A. SIMONCINI (eds.), *La sostenibilità della democrazia nel XXI secolo*, Bologna, il Mulino, 2009, 159-164.

In responding to the question of whether global standards of democracy are democracy-threatening or democracy-enhancing, I shall refer to six examples.

First, I shall consider the Organization for Security and Cooperation in Europe (OSCE), the world's largest regional security organization, with 56 participating States. Within the OSCE, the Office for Democratic Institutions and Human Rights (ODIHR), based in Warsaw, Poland, is active throughout the OSCE area in the fields, *inter alia*, of democratic development, election observation, and non-discrimination.

Within the ODIHR, there are several different departments, one of which is the Democratization Department, which focuses on rule of law, equal participation in political and public life, promoting democratic governance, freedom of movement, and providing legislative support in these fields; another especially relevant unit is the Elections Department, engaged in election observation and in technical assistance projects, including the review of election-related legislation and the promotion of domestic observer groups throughout the OSCE region.

In its democratization activities, the ODIHR aims to develop the necessary institutional capacity for the consolidation of a democratic culture, and responds to requests for assistance with drafting legislation.

With regard to elections, the ODIHR deploys observation missions to OSCE participating States to assess the implementation of OSCE election-related commitments, and publishes different documents depending upon the type of observation mission engaged in (e.g. needs assessment reports, which detail the type of mission to be deployed; interim reports, which provide insights into the issues confronting the mission in question prior to election day; prelimi-

nary statements, which are released the day after the completion of a mission and present the ODIHR's preliminary conclusions as to the conduct of the election observed; and final reports, which are published subsequent to an in-depth analysis of the election observation and which also provide recommendations).

The Office also conducts technical assistance projects and legislative reviews¹². Some projects stem directly from recommendations made during observation missions, while others are the result of requests from participating States.

What can be learned from the activities of this organization? Firstly, national democracy matters on a global level too. Secondly, not only economic performance, but also political (democratic) performance can be subjected to independent evaluation¹³. And thirdly,

[12] In 2002, the ODIHR created a free-of-charge legislative online database, Legislationonline, (<http://www.legislationline.org/>) to assist «OSCE participating States in bringing their legislation into line with relevant international human-rights standards. [...] Its purpose is to provide assistance to those who prepare and draft laws at the working level. Through Legislationline, they can obtain examples and options from other countries' legislation that can help them make their own choices. The activities involved in maintaining the database not only benefit lawmakers but also permit ODIHR experts to observe patterns in legislative activity, identify best practices, and monitor the application of international standards. As a reference tool for a variety of users (primarily law drafters, legal professionals, government officials, parliamentary staff, and legal specialists in international organizations), it is the most comprehensive database on legislation related to issues such as human trafficking, elections, and citizenship.» (ODIHR web page, <http://www.osce.org/odihr/43644>).

[13] Annually, Freedom House, an independent watchdog organization that supports the expansion of freedom around the world (<http://www.freedomhouse.org>), issues *The Freedom in the World* survey that provides an evaluation of the progress and decline of freedom in 193 countries and 15 select related and disputed territories. The survey measures freedom according to two broad categories that are derived from the Universal Declaration of Human Rights: political rights (Electoral Process, Political Pluralism and Participation, Functioning of Government) and civil liberties (Freedom of Expression and Belief, Associational and Organizational Rights, Rule of Law, Personal Autonomy and Individual Rights). These political rights and civil liberties ratings are combined and averaged to determine an overall «freedom status» for each country and territory. Countries and ter-

the global legal space is capable of promoting and assisting democratic institution-building.

My second example is the European Union enlargement process. The «Enlargement Strategy» is based on the «principles of consolidation of commitments»: «[t]he EU's enlargement policy allows for a carefully managed process where candidates and potential candidates approach the EU in line with the pace of their political and economic reforms as well as their capacity to assume the obligations of membership in accordance with the Copenhagen criteria»¹⁴ providing «mechanisms and incentives, culminating in membership,

ritories with a combined average rating of 1.0 to 2.5 are considered «Free»; 3.0 to 5.0, «Partly Free»; and 5.5 to 7.0 «Not Free».

Similarly, the Polity IV Project data series comprises information coded on an annual basis on the qualities of institutionalized regime authorities for all independent countries (not including micro-states) from 1800 through 2010 (Center for Systemic Peace web site, <http://www.systemicpeace.org/polity/polity4.htm>). These ratings are then combined into a single, scaled measure of regime governance: the *Polity* score. The *Polity* scale ranges from -10, fully institutionalized autocracy, to +10, fully institutionalized democracy. (Global Report 2009, <http://www.systemicpeace.org/Global%20Report%202009.pdf>).

[14] Commission of the European Communities, *Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010*, COM(2009)-533, Brussels, 14.10.2009, 3. As for the Copenhagen criteria, see Copenhagen European Council, 21-22 June 1993, *Conclusions of the Presidency*, SN 180/93, 7.A.III: «The European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required. Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union».

that encourage enlargement countries to work together with the EU in realising common objectives».¹⁵

This strategy implies four important steps: the definition of benchmarks of democratic performance as conditions for accession; the securing of commitments from the candidates; the oversight of the implementation of these on the basis of annual reports; and the provision of pre-accession assistance.

As an example of the final two of these steps, I shall consider the case of Turkey. Turkey has been an EU associate since 1964, and applied to join in 1987. It was officially recognized as a candidate in 1999, and negotiations began in 2005. The Commission Staff Working Document entitled *Turkey 2009 Progress Report*¹⁶ «analyses the situation in Turkey in terms of the political criteria for membership; analyses the situation in Turkey on the basis of the economic criteria for membership; [and] reviews Turkey's capacity to assume the obligations of membership, that is, the *acquis* expressed in the Treaties, the secondary legislation, and the policies of the Union»¹⁷. The Report covers issues of democracy and rule of law (including those relating to parliament, government, public administration, civil-military relations, the judicial system, and anti-corruption measures), and all forms of human rights (civil, political, economic, social, etc.) and protection of minorities¹⁸.

[15] European Commission, *Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011*, COM(2010) 660, 3, Brussels, 9.11.2010.

[16] Commission of the European Communities, Commission Staff Working Document, *Turkey 2009 Progress Report, Accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010*, COM(2009) 533 Brussels, 14.10.2009.

[17] P. 4, *ibid.*

[18] The same subjects are examined by the EU Commission in the framework of the enlargement strategy for other countries such as Croatia, the former Yugoslav Repub-

The *Turkey 2010 Progress Report*¹⁹, *inter alia*, «examines progress made by Turkey towards meeting the Copenhagen political criteria, which require stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities»²⁰.

The *Commission Decision on a Multi-annual Indicative Planning Document (MIPD) 2009-2011 for Turkey*²¹, taken within the framework of the Instrument for Pre-Accession Assistance (IPA), provides that «[w]ithin the Institution Building component, the focus of assistance in the area of the political criteria will be on the institutions that are directly concerned by the reforms: the judiciary and the law enforcement services. A second priority will be support for the continued development of civil society organisations. Among the issues to be addressed, priority will be given to human rights and fundamental freedoms; gender issues and the fight against corruption»²².

Here, once again, the global legal polity puts pressure on national institutions to improve their democratic performance²³; this time,

lic of Macedonia, Albania, Montenegro, Kosovo, Bosnia and Herzegovina, Serbia, and Iceland.

[19] European Commission, Commission Staff Working Document, *Turkey 2010 Progress Report, Accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011*, COM(2010)660, Brussels, 9.11.2010.

[20] P. 6, *ibid.*

[21] Commission of the European Communities, *Commission Decision C(2009)5041 of 29 June 2009, on a Multi-annual Indicative Planning Document (MIPD) 2009-2011 for Turkey, Instrument for Pre-Accession Assistance (IPA) Multi-annual Indicative Planning Document (MIPD) 2009-2011, Turkey.*

[22] P. 4, *ibid.*

[23] On the impact of the European measures, see F. TÜRKMEN, *The European Union and Democratization in Turkey: The Role of the Elites*, in «Human Rights Quarterly», vol. 30, n. 1, February 2008, 147: «Since Turkey's candidacy to the European Union was officially con-

however, this occurs against a set of benchmarks, and through the monitoring of developments and provision of assistance. It is to be noted that, by involving itself in such issues, the European Union — like many other international organizations — exceeds its jurisdiction. Indeed, responsibility for anti-corruption policies, for example, has not been transferred to the Union.

The third example that I wish to refer to involves the United Nations Democracy Fund (UNDEF) and the European Instrument for Democracy and Human Rights (EIDHR).

With regard to the first, the General Assembly of the United Nations, on October 24th 2005, adopted a Resolution (or World Summit Outcome) where it stated the following: «[w]e reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing. We renew our commitment to support democracy by strengthening countries' capacity to implement the principles and practices of democracy and resolve to strengthen the capacity of the United Nations to assist

firmed by the Union on 11 December 1999 at the Helsinki Summit, the country has been undergoing a profound transformation in terms of democratization. Two series of constitutional amendments and eight reform packages, comprising more than 490 laws, were adopted or amended by the Turkish Parliament in the last six years. The issues addressed range from the abolition of the death penalty to the recognition of the right to be taught and broadcast in mother tongues other than Turkish, as well as the improvement of the legal situation of non-Muslim religious minorities and the expansion of civil and political rights in general».

Member States upon their request. We welcome the establishment of a Democracy Fund at the United Nations. We note that the advisory board to be established should reflect diverse geographical representation. We invite the Secretary-General to help to ensure that practical arrangements for the Democracy Fund take proper account of existing United Nations activity in this field. We invite interested Member States to give serious consideration to contributing to the Fund»²⁴.

UNDEF was established in July 2005, with an Executive Head, a Secretary-General Advisory Board and a Programme Consultative Group. Thus far, 40 Member States have contributed to the Fund, which provides financing to civil society organizations every year, toward the ultimate aim of promoting democracy²⁵.

[24] United Nations General Assembly, Resolution, A/RES/60/1, *2005 World Summit Outcome*, 24th October 2005, paras 135-137.

[25] The UNDEF was launched in 2005 as a United Nations General Trust Fund, with the aim of providing support for democratization efforts around the world. It finances projects oriented at strengthening the relations between civil society and governmental bodies, promoting the inclusion and participation of all segments of society in the democratic process and enhancing South-South cooperation. UNDEF preferentially funds projects implemented by civil society organizations selected through a highly competitive process that includes quality control and due diligence, but projects may also be implemented by government bodies, national constitutional bodies, regional entities, intergovernmental bodies and United Nations entities.

The projects, that must fall under one or more of the six main areas indicated by UNDEF (community development, rule of law and human rights, tools for democratization, women, youth, media), can be directed at strengthening democratic dialogue, civil society empowerment, civic education, freedom of information, support for constitutional processes, civil society and especially women's empowerment, civic education and voter registration, access to media, participation rights and the rule of law in support of civil society and transparency.

The large majority of UNDEF projects go to local NGOs in African, Asian and Latin American countries – both in the transition and consolidation phases of democratization. UNDEF also supports a small number of major global and regional projects with a normative and policy focus. Since its creation, UNDEF has supported a total of over 330 projects

As for the EIDHR²⁶, European Union Regulation No. 1889/2006 states the following: «[t]his Regulation establishes a European Instrument for Democracy and Human Rights under which the Community shall provide assistance, within the framework of the Community's policy on development cooperation, and economic, financial and technical cooperation with third countries, consistent with the European Union's foreign policy as a whole, contributing to the development and consolidation of democracy and the rule of law, and of respect for all human rights and fundamental

in more than 110 countries (United Nations Democracy Fund website, <http://www.un.org/democracyfund/>).

[26] The EIDHR was launched in 2006 with the aim of providing support for democracy and human rights in non-EU countries. The instrument can provide assistance where no established development cooperation exists and, in principle without the consent of third country governments. Its main goals are: «[e]nhancing respect for human rights and fundamental freedoms in countries and regions where they are most at risk; [s]trengthening the role of civil society in promoting human rights and democratic reform, in supporting the peaceful conciliation of group interests and in consolidating political participation and representation; [s]upporting actions in areas covered by EU Guidelines: dialogue on Human rights, human rights defenders, the death penalty, torture, children and armed conflicts and violence against women; [s]upporting and strengthening the international and regional framework for the protection of human rights, justice, the rule of law and the promotion of democracy; building confidence in and enhancing the reliability and transparency of democratic electoral processes, in particular through monitoring electoral processes».

The EIDHR can support groups or individuals within civil society which defend democracy as well as intergovernmental organisations that implement the international mechanisms for the protection of human rights. The assistance may be in the form of projects and programmes, grants to finance projects presented by civil society and/or international organizations; grants to human rights advocates, grants to support operating costs of the Office of the UN High Commissioner for Human Rights and the European Inter-University Centre for Human Rights and Democratisation (EIUC), human and material resources for EU election observation missions; and public contracts. The EIDHR can finance not only registered organisations, but also non-legal entities and it provides the possibility of “re-granting”: civil society organizations in charge of project implementation can award small grants to other local organizations, non-legal entities or individual human rights defenders. For the years 2007-2013, the EIDHR has a budget of € 1,104 billion (European Instrument for Democracy & Human Rights (EIDHR) website, http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm).

freedoms. Such assistance shall aim in particular at [...] promoting and consolidating democracy and democratic reform in third countries, mainly through support for civil society organisations; [...] strengthening civil society active in the field of human rights and democracy promotion; supporting and strengthening the international and regional framework for [...] the promotion of democracy and the rule of law, and reinforcing an active role for civil society within these frameworks; [...] building confidence in and enhancing the reliability of electoral processes, in particular through election observation missions, and through support for local civil society organisations involved in these processes»²⁷.

Since 2006, the European Instrument has funded civil society initiatives directed at supporting action on democracy and transparency of democratic electoral processes, in particular through election observation.

This example is different from those described earlier in two respects. In the first place, the addressees of the UN and EU initiatives are national governments only indirectly: both institutions provide incentives for civil societies, so that these may be the entities to put pressure on national governments. In the second place, both global institutions act through financial means, open to requests from interested parties.

My fourth example is Article 11 of the European Convention on Human Rights, which provides that «[e]veryone has the right to freedom of peaceful assembly and to freedom of association [...]. No restrictions shall be placed on the exercise of these rights other than

[27] Regulation (EC) No. 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, in «Official Journal of the European Union», L 386/1, 29.12.2006.

such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others [...]». The European Court of Human Rights can therefore decide whether, in one of the 47 countries that have ratified the Convention, the dissolution of a political party, or the temporary forfeiture of certain political rights, meets the tests prescribed by the Convention (i.e. that the act has a basis in domestic law; that it pursues one or more of the legitimate aims prescribed by Article 11 of the Convention; that it is necessary in a democratic society, to meet a pressing social need; and that it is proportionate to the aims pursued).

Such an evaluation was carried out, for instance, in the *Refah Partisi (The Welfare Party) and Others v. Turkey* case²⁸. The Refah Party, founded in 1983, became, after the 1995 general elections, the largest political party in Turkey. A 1998 Constitutional Court judgement had dissolved Refah on the ground that it had become a «centre of activities contrary to the principle of secularism». The national Constitutional Court had declared that «[d]emocracy is the antithesis of sharia». The Strasbourg Court, on the basis of a careful examination of the national court's decision in the light of the Convention, reached the conclusion that «there ha[d] been no violation of Article 11 of the Convention», as «Refah's dissolution may be regarded as 'necessary in a democratic society' within the meaning of Article 11»²⁹.

[28] ECHR *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

[29] The European Court of Human Rights was called to judge other cases of dissolution of political parties in Turkey (e.g. the *case of the United Communist Party of Turkey and Others v. Turkey*, 19392/92, 30 January 1998; the *Case of the Socialist Party and Others v. Turkey*, 21237/93, 25 May 1998; the *Case of Freedom and Democracy Party*, 23885/94, 8 December 1999. For a general overview see M. KOÇAK, E. ÖRÜCÜ, *Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights*, in «Euro-

This case presents a much higher level of interference, operated by global law, with national law in the field of democracy, in that the supranational court legitimized a repressive strategy adopted by national authorities for the ultimate purpose of defending democracy.

A fifth example is Article 3 of Protocol No. 1 of the European Convention on Human Rights, which provides the following: «[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will

pean Public Law», Volume 9, Issue 3, 2003). However, the *Refah Partisi (The Welfare Party) and Others v. Turkey* was the first case in which the Court endorsed a decision to ban a political party. On this case, see D. KUGELMANN, *Die streitbare Demokratie nach der EMRK / Politische Parteien und Gottesstaat: Das Urteil des EGMR zur Auflösung der Wohlfahrtspartei in der Türkei*, in «Europäische Grundrechte Zeitschrift», Vol. 30, October, 2003, Heft 17-20, 533; M. LEVINET, *Droit constitutionnel et Convention européenne des droits de l'homme. L'incompatibilité entre l'Etat théocratique et la Convention européenne des droits de l'homme/ À propos de l'arrêt rendu le 13 février 2003 par la Cour de Strasbourg dans l'affaire Refah Partisi et autres c/Turquie*, in «Revue française de droit constitutionnel», n. 57, 2004, 207; P. HARVEY, *Militant democracy and the European Convention on Human Rights*, in «European Law Review», vol. 29, no. 3, June, 2004, 407; Y. MERSEL, *The dissolution of political parties: the problem of internal democracy*, in «International Journal of Constitutional Law», vol. 4, no. 1, January 2006, 84; P. MACKLEM, *Militant democracy, legal pluralism, and the paradox of self-determination*, in «International Journal of Constitutional Law», vol. 4, no. 3, July 2006, 488; A. NIEUWENHUIS, *The Concept of Pluralism in the Case-Law of the European Court of Human Rights*, in «European Constitutional Law Review», no. 3, 2007, 367. On the «militant democracy», see also K. LOEWENSTEIN, *Militant Democracy and Fundamental Rights, I*, in «The American Political Science Review», no. 3, June 1937, 417 and more recently see M. THIEL (ed.), *The «Militant Democracy» Principle in Modern Democracies*, Farnham, Ashgate, 2009; S. ISSACHAROFF, *Fragile Democracies*, in «Harvard Law Review», April 2007, Vol. 120, Issue 6, 1405; A. SAJÓ (ed.), *Militant Democracy*, Utrecht, Eleven International Publishing, 2004.

See also the documents of the Venice Commission: *Lignes directrices sur l'interdiction et la dissolution des partis politiques et les mesures analogues, adoptées par la Commission de Venise lors de sa 41e réunion plénière (Venise, 10-11 décembre, 1999)*, CDL-INF(2000)001, <http://www.venice.coe.int/docs/2000/CDL-INF%282000%29001-f.asp> and the *Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009)*, CDL-AD (2009) 006, [http://www.venice.coe.int/docs/2009/CDL-AD\(2009\)006-e.asp](http://www.venice.coe.int/docs/2009/CDL-AD(2009)006-e.asp).

ensure the free expression of the opinion of the people in the choice of the legislature».

A violation of this article was alleged in the case of *Yumak and Sadak v. Turkey* of 8 July 2008³⁰ because, according to two Turkish nationals, «the imposition of an electoral threshold of 10% in parliamentary elections interfered with the free expression of the opinion of the people in the choice of the legislature».

The Grand Chamber of the Strasbourg Court maintained that «[d]emocracy constitutes a fundamental element of the ‘European public order’, and the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law», and reached the conclusion that «in general a 10% electoral threshold appears excessive. In that connection, [the Court] concurs with the organs of the Council of Europe, which have stressed the threshold’s exceptionally high level and recommended that it be lowered [...]. It compels political parties to make use of stratagems which do not contribute to the transparency of the electoral process. In the present case, however, the Court is not persuaded that, when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured to the applicants by Article 3 of Protocol No. 1. There has accordingly been no violation of that provision»³¹.

[30] ECHR, *Yumak and Sadak v. Turkey* [GC], no. 10226/03, 8 July 2008.

[31] On this case, see R. ZIMBRON, *The Unappreciated Margin: Turkish Electoral Politics before the European Court of Human Rights*, in «Harvard ILJ Online», vol. 49, November 13, 2007, 10; M. LEVINET, *Droit constitutionnel et Convention européenne des droits de l’homme: La confirmation de l’autonomie des États en matière de choix des systèmes électoraux. Brèves réflexions sur l’arrêt rendu par la Cour européenne des droits de l’homme dans l’affaire Yumak et Sadak c/Turquie (Gr. Ch., 8 juillet 2008)*, in «Revue française de Droit constitutionnel», n. 78,

The Court makes use of a supranational standard of legality to measure the degree of democracy exhibited by a national government, and this standard is derived not from a global definition of national democracy, but rather from an internationally recognized human right (along the same lines, the Council of Europe established, in 1990, the European Commission for Democracy through Law — better known as the Venice Commission — for the purpose of upholding the three principles of Europe’s constitutional heritage: democracy, human rights and the rule of law, in four key areas: constitutional assistance; elections and referendums, political parties; co-operation with constitutional courts and ombudspersons; and transnational studies, reports and seminars).

The last example that I wish to analyse here is provided by the history and processes of the Second Gulf War and of the Iraqi transition. On March 20th, 2003, a Multinational Force of 49 Nations³² invaded Iraq. Some countries supported the invasion in a non-military fashion; many others subsequently withdrew their troops. On April 21st, 2003, the Coalition created a Coalition Provisional Authority (CPA), a transitional government of Iraq, endowed with executive, legislative and judicial authority. In May 2003, the Coalition pronounced the «mission accomplished», signalling the end of major armed combat engagements. Saddam Hussein was captured in December 2003. On June 28th, 2004, the CPA transferred the «sovereignty of Iraq» to the «Iraqi Transitional Government», which began the trial of Saddam Hussein and the process of moving

Avril 2009, 423; J. LEVIVIER, *Droit à des élections libres*, in «Journal du Droit International», Juillet-Août-Septembre 2009, n. 3/2009, 1072; D. POPOVIC, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, in «Creighton Law Review», n. 42, 2009, 361, S. GOLUBOK, *Right to Free Elections: Emerging Guarantees or Two Layers of Protection?* in «Netherlands Quarterly of Human Rights», Vol. 27/3, 2009, 361.

[32] «Coalition of the Willing»: phrase first used in the late 1980s to refer to nations acting collectively, often in defiance of the UN.

towards the establishment of open elections. On January 31st, 2005, direct democratic elections were held, electing members to the Transitional National Assembly, which was tasked with drafting a Constitution — a document that was ratified on October 15th, 2005. On December 15th, 2005, the members of the Iraqi National Assembly were elected. Finally, on May 20th, 2006, the Government of Iraq took office, succeeding to the Iraqi Transitional Government.

These steps were taken in accordance with the procedural provisions of Chapter VII of the UN Charter, which require a Security Council decision to determine the existence of a threat to peace, of a breach of the peace or of an act of aggression (Article 39). A complex structure was created by the United Nations in order to establish democracy in Iraq: a Special Representative for Iraq of the Secretary-General³³; a United Nations Assistance Mission for Iraq UNAMI³⁴; a Development Fund for Iraq, and an International Advisory and Monitoring Board of that Fund³⁵; and a Multinational Force (MNF)³⁶.

[33] Security Council Resolutions 1483(2003), para. 8, 1546(2004), para. 7, 1770(2007), para. 2, 1830(2008), para. 2 and 1883(2009), para. 2.

[34] Security Council Resolutions 1500(2003), para. 2, 1546(2004), para. 7, 1770(2007), para. 2, 1830(2008), para. 2 and 1883(2009), para. 2.

[35] Security Council Resolution 1483(2003), paras. 12 and 17, 1546 (2004), para. 24, 1905(2009). Proceeds from export sales of petroleum products and natural gas are deposited into the Fund.

[36] Security Council Resolutions 1511(2003), para. 13 and 1546(2004), paras. 9-15. The mandate of UNAMI, of the Fund, of the Board and of the MNF have been extended with Resolutions 1619 and 1637 (2005), 1700 (2006), 1770 and 1790 (2007), 1830 and 1859(2008), 1883 (2009), 1905(2009) and 1936(2010). At the end of 2010, the Council adopted three resolutions to terminate: UN-supervised arrangements for the Development Fund for Iraq with effect from June 30, 2011, Resolution 1956(2010); «the weapons of mass destruction, missile, and civil nuclear-related measures» imposed upon Iraq since 1991, Resolution 1957(2010), and the residual activities of the Oil-for-Food Programme, Resolution 1958(2010).

The purpose of these efforts was to give to the United Nations a «leading role in assisting the efforts of the Iraqi people and Government in developing institutions for representative government and in promoting national dialogue and unity»³⁷. The importance of the United Nations' role «in advising, supporting and assisting the Iraqi people and Government to strengthen democratic institutions, advance inclusive political dialogue and national reconciliation, facilitate regional dialogue, aid vulnerable groups including refugees and internally displaced persons, strengthen gender equality, promote the protection of human rights, and promote judicial and legal reform» was reaffirmed in August 2010³⁸.

During the transition, it was held to be important to ensure welfare, security, stability, self-determination³⁹ and the presence of an internationally recognized, representative government to assume the responsibilities of the Authority⁴⁰.

According to the Security Council, the concept of democracy included the right of the Iraqi people to determine their own political future and control over their own natural resources⁴¹; to independence, sovereignty, unity and territorial integrity⁴²; to the rule of law⁴³; to democracy, including free and fair elections⁴⁴;

[37] Security Council Resolution 1619(2005), 1 (no. 3).

[38] Security Council Resolution 1936(2010), 1 (no. 7).

[39] Security Council Resolution 1483(2003), para. 4.

[40] Security Council Resolution 1511(2003), para. 1.

[41] Security Council Resolutions 1511(2003),1 (no. 2), 1546(2004), para. 3, and 1637(2005), p. 1 (no. 4).

[42] Security Council Resolution 1546(2004),1 (no. 3),Resolutions 1619(2005), 1, (no.2) and 1637(2005), 1 (no. 3).

[43] Security Council Resolution 1546(2004), 1 (no. 10).

[44] *Ibid.*

and to an internationally recognized, representative government of Iraq⁴⁵.

This last case raises the question of whether democracy can be imposed by military force. We might recall, in this regard, the achievements of occupation forces in Germany and Japan after World War II, and, more recently, in Bosnia and Herzegovina; however, the question of whether democracy can be imposed from outside, or can grow only by means of indigenous development⁴⁶, can also be raised in the present context.

III. WHAT DO THESE CASES HAVE IN COMMON, AND WHAT ARE THE DIFFERENCES BETWEEN THEM?

All the regulatory regimes examined operate at a supra-national level, and most of them at a regional level.

As for the subject of regulation, all cases refer to national democracies. But all consider democracy in conjunction with human rights (and some additionally with the rule of law).

The addressees of these interventions are national governmental institutions; in most cases on a direct basis, in others (namely those concerning UNDEF and EIDHR) through civil societies.

The power to originate proceedings rests on a request from either national governments (as occurs in the context of the EU enlargement process and of the ODIHR), or private parties (as in the

[45] Security Council Resolution 1483(2003), para. 22.

[46] See S. CASSESE, *The Globalization of Law*, in «NYU Journal of International Law and Politics», vol. 37, n. 4, 2005, Summer, 973-974.

UNDEF, EIDHR, and ECHR cases). Only in the case of the UN Security Council does the power to start proceedings rest with the authority that possesses jurisdiction.

Interventions consist in monitoring, issuing recommendations, and providing assistance; or, in the case of the ECHR, adjudicating, and, in those of UNDEF and EIDHR, in financing.

Benchmarks are undisclosed, with the exception of those relevant to the European Union enlargement process (where the benchmarks consist of the Copenhagen criteria) and to ECHR judgements (where the benchmark is the European Convention)⁴⁷.

Finally, only the assessments given by the EU Commission and the European Court of Human Rights are binding. The remaining interventions constitute guidelines or incentives, promote, or advise, but do not bind.

The examples raise a number of different sets of questions.

Firstly, can democracy be imported from above (or protected from the outside)⁴⁸? Should not democracy rely on self-creation and

[47] This lack of detailed indicators is significant: see K.E. DAVIS, B. KINGSBURY, S.E. MERRY, *Indicators as a Technology of Global Governance*, New York University School of Law, Global Administrative Law Series, IILJ Working Paper 2010/2, <http://www.iilj.org/publications/documents/2010-2.Davis-Kingsbury-Merry.pdf>.

[48] The focus of the present contribution is on the promotion of democracy by global institutions, not on the import-export of democratic institutions and processes between countries. On this last topic there is a large body of literature. See P. BURNELL, R. YOUNGS (eds.), *New Challenges to Democratization*, London, Routledge, 2010; M. McFAUL, *Advancing Democracy Abroad: Why We Should and How We Can*, Lanham, Rowman & Littlefield, 2010; A. MAGEN, T. RISSE, M.A. McFAUL (eds.), *Promoting Democracy and the Rule of Law: American and European Strategies*, Basingstoke, Palgrave, 2009; Z. BARANY, R.G. MOSER, *Is Democracy Exportable?*, Cambridge, Cambridge University Press, 2009; L. MORLINO, A. MAGEN, *International Actors, Democratization and the Rule of Law: Anchoring Democracy?*,

self-preservation, instead of depending on external pressures? How democratic is an imported democracy? And what is the proper role of the «demos» in a democracy? If global institutions are affected by a democratic deficit, as there is no direct election at the global level, are they entitled to impose or promote democracy in national settings?

This argument descends into a contradiction: if democracy can only be self-given, the only way to introduce or protect democracy in a non-democratic country⁴⁹ (given that the people cannot express themselves through elections) is through a non-democratic, but domestic process: for example, a popular upheaval. However, as history teaches, the introduction of democracy, or its protection⁵⁰ against authoritarian impulses, are not necessarily domestic processes: they can be the product of external pressures or conditions, provided that these allow, after a certain amount of time, for local

London, Routledge, 2009; P. GRILLI DI CORTONA, *Come gli Stati diventano democratici*, Bari-Roma, Laterza, 2009; L. DIAMOND, *The Spirit of Democracy: The Struggle to Build Free Societies through the World*, New York, Henry Holt and Company, 2008; P.F. NARDULLI, *International Perspectives on Contemporary Democracy*, Baltimore, University of Illinois Press, 2008; N.S. TEIXEIRA, *The International Politics of Democratization: Comparative Perspectives*, London, Routledge, 2008. On the emergent international backlash against democracy promotion, T. CAROTHERS, *The continuing backlash against democracy promotion*, in P. BURNELL, R. YOUNGS (eds.), *New challenges to democratization*, cit., 59-73; L. DIAMOND, *The Spirit of Democracy*, above, ch. 3, «The Democratic Recession», 56-87; L. MORLINO and A. MAGEN (eds.), *International actors, Democratization and the Rule of law: Anchoring democracy?*, above; *Crying for freedom*, in «The Economist International», January, 16th 2010, 54.

[49] Assuming that «the people» do not agree to being governed by non-democratic rules. The existence of such support is often difficult to ascertain. But one can assume that, in this case, non-democratic rulers do enjoy some popular support. Therefore, there is some kind of (very limited degree of) democracy.

[50] On the conceptual distinction between democracy promotion and protection, see P.C. SCHMITTER, I. BROUWER, *Conceptualizing, Researching and Evaluating Democracy Promotion and Protection*, EUI Working Paper, SPS No. 99/9, http://cadmus.eui.eu/dspace/bitstream/1814/309/1/sps99_9.pdf.

elections to be held. Therefore, external pressures or conditions can play the same role as a constituent process.

Moreover, democracy does not consist only of periodically held elections, but also of controlling special interest predomination, making institutions more inclusive by protecting individual and minority rights, and of fostering collective deliberation. And global institutions are well equipped for doing so⁵¹.

Finally, democratic regimes, even those which are well-developed, are full of flaws. For example, the British democracy does not allow people in prison to vote⁵². Therefore, external checks can be useful in improving democratic institutions and practices.

Secondly, as there is not only one type or kind of democracy⁵³, the following question arises: *which* democracy should be imported or protected from the outside? For example, should the emphasis be placed on free elections, or, rather, on a multi-party system? What about freedom of information, public access to official documents, equality, and the separation of powers? Should the global

[51] This point is made incisively by R.O. KEOHANE, S. MACEDO and A. MORAVCSIK, *Democracy-Enhancing Multilateralism*, cited above at note 10.

[52] ECHR, *Hirst v. The United Kingdom* [IV Sect.] no. 2 - 74025/01 [2004] 30 March 2004.

[53] See UN, *Guidance Note of the Secretary General on Democracy*, March 2010, 2: «The UN has long advocated a concept of democracy that is holistic: encompassing the procedural and the substantive; formal institutions and informal processes; majorities and minorities; men and women; governments and civil society; the political and the economic; at the national and the local levels. It has been recognized as well that, while these norms and standards are both universal and essential to democracy, there is no one model: General Assembly Resolution 62/7 posits that ‘while democracies share common features, there is no single model of democracy’ and that ‘democracy does not belong to any country or region’. Indeed, the ideal of democracy is rooted in philosophies and traditions from many parts of the world. The Organization has never sought to export or promote any particular national or regional model of democracy».

legal space also lend its support to forms of «militant democracy» («*streitbare Demokratie*»)⁵⁴? Which attitude should the global system adopt vis-à-vis anti-system actors (such as insurrectionist parties) and secessionism (such as separatist parties)? Should the members of the judiciary be appointed through a democratic process, or selected according to merit?

This is a much more difficult question. Even if it is assumed that democracy can be transplanted from above, one must recognise that the choice from such a vast range of different alternative interpretations of the concept of democracy results from a non-democratic process, if left in the hands of global institutions. However, experience shows that democratic institutions imported from the outside are indeed capable of adjusting to the domestic context.

One good example of such an adjustment is that of local government in Germany. The *Länder* structure, while not entirely new, was introduced under pressure from allied military forces, following the American federalist example. After a few years, however, they evolved into an entirely novel institution; in their new context, they became different bodies from the originals upon which they were modelled.

Thirdly, at which stage should the global legal space defend democracy? At its very inception, seeking only to introduce democratic institutions? Or at a later stage too, in order to protect and safeguard democracy against extremism or other kinds of attack?

[54] «A democracy capable of defending itself against anti-democratic actors who use the democratic process in order to subvert it»: P. HARVEY, *Militant democracy and the European Convention on Human Rights*, cited above at note 29, 408.

The democratic process is not necessarily a machine that runs by itself. In every democracy there are developments and setbacks. Therefore, corrections are necessary.

The example of the European Court of Human Rights is instructive, as its interference with national democracies, including mature ones, puts pressure on national governments to democratize: the domestic legal order is subject to a penalty in case of non-compliance. The Strasbourg Court introduces a «dialogue» between a global court and national governments.

This result raises a different question. A favourable international environment is important for the survival of democracy⁵⁵. But can external pressures or conditions, even if they come from above (global bodies, or a group of foreign governments), genuinely be effective?

Lastly, which is the authority endowed with the power to decide when conflicting values arise, and, in particular, in extreme cases? Is it more democratic to prohibit or exclude insurrectionary and secessionist parties from the electoral arena, or to leave them to act freely? Must the domestic legal order adjust to the global standards? And where does the legitimacy of global standards come from, given that the global legal space is not democratic itself (i.e. that there is no cosmopolitan «demos»; no global public opinion, debate or deliberation; no global political party; no global elections; and no World Parliament⁵⁶)?

[55] G. CAPOCCIA, *Defending Democracy: reactions to extremism in interwar Europe*, Baltimore and London, Johns Hopkins University Press, 2005, 224.

[56] The government of international organizations is an undemocratic «bureaucratic bargaining system» (R. DAHL, *Can international organizations be democratic? A skeptic's view*, in I. SHAPIRO and C. HACKER-CORDÓN (eds.), *Democracy's Edges*, Cambridge, Cambridge University Press, 1999, 33). For a different point of view, see A. BUCHANAN and R.O. KEO-

However, a real conflict between the legitimacy of global decisions and that of domestic authorities occurs only in extreme cases. With a few exceptions, global institutions establish standards not in order to impose, but rather to promote and induce democracy in domestic governments. They want — as a rule — national governments to respect democratic principles; they do not, however, seek to force such principles onto domestic institutions.

The final observation brings me back to my point of departure. Democracy is strongly correlated with the rule of law⁵⁷ and with economic development⁵⁸. In terms of the former, «[t]he relation-

HANE, *The Legitimacy of Global Governance Institutions*, in «Ethics and International Affairs», vol. 20, 2006, 405.

[57] See L. MORLINO, A. MAGEN, *International Actors, Democratization and the Rule of Law, Anchoring Democracy?*, cited above at note 49; T. CAROTHERS (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Washington, Carnegie Endowment for International Peace, 2006; J.M. MARAVALL, A. PRZEWORSKI (eds.), *Democracy and the Rule of Law*, Cambridge, Cambridge University Press, 2003.

[58] See S.M. LIPSET, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, in «The American Political Science Review», Vol. 53, No. 1, (Mar., 1959) 69; L. DIAMOND, *Economic Development and Democracy Reconsidered*, in G. MARKS and L. DIAMOND (eds.), *Reexamining Democracy: Essays in Honor of Seymour Martin Lipset*, London, Sage, 1992, 93-139; A. PRZEWORSKI, M.E. ALVAREZ, J.A. CHEIBUB, F. LIMONGI, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990*, Cambridge, Cambridge University Press, 2000; A. SEN, *Development as Freedom*, New York, Anchor Books, 2000. Sen introduced a new perspective in the understanding of the causal relationship between economic development and democracy. In his view «[a] country does not have to be deemed fit for democracy; rather, it has to become fit through democracy» (A. SEN, *Democracy as a Universal Value*, in «Journal of Democracy» 10.3, 1999, 4).

Democracy is also seen as instrumental to other goals of the international community, such as peace and security, as noted by the European Council, by the European Parliament and by the United Nations Secretary-General: «The best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order» (European Council, *A Secure Europe in a Better World - European Security Strategy 2003*, Brussels, 12 December 2003, 10). «[D]emocratisation and good governance are not only ends in themselves, but are also vital for poverty reduction, sustainable development, peace

ship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law»⁵⁹. In terms of the latter, «[...] for democracy to *endure*, historical experience suggests that the chances for democratic survival are directly linked to per capita GNP»⁶⁰.

This correlation has led many global institutions, such as the World Bank and the European Union, first, to develop indicators to evaluate and monitor respect for democracy and compliance with the rule of law; and then, to provide assistance and aid in order to promote both. Institutions engaged in promoting economic development have also become engaged in promoting a better institutional setting for policymaking, through encouraging efficient administration, enhanced transparency and accountability, disclosure laws, more secure property rights, protection of shareholders, and anti-corruption regulations.

and stability; [...] as demonstrated by the EU's internal integration process, democracy helps to deliver not only political and civil rights, but also economic, cultural and social rights, including solidarity» (European Parliament, Resolution on *Democracy building in external relations*, P7_TA(2009)0056, 22 October 2009 in "Official Journal of the European Union", C 265, E/3, 30.09.2010). «Democracy, based on the rule of law, is ultimately a means to achieve international peace and security, economic and social progress and development, and respect for human rights — the three pillars of the United Nations mission as set forth in the Charter of the UN» (K.M. BAN, *Guidance Note of the Secretary-General on Democracy*, 11 September 2009, 2).

[59] T. CAROTHERS, *The Rule-of-Law Revival*, in T. CAROTHERS (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, cited above at note 58, 4-5.

[60] E. BELLIN, *The Iraqi Intervention and Democracy in Comparative Historical Perspective*, in «Political Science Quarterly», vol. 119, no. 4, Winter, 2004-2005, 597.

IV. THE SUBJECT OF THIS CONTRIBUTION WAS NOT THE WIDELY DISCUSSED PROBLEM OF THE «DEMOCRATIZATION OF THE INTERNATIONAL REALM»⁶¹. «GLOBAL DEMOCRACY» — UNLIKE GLOBAL WARMING OR GLOBAL TERRORISM — SIMPLY DOES NOT EXIST.

This does not, however, mean that questions of democracy are irrelevant to global governance; quite the contrary. Firstly, democracy in the national setting suffers from many inherent weaknesses, and may gain in effectiveness if supported from outside (as illustrated by the example of Turkey before the Strasbourg Court). Secondly, many important actors within the global arena have an interest in increasing the spreading of democratic institutions (not least because it is often awkward for the heads of democratic States and governments to deal with partners who do not represent the will of their people).

Therefore, despite finding its proper location in the State, democracy is not only a domestic matter. Global institutions too care about national democracy, and there is widespread interest in the global arena in the goals of achieving, diffusing and maintaining democracy worldwide. The purpose of the present contribution is to seek to illustrate how, when and why global institutions take responsibility for introducing or defending democracy within national institutions.

As illustrated by the preceding analysis, global institutions make use of a wide array of instruments, using benchmarks and other means of evaluating democratic performance, in order to fulfil the

[61] See A. VON BOGDANDY, *Globalization and Europe: how to square democracy, globalization, and international law*, in «The European Journal of International Law», vol. 15, no. 5, 2004, 900. This contribution is important because it lays down the «conceptual foundations» (p. 896) of the relations between globalization and democracy.

varied goals of promoting, assisting, monitoring, judging or, rarely, imposing democracy. Moreover, they take action both in terms of introducing democracy into States in which it is not present, and of strengthening democracy in States in which it is under threat. Lastly, different global institutions can and do act to further different conceptions of democratic governance.

Each of these conclusions raises many problems of its own. The various means of introducing democracy can be classified under one of two major categories: soft and hard interventions. While those in the first category act as incentives, the second seek to impose democracy from above, and their results should be at least ratified or confirmed by subsequent popular elections.

A second major problem stems from the interventions of global institutions in democratic societies, performed with the aim of adjusting or improving domestic democracy. The legitimacy of any such interventions can be considered doubtful, as particular non-democratic practices can themselves be the product of a democratic regime (consider, for example, the lack of transparency rules in many democratic legal systems). But democracy does not mean only democratic investiture through elections: it also implies a wealth of other institutions (among others, free speech, transparency, and local government), the absence of which can, indeed, endanger elections themselves.

A third major problem concerns global judicial oversight over the basic institutional arrangements of national politics. When the global body in question is not «political» (such as the United Nations), but, rather, judicial in nature (such as the Strasbourg Court), there is a risk that «courts [...] enter the political domain»⁶². In the national

[62] S. ISSACHAROFF, *Democracy and collective decision making*, in «International Journal of Constitutional Law», Vol. 6, No. 2, April, 2008, 266.

arena, «it is becoming commonplace for courts to confront questions that were long deemed beyond the realm of possible judicial competence. [...] [C]ourts now routinely engage the complicated world of political power in ways unimaginable a few generations back»⁶³. The question remains, however: are courts beyond the State entitled to exercise similar control?

A fourth major problem concerns the definition of democracy: beyond self-determination and representative government, should it also be conceived of as including pluralism, self-government, and the separation of powers? Should only a common core of democratic institutions and rules be imposed from the outside, or should the global bodies in question seek, rather, to ensure that each country imports the entire panoply of democratic arrangements? The answers to these questions cannot be furnished by abstract reflection alone, but require, instead, decisions to be made in consideration of the particular context of each individual case.

[63] *Ibid.*

CHAPTER III

A GLOBAL DUE PROCESS OF LAW?

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I. THE IMMATURITY OF INTERNATIONAL LAW?

ADMINISTRATION is becoming increasingly international. Regulatory regimes are being shifted from domestic authorities to global agencies. International organizations now enjoy regulatory, adjudicatory and dispute resolution powers. Their number is increasing (there were 123 international governmental organizations in 1951; 154 in 1960; 242 in 1971; 1039 in 1981; there are approximately 2000 now¹). Their staff is growing (from 65,000 in the year 1970 to 100 – 120,000 in 1981 to 250.000 now²). Their influence is on the rise.

If a global administration is now well-established, is it also now subject to those special rules – the right to a hearing, the duty to give reasons, judicial review - that we call administrative law? Or, at this early stage, is the global administration still ruled by secrecy, informality and arbitrariness?

Hans Kelsen, writing in 1934, argued that “international law is a ‘primitive’ system, in that it lacks organs for creating and applying legal norms, and so has to rely on the members of the international

[1] S. Cassese, *Relations between International Organizations and National Administrations*, in International Institute of Administrative Sciences, XIXth International Congress of Administrative Sciences, *Proceeding*, Deventer, Kluwer, 1985, p. 165; Union of International Associations, *Yearbook of International Organizations*, Muenchen, Saur, 2005.

[2] S. Cassese, *Relations* cit., p.165; data for 2006 are author’s estimate.

legal community to create norms and on individual states to enforce them”³.

Kelsen’s diagnosis has been echoed by three recent authors. The first has remarked upon the “continuing immaturity of international law in the failure of international organizations to provide the controls of the rule of law which are the mark of a mature legal order”⁴. The second has observed that an international organization “[...] operates [...] in something of a legal vacuum, within what is

[3] H. Kelsen, *Introduction to the Problems of Legal Theory*, Oxford, Clarendon, 1992, chapter IX (translation of the *Reine Rechtslehre*, 1934), as summarised by D. Dyzenhaus, *Emerging from self-incurred immaturity*, paper presented at the NYU Law School, Globalization and its Discontents Colloquium, Spring 2004 (<http://www.iilj.org>). Kelsen wrote: “*International law is still a primitive legal system, however, just at the beginning of a development that the state legal system has already completed. It is still marked by wide-ranging decentralization – at least in the field of general international law, and thus as it affects the entire international legal community. There are still no organs, whose respective functions reflect a division of labour, for creating and applying legal norms. The formation of general norms proceeds by way of custom or treaty, which is to say, by way of the members of the legal community themselves, and not by way of a special legislative organ. And the application of general norms to the concrete case proceeds in the same way. The state that considers its interests violated is to decide for itself whether there exists the material fact or an other state denies the claimed unlawful act, then, for want of an objective authority to settle the dispute in a legally regulated authorized to respond to the violator with a coercive act of general international law, that is, with reprisal or war. This self-help technique, which also served as the point of departure for the development of the state legal system, emphasizes the principles of collective and absolute liability over the principles of individual liability and liability for fault. The consequence of an unlawful act is not directed against the human being who, functioning as an organ of the individual state, intentionally or negligently brought about the material fact of the unlawful act. Rather, the consequence is directed against others, who took no part in the unlawful act and were unable to prevent it. Reprisals and war do not strike the state organs whose acts or forbearances, imputed to the state, count as violations of international law; reprisals and war strike either the mass of human beings making up “the people”, or they strike a particular state organ, the army – in so far as it is possible, in modern warfare, to separate the army from the people at all.*”, in H. Kelsen, *Introduction to the problems of legal theory*, A Translation of the First Edition of the *Reine Rechtslehre* or Pure Theory of Law, Clarendon Press, Oxford, 1992, p. 108 ff. See also H. Kelsen, *The Essence of International Law*, in K. W. Deutsch and S. Hoffmann (eds.), *The Relevance of International Law*, Cambridge, Mass., Schenkman, 1968, p. 87 (“International Law as a Primitive Legal Order”)

[4] D. Dyzenhaus, cit. p. 2.

literally a lawless environment”⁵. The third has noted that globalization is the most dramatic assertion of the superiority of technocratic government, in contrast with the American, “enormous new apparatus of administrative law designed to maximize both the participation of interest groups in the bureaucratic policy-making process and the obligation of bureaucracies to make public every bit of their fact gathering, analysis, and public choice processes and to prove publicly their every claim of expertise”. “Transnational or global governance [...] raises [...] serious problems for administrative law. Under this form of governance, decision-making processes are relatively new and tend to be elitist and opaque, with few participants and no agreed upon protocol. [...] Lack of defined participatory mechanisms lead to street demonstrations that demand additional places at the table, but there are as yet few seating plans or even table manners”⁶.

An opposite point of view is that the regulatory dimension of international law has produced the emergence of global governance and that, among the hallmarks of the global governance, there is “international proceduralization and international insistence on domestic proceduralization”⁷.

[5] R. A. Gorman, *The Development of International Employment Law: my Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank*, in *Comp. Labor Law and Pol’y Journal*, 25, 2004, p. 633, 638.

[6] The two quotations are from two articles by M. Shapiro, *The Globalization of Law*, in *Global Legal Studies Journal*, I, 1993, p. 45-47 and *Administrative Law Unbounded*, in 8 *Indiana Journal of Global Legal Studies* 369, 2001, p. 374-375. See also D. Dyzenhaus, *The Rule of (Administrative) Law in International Law*, in *Law and Contemporary Problems*, vol. 68, Summer-Autumn 2005, n. 3-4, p.127 ff.

[7] J. H. H. Weiler and I. Motoc, *Taking Democracy Seriously: The Normative Challenges to the International Legal System*, in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns-New Challenges for the International Legal Order*, Wien, Springer, 2003, p. 68-69.

In this paper I shall not examine the entire problem of the development of the rule of law at the global level⁸. Instead, I shall focus only on one aspect of this problem: are mechanisms of procedural participation, that are taken for granted in domestic administrations, lacking in the global legal order? Are “notice and comment” rights in rule-making procedures and the “right to a hearing” in adjudicatory proceedings granted in the global arena?

The reason for this choice is that “[...] fair decision-making procedures have been very successful in gaining deference to decisions and to rules, authorities and institutions more generally”⁹. A fair procedure plays an important role in building social consensus. Process control or voice encourage people’s cooperation with authorities and lead to legitimacy. Recognizing participatory rights in the global legal order may, therefore, increase international organizations’ legitimacy.

This analysis will be divided into two parts. In Part I, I shall present a taxonomy of participatory rights and procedural rules. In Part II, I shall measure the maturity of participation rights in

[8] See E. Denninger, *Lo Stato di diritto o “rule of law”: che cosa è oggi?*, in A. Jellamo and F. Riccobono, *In ricordo di Vittorio Frosini*, Milano, Giuffrè, 2004, p. 74, where he raises the question of whether the rule of law ends with the end of the sovereignty of the nation State.

[9] T. R. Tyler, *Social Justice: Outcome and Procedure*, in *International Journal of Psychology*, 2000, 35, (2), p. 124. See also K. Murphy, *Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance*, in *Journal of Law and Society*, vol. 32, n. 4, December 2005, p. 562 ff. and N. Luhmann, *Legitimation durch Verfahren*, Frankfurt, Suhrkamp, 1983, II ed. (Italian translation *Procedimenti giuridici e legittimazione sociale*, Milano, Giuffrè, 1995): according to Luhmann, procedure is a means for neutralizing disappointment. An opposite point of view is that of L. H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, in *Yale Law Journal*, 1980, 89, p. 1063: “[...] the constitutional theme of perfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete”.

the global administrative arena and compare global to domestic proceduralism.

II. THE MAZE OF GLOBAL PARTICIPATORY RIGHTS

“In domestic settings, the right of affected individuals to have their views and relevant information considered before a decision is taken is one of the classical elements of administrative law. Versions of such a principle are increasingly applied in global administrative governance [...]”¹⁰

In domestic legal orders, participatory rights have a simple structure. For example, if an authority has to take decisions that affect large populations, the law may require that the interested parties be consulted and due consideration be given to their opinions. Or, if an authority has to apply sanctions to private individuals, the law may provide that the affected party be heard and due consideration be given to the hearing in deciding (and possibly that reasons be given with the decision).

In the global legal order, things are more complex. In the global regulatory process, participation can be granted to national authorities or to private individuals. Domestic authorities may make comments in global procedures or in the domestic procedures of another State. Private individuals may be heard both by their domestic authorities and by foreign national authorities. The right to a hearing may be granted both vertically (for example to a national gov-

[10] B. Kingsbury, N. Krisch, R. Stewart, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1 New York University School of Law, p. 24 (<http://www.iilj.org>, now in *Law and contemporary Problems*, 68, 2005, n. 3-4, p. 15 ff.)

ernment in conflict with an international organization) and horizontally (for example, to a domestic authority in conflict with a domestic authority of another State). National governments appear before and within international organizations both as a unit and as a disaggregated set of bodies. Relations are usually triadic (between the private party, the national government, the global institution), rather than dyadic. We are thus witnessing the growing complexity of participation in the global arena.

I will now examine the five main categories of participatory rights. In the first global rules impose participation on domestic administrations, for the benefit of private actors. These rules reinforce the participation otherwise provided by domestic rules, but also broaden its range, extending the right to be heard to foreign actors as well.

Second, global rules impose participatory rights upon global institutions, for the benefit of domestic administrations. In these cases, global organizations subject themselves to the rule of law. This works to the benefit national administrations, which come to play a more active role than their usual one, as a passive recipient of private parties' comments.

Third, global rules impose participatory rights upon domestic administrations, for the benefit of other domestic administrations. This obligation affects actors that formally stand on an equal footing.

Fourth, global rules grant participatory rights to global organizations vis-à-vis other global organizations.

Fifth, global rules grant participatory rights directly to private actors vis-à-vis global institutions.

1. PARTICIPATION GRANTED TO PRIVATE PARTIES VIS-À-VIS DOMESTIC AUTHORITIES.

First, global rules may provide for the participation of private parties in national decision-making.

For example, the Rio Declaration on environment and development (3 – 4 June 1992) has established, as Principle 10, that “[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities [...] and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available”.

Subsequently, the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters¹¹ establishes the principle of “public participation” (Article 1.1). Furthering this principle, Article 6 provides that “*the public concerned shall be informed*” of an environmental decision-making procedure. The procedure must provide “*opportunities for the public to participate*”, a public hearing with comments or questions, sufficient time for informing the public, early public participation, when all options are open and effective public participation can take place. In the decision due account is taken of the outcome of the public participation. The public authority has to “*make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based*”.

Article 7 recognizes the right for the public to participate during the preparation of plans and programmes and of policies relating to the environment, while Article 8 establishes the right to “*effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding*

[11] G. Handl, *International “Lawmaking” by Conferences of the Parties and Other Politically Mandated Bodies*, in R. Wolfrum-V. Röben (eds.), *Developments of International Law in Treaty Making*, Springer, Berlin, 2005, p. 135 ff. See, in general, K. Raustiala, *The “Participatory Revolution” in International Environmental Law*, in *Harvard Environmental Law Review*, vol. 21, 1997, p. 537 ff.

rules that may have a significant effect on the environment". To this end, "draft rules should be published or otherwise made publicly available and the public should be given the opportunity to comment, directly or through representative consultative bodies. The result of the public participation shall be taken into account as far as possible".

A second example is the Code of Conduct for Responsible Fisheries, a voluntary agreement that serves as an "instrument of reference to help States to establish or improve legal and institutional framework required for the exercise of responsible fisheries" (Article 2). Article 6.13 provides that States, "in accordance with appropriate procedures, should facilitate consultation and the effective participation of industry, fishworkers, environmental and other interested organizations in decision making with respect to the development of laws and policies related to fisheries management, development, international lending and aid". According to Article 6.6, States "should ensure that fishers and fishfarmers are involved in the policy formulation and implementation process". Article 7.1.2 provides that "within areas under national jurisdiction, States should seek to identify relevant domestic parties having a legitimate interest in the use and management of fisheries resources and establish arrangements for consulting them to gain their collaboration in achieving responsible fisheries". According to Article 7.1.6, "[r]epresentatives from relevant organizations, both governmental and non-governmental, concerned with fisheries should be afforded the opportunity to take part in meetings of subregional and regional fisheries management organizations and arrangements [...]. Such representatives should be given timely access to the records and reports of such meetings, subject to the procedural rules on access to them". Finally, Article 11.3.2 provides that "States, in accordance with their national laws, should facilitate appropriate consultation with and participation of industry as well as environmental and consumer groups in the development and implementation of laws and regulations related to trade in fish and fishery products"¹².

[12] The Code has been followed by the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), another voluntary instrument. This provides that States encourage "full participation of stakeholders in combating IUU fishing, including industry, fishing communities, and non-governmental organizations" (Article 9.1; see also Articles 25 and 83).

A third example is the Cartagena protocol on biosafety to the 2000 Montreal Convention on biological diversity¹³. Article 23, on public awareness and participation, provides that “[t]he Parties shall: (a) Promote and facilitate public awareness, education and participation [...] and “in accordance with their respective laws and regulations, consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public”.

A fourth example is that of World Trade Organization (WTO) Guidelines for arrangements on relations with non-governmental organizations (decision adopted by the General Council on 18 July 1996)¹⁴. This points to “the special character of the WTO”. As it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings, “[c]loser consultation and cooperation with NGOs can [...] be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making”.

A fifth example is the 1994 Agreement on implementation of article VI of the General Agreement on Tariffs and Trade (GATT). Article 6.1 provides that “[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question”. Article 6.1.1 provides that “evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation”. Article 6.1.3 states: “[a]s soon as an investigation has been initiated, the authorities shall provide the full text of the written application received [...] to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved”. Article 6.2 continues by saying: “[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests”¹⁵.

[13] M. Böckenförde, *Grüne Gentechnik und Welthandel*, Springer, Berlin, 2004.

[14] E. Benvenisti, *Public Choice and Global Administrative Law: Who's Afraid of Executive Discretion?*, Draft February 11, 2004, Paper presented at the NYU Law School Globalization and its Discontents Colloquium, Spring 2004 (<http://www.iilj.org>).

[15] It continues, specifying that “to this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that

A sixth example is provided by the World Bank Guidelines for joint staff assessment of a poverty reduction strategy, which require that the program called Heavily Indebted Poor Countries Initiative (HIPC), started in 1996, be based on participation. Civil society groups, women's groups, ethnic minorities, policy research institutes and academics, private sector trade unions, representatives of different regions of the country must be involved in the design of the strategy at the national level, in order to obtain concessional lending and debt relief¹⁶.

Finally, the North American Agreement for Labor Cooperation (NAALC), which entered into force in 1994, established the Commission for Labor Cooperation. The Agreement provides (Article 5, para. 1) that “[e]ach Party shall ensure that its administrative [...] proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each party shall

opposing views may be presented and rebuttal arguments offered [...]. Interested parties shall also have the right, on justification, to present other information orally”. Article 6.3 states that “[o]ral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2” and Article 6.4 specifies that “[t]he authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases [...]”. The following provisions regulate control of the accuracy of the information supplied by the interested parties and investigations carried out in order to verify the information provided or to obtain further details. Finally, according to Article 6.9, “[t]he authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests”.

Article 6.11 of the Agreement states that “[f]or the purposes of this Agreement, “interested parties” shall include: (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; (ii) the government of the exporting Member; and (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member. This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties”.

[16] See B. Dalle, *The Global Aspirations of the Aarhus Convention and the Case of the World Bank*, paper presented to the Second Global Administrative Law seminaer, Viterbo, 9-10 June 2006.

*provide that: 1. such proceedings comply with due process of law; 2. any hearings in such proceedings are open to the public [...]; 3. the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and 4. such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays*¹⁷. This rule continues by requiring that national governments provide reasoned decisions (based on information or evidence in respect of which the parties were offered the opportunity to be heard) and judicial review by independent and impartial tribunals.

Though global norms do not determine the structure of the procedure, they might establish a global supervisory board to check national authorities' compliance with the global rules and to interpret their scope and application on a case by case basis. Even where the applicable global norms address only substantive areas and not procedure, supervisory bodies have created procedural rights to ensure the vindication of substantive rights. In these cases, global rules guarantee participation in national decision-making processes, under the control of global regulators. This is a variant of the first type, as global rules require States to guarantee participation, but also require international institutions to supervise and control the participation granted at the national level.

The WTO Agreement on Safeguards, Article 3, provides that “*a member may apply a safeguard measure only following an investigation by the competent authorities of that member pursuant to procedures previously established and made public in consonance with article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of*

[17] The Agreement has established “*a process whereby citizens, groups, or governments can raise questions of labor law enforcement in all three member countries. The Commission, through a network of National Administrative Offices in each country, coordinates the submission process, which can, in some cases, directly result in initiation of the government-to-government dispute settlement mechanism*” (U.S. General Accounting Office, *NAFTA – U.S. Experience With Environment, Labor, and Investment Dispute Settlement Cases*, GAO-01-933, July 2001, p. 4

other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law”.

Article 13 of the Agreement on Safeguards establishes a Committee on Safeguards for the oversight of the agreement’s implementation. This Committee has “*to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods*”. According to Article 12 of this Agreement, a Member must notify the Committee upon initiating an investigation, before taking a provisional safeguard measure and upon taking a decision, and provide the Committee with all pertinent information.

In this case, participation is granted by global rules to private parties before national authorities. Private parties may be nationals of the State in which participation takes place, or nationals of another State. Participation has the task of providing the parties with the possibility of defending their interests.

There are however cases in which the principle of fairness is not imposed on national governments by global rules, but is instead determined by a global court.

Article 73. 2 of the United Nations Convention on the Law of the Sea provides that “*arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security*”. The International Tribunal of the Law of the Sea, in the “Juno trader” case of December 18, 2004¹⁸, decided that “[*t*]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other

[18] http://www.itlos.org/case_documents/2004/document_en_249.pdf.

*financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision*¹⁹. In a separate opinion, Judge Treves wrote: [...] *the essential fact seems to me to be that between the time of arrest of the ship and the time of the application to the Tribunal [...] all domestic procedures held in the case [...] inaudita altera parte [...]*". In fact, "*confiscation [had been] obtained in violation of due process*" and "*finis [had been] imposed without procedural guarantees*".

Finally, global procedural norms have been extended to non-governmental bodies.

A first example is provided by the Programme for the Endorsement of Forest Certification (PEFC) Rules for Standard Setting. Article 3.5 regulates the participatory process for the standard setting process for forest certification in the following manner: "*3.5.1 [t]he process of development of certification criteria shall be initiated by national forest owners' organisations or national forestry sector organisations having the support of the major forest owners' organisations in that country. All relevant interested parties will be invited to participate in this process. Their views will be documented and considered in an open and transparent way. A Forum (e.g., committee, council, working group) shall be created to which interested parties are invited to participate in the process [...]*"²⁰. "*3.5.2 The start of the standard setting process shall be communicated to the public. Information on the development process shall be distributed and discussed and final draft standards shall be available to all interested parties, e.g. by posting it on the Internet. 3.5.3 The final draft standards are sent out for formal national consultation process. Consulta-*

[19] Paragraph 77.

[20] Article 3.5.1 continues by saying: "*[t]he invited parties should represent the different aspects of sustainable forest management and include, e.g. forest owners, forest industry, environmental and social non-governmental organisations, trade unions, retailers and other relevant organisations at national or sub-national level. Participation in the Forum shall be organised according to its respective consensus-building procedures which should provide for balanced representation of interest categories such as producers, buyers, consumers, etc. The interested parties' participation and views will be documented and considered in an open and transparent way. Formal approval of standards shall be based on evidence of consensus. The Forum shall define its own written procedures based on the consensus principle which governs the methods used for standards development. Copies of the procedures shall be made available to interested parties upon request. Such written procedures shall contain an appeal mechanism for the impartial handling of any substantive and procedural complaints*".

tion shall ensure that the views of interested parties are discussed. The Forum shall give general information on the changes made as the result of a consultation process. [...]"²¹.

A second example is that of the International Organization of Securities Commission's (IOSCO) Objectives and Principles of Securities Regulation²². Article 6.5, on *Clear and consistent regulatory processes* provides that "in exercising its powers and discharging its functions, the regulator should adopt processes which are: [...] transparent to the public; fair and equitable. In the formulation of policy, the regulator should: have a process for consultation with the public including those who may be affected by the policy; publicly disclose its policies in important operational areas; observe standards of procedural fairness; [...]. Many regulators have authority to publish reports on the outcome of investigations or inquiries, particularly where publication would provide useful guidance to market participants and their advisers. Any publication of a report must be consistent with the rights of an individual to a fair hearing [...]"

A third example is that of the World Anti-Doping Agency (WADA) Code (World Anti-Doping Code). This sets forth rules and principles that are to be followed by all anti-doping organizations, understood as all organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority (the International Olympic Committee, the International Para-olympic Committee, international federations, major event organizations, and national anti-doping organizations)²³.

[21] A similar rule is established by Article 4. 3, which sets standards for chain of custody certification. See E. Meidinger, *The Administrative Law of Private/Public Global Forestry Regulation*, Paper presented at the NYU Law School Conference on Global Administrative Law (2005), now in *European Journal of International Law*, 2006, vol. 17, n. 1, p. 47 ff., p. 82-83. See also C. Segall, *The Forestry Crisis as a Crisis of the Rule of Law*, in *Stanford Law Review*, vol. 58, March 2006, p. 1539 ff. and M. Howlett and J. Rayner, *Globalization and Governance Capacity: Explaining Divergence in National Forest Programs as Instances of "Next-Generation" Regulation in Canada and Europe*, in *Governance*, vol. 19, n. 2, April 2006, p. 251 ff.

[22] D. Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, IILJ Working Paper 2004/6, Global Administrative Law Series, NYU, pp. 14, 19-20 and 24-27 (<http://www.iilj.org>).

[23] Notice that, in this case, global procedural norms also include international bodies.

Article 8, on the “right to a fair hearing”, provides that “*each anti-doping organization with responsibility for results management shall provide a hearing process for any person who is asserted to have committed an anti-doping rule violation. Such hearing process shall address whether an anti-doping violation was committed and, if so, the appropriate consequences. The hearing process shall respect the following principles: a timely hearing; fair and impartial hearing body; the right to be represented by counsel at the person’s own expense; the right to be fairly and timely informed of the asserted anti-doping rule violation; the right to respond to the asserted anti-doping rule violation and resulting consequences; the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body’s discretion to accept testimony by telephone or written submission); the person’s right to an interpreter at the hearing, with the hearing body to determine the identity, and responsibility for the cost, of the interpreter; and a timely, written, reasoned decision*”. The violation leads to disqualification and the decision is subject to appeal (Articles 9 and 13)²⁴.

As mentioned above, these global rules are enacted by private global organizations, like the PEFC, or by semi-public global organizations, like the IOSCO and WADA (which bring together domestic public authorities). These rules are imposed from above upon the national authorities or organizations identified by the global rule; they operate vertically or diagonally, granting the right to be heard to nationals and to foreigners. The right to participate has the purpose of ensuring consultation or guaranteeing the right to a fair hearing²⁵.

[24] M. S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, in 106 *Dickinson Law Review*, 523, spec. p. 544 on the clash between US and civil law notion of due process and p. 557-558 on procedural rules; A. Van Vaerenbergh, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement’s Anti-Doping Regime*, IILJ Working Papers 2005/11, New York University Law School, spec. p. 15, 30 and 38 (<http://www.iilj.org>).

[25] One type of participatory right is granted to private parties before national agencies which act in the global arena. This type has two peculiarities: participatory rights are not provided for by global rules, but by national law; private parties participate in national proceedings, but these proceedings serve global decision-making processes.

Let us analyze and compare the above examples.

The participatory rights of private parties before domestic authorities vary noticeably. These rights are provided by global law, and may be exercised in many different *fora*: in informal procedures aimed at ensuring civic participation in policy formation (exemplified by the WTO Guidelines on the relations with non-governmental organizations and the World Bank Guidelines for the assessments of poverty reduction strategies); in rule-making procedures (exemplified by the Code of Conduct for Responsible Fisheries or securities regulation); in procedures leading to administrative measures, like

The United States Code, Chapter 13, Subchapter II, Paragraph 2578, Notice of United States participation in international standard-setting activities, provides that “(a)[t]he President shall designate an agency to be responsible for informing the public of the sanitary and phytosanitary standard-setting activities of each international standard-setting organization. (b) Not later than June 1 of each year, the agency designated under subsection (a) of this section with respect to each international standard-setting organization shall publish notice in the Federal Register of the information specified in subsection (c) of this section with respect to that organization. [...] (c) The information to be provided in the notice under subsection (b) of this section is (1) the sanitary or phytosanitary standards under consideration or planned for consideration by that organization; (2) for each sanitary or phytosanitary standard specified in paragraph (1) a description of the consideration or planned consideration of the standard; whether the United States is participating or plans to participate in the consideration of the standard; the agenda for the United States participation, if any; and the agency responsible for representing the United States with respect to the standards. (d) The agency specified in subsection (c) (2) (d) of this section shall provide an opportunity for public comment with respect to the standards for which the agency is responsible and shall take the comments into account in participating in the consideration of the standards and in proposing matters to be considered by the organization”.

Paragraph 2578a provides that “[i]f the Commissioner proposes to issue a determination of the equivalency of a sanitary or phytosanitary measure of a foreign country to a sanitary or phytosanitary measure of a foreign country to a sanitary or phytosanitary measure of the Food and Drug Administration that is not required to be promulgated as a rule under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] or other statute administered by the Food and Drug Administration, the Commissioner shall publish a notice in the Federal Register that identifies the basis for the determination that the measure provides at least the same level of sanitary or phytosanitary protection as the comparable Federal sanitary or phytosanitary measure. The Commissioner shall provide opportunity for interested persons to comment on the notice. The Commissioner shall not issue a final determination on the issue of equivalency without taking into account the comments received”.

environmental impact assessment, the transfer, handling or use of living modified organisms, trade safeguard measures, forest certification, disqualification for doping and labour law enforcement in North America; and in dispute settlement proceedings (for example, the anti-dumping investigation).

In each of these cases, participation rights are mandated by global rules only some of which are binding. These rules are imposed upon national legal orders from above, and thus create a vertical opening, in the sense that they oblige domestic authorities to hear private parties. They reinforce the national rules providing for participation in the domestic realm. But they also go beyond domestic rules, which generally grant participatory rights only to nationals. The global rules, by contrast, require domestic authorities to hear foreign parties as well.

The participatory rights examined here also manifest an incredible diversity of structures.

The right to participation in proceedings before public authorities, or semi-public bodies, and even private bodies may be granted. Examples of this can be seen in the areas of forest certification, securities regulation and anti-doping measures. Only in the last case is a hearing before an impartial hearing body required

The procedure for such participation is not fully determined by the global rules. This is because these global rules guarantee participation in proceedings before national authorities, and global actors do not want or need to unduly interfere with domestic authorities' jurisdiction; the same can be said for the specification of the private parties entitled to participate, the provisions on access to records, the kind of participation envisaged (to make comments or attend meetings) and the obligation to take the comments made by the parties into due consideration.

The right to participation is granted to affected parties, concerned citizens or interested organizations. In some areas, like fisheries, parties are more specifically defined as parties having a legitimate interest in the use and management of fisheries resources. In other areas, notably the WTO anti-dumping and safeguard measures, foreign parties can participate and parties can respond to other parties' statements.

To make participation possible, some global rules guarantee access to the information, or the right to be informed, or they require authorities to give notice or disclose policies. Such guarantees can be seen in the areas of environmental assessment, fisheries regulation, WTO anti-dumping and safeguard measures, forest certification, securities regulation, and the anti-doping disqualification.

Global rules do however address the time and form of participation. Environmental proceedings must assure early public participation and anti-doping hearings are required to be timely. Participation may be oral or written. Participation rights may be exercised in hearings or meetings. Parties may appear with or without counsel (see the cases of fisheries regulation, WTO anti-dumping and safeguard measures, forest certification, securities regulation, and anti-doping measures).

The authorities' obligation to take the points of view expressed in consultation proceedings into account is specified only in the areas of the environment, NGO consultation and in the proceedings for labour law enforcement in the North American system. A reasoned decision is required only in the cases of the environment, WTO safeguard measures, anti-doping disqualification and North American labour law enforcement procedures. The duty to publicize decisions is established only in the cases of the environment, living modified organisms procedures and North American labour law enforcement.

Moving from the structure of participation to its function, one can observe four main goals of participation. Participation may have the purpose of involving civil society in the (public or private) decision-making process (for example, in environmental matters and in securities regulation proceedings); or it may aim at encouraging private cooperation with governmental and intergovernmental action (like in the case of responsible fisheries); participation may have the job of promoting civic trust (like in the case of living modified organisms); it may play the same role as the right of defence in a judicial process (this is illustrated by the WTO anti-dumping and safeguard measures, the anti-doping disqualification, and North American labour law enforcement).

Why do global organizations take measures to provide for participation in domestic matters, before national agencies? One can distinguish three main reasons.

One reason is a need to harmonize not only goods, services and tariffs, but also procedures. This leads the rules and practices followed in many countries to be codified at the global level. The scope of these rules thus becomes wider, because they are imposed upon multiple national governments. This is the case of participation in environmental matters, in the proceedings for forest certification, in securities regulatory processes and in the anti-doping procedures.

The obligation of national governments to hear private parties is established at the global level, in another set of cases, in order to promote the collaboration of domestic private parties in implementing global policies, because national agencies act in accordance with such policies. This is the case of the Code of Conduct for Responsible Fisheries, of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, of the WTO Guidelines for

arrangements in relations with non-governmental organizations, of the HIPC Programme of the World Bank²⁶.

Thirdly, participation is provided at the global level because it involves foreign actors, who would not otherwise have a right to a hearing under domestic law. In the cases of anti-dumping investigation, of measures of safeguards, of the UNCLOS, as interpreted in the *Juno Trader* decision of the International Tribunal of the Law of the Sea, global law was needed to impose on States the obligation to provide a hearing to somebody who did not enjoy the right to a hearing under domestic law.

In these cases, national rules either grant participation to nationals, but not to foreigners (and therefore global norms widen their scope), or they fail to ensure participation at all (and global norms make it available to everybody, but foreign actors have a special interest in making use of it).

2. PARTICIPATION GRANTED TO NATIONAL GOVERNMENTS VIS-À-VIS GLOBAL ORGANIZATIONS

A second type of participation is that granted to national governments in global decision-making processes. Like the previous type of participation discussed above, this too is vertically oriented.

The first example is that of the International Convention for the Regulation of Whaling²⁷. This Convention includes a Schedule, which is an integral part of the Convention. The Schedule can be amended. Article V.3 provides that amendments shall be notified by the Commission to each of the

[26] Notice that, according to the WTO document already quoted, the WTO is both a treaty establishing rights and obligations and a forum for negotiations.

[27] G. Handl, *cit.*, p. 133 ff.

Contracting Governments. If any Government presents to the Commission objection to any amendment, the amendment shall not become effective with respect to any of the Governments and any other Government may present objection to the amendment. The amendment shall become effective with respect to all Governments which have not presented objection²⁸.

A second example is that of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer as adjusted and amended by the second Meeting of the Parties (1997)²⁹. Article 2.9 provides that proposals for adjustments and reductions of production or consumption of the controlled substances “*shall be communicated to the Parties by the Secretariat at least six months before the meeting of the Parties at which they are proposed for adoption*”³⁰.

A third example is that of the Procedures for the Elaboration of Codex Alimentarius Standards and Related Texts. Part I on the “Uniform procedure for the elaboration of codex standards and related texts” provides two consultations with Members of the Commission (i.e. Member Nations and Associate Members of the Food and Agriculture Organization (FAO) and World

[28] Article V. 3 provides that “[*e*]ach of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals”..

[29] G. Ulfstein, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements*, in R. Wolfrum-V. Röben, cit., p. 147 ff.

[30] It continues by saying: “[i]n taking such decisions, the Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement reached, such decisions shall, as a last resort, be adopted by a two-thirds majority vote of the Parties present and voting representing at least fifty per cent of the total consumption of the controlled substances of the Parties”.

Health Organization (WHO))³¹. The first has to do with the proposed draft standard. This is “sent to Members of the Commission and interested international organizations for comment [...]”. (4) The comments received are sent by the Secretariat to the subsidiary body or other body concerned which has the power to consider such comments and to amend the proposed draft standard. (5) The proposed draft standard is submitted through the Secretariat to the Commission or to the Executive Committee with a view to its adoption as a draft standard. In taking any decision at this step, the Commission or the Executive Committee will give due consideration to any comments that may be submitted by any of its Members regarding the implications which the proposed draft standard or any provisions thereof may have for their economic interests.[...] (6) The draft standard is sent by the Secretariat to all Members and interested international organizations for comment on all aspects, including possible implications of the draft standard for their economic interests. (7) The comments received are sent by the Secretariat to the subsidiary body or other body concerned, which has the power to consider such comments and amend the draft standard. (8) The draft standard is submitted through the Secretariat to the Commission together with any written proposals received from Members and interested international organizations for amendments at Step 8 with a view to its adoption as a Codex standard.[...]”. A similar two-step consultation procedure is followed, according to Part II, for the “uniform accelerated procedure for the elaboration of codex standards and related texts”.

A fourth example is that of the Operational Guidelines for the Implementation of the World Heritage Convention established by the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage³². These Guidelines provide for the participation of the State Parties in the process for the inscription of properties on the world heritage list. For this purpose, Articles 149 and 150 provide that “[t]he Advisory Bodies are requested to forward to States Parties [...] any final question or request for information that they may have after the examination of their evaluation. The concerned States Parties are invited to send [...] a letter to

[31] S. Suppan, *Consumers International's Decision-Making in the Global Market Codex Briefing Paper*, August 2004, p. 11ff. (<http://www.tradeobservatory.org/library.cfm?RefID=36988>); M. Savino, *The Role of Transnational Committees in the European and Global Order*, paper presented at the University of Viterbo, Global Administrative Law Seminar, June 10-11, 2005.

[32] L. Boisson de Chazournes, *Treaty Law-Making and Non-Treaty Law-Making : The Evolving Structure of the International Legal Order*, in R. Wolfrum-V. Röben, cit., p. 473 ff.

the Chairperson, with copies to the Advisory Bodies, detailing the factual errors they might have identified in the evaluation of their nomination made by the Advisory Bodies [...]”. The dialogue between global institutions and States continues in the following way, regulated by Articles 159 and 169: “[n]ominations which the Committee decides *to refer* back to the State Party for additional information may be resubmitted to the following Committee session for examination. The additional information shall be submitted to the Secretariat [...]. The Secretariat will immediately transmit it to the relevant Advisory Bodies for evaluation.[...] The Committee may decide *to defer* a nomination for more in-depth assessment or study, or a substantial revision by the State Party.[...] These nominations will then be reevaluated by the relevant Advisory Bodies [...]”. Articles 183, 184 and 196 provide that corrective measures and the deletion of properties shall be made in consultation with the State Party.

A fifth example is that of the International Labour Organization (ILO). Article 26 of the ILO Constitution provides that “[a]ny of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles. 2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry,[...] communicate with the government in question[...]. 3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon”³³.

The Members are required to place at the disposal of the Commission of Inquiry all the information in their possession which bears upon the subject-matter of the complaint (Article 27). According to Article 28, “[w]hen the Commission of Inquiry has fully considered the complaint it shall prepare a report

[33] Article 26 continues by saying: “4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference. 5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question”.

embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken”.

Finally, Article 29 provides that “[t]he Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published. 2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice”. The International Court of Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry³⁴.

A sixth example is the Financial Action Task Force on money laundering (FATF). Paragraph 11 (“Review process”) of the “Annual Review of Non-Cooperative Countries or Territories”, 20 June 2003 states that “[t]he jurisdictions to be reviewed were informed of the work to be carried out by the FATF. The reviews involved gathering the relevant information, including laws and regulations, as well as any mutual evaluation reports, related progress reports and self-assessment surveys, where these were available. This information was then analysed against the twenty-five criteria and a draft report was prepared and sent to the jurisdictions for comment. In some cases, the reviewed jurisdictions were asked to answer specific questions designed to seek additional information and clarification. Each reviewed jurisdiction provided their comments on their respective draft reports. These comments and the draft reports themselves were discussed between the FATF and the jurisdictions concerned during a series of face-to-face meetings. Subsequently, the draft reports were discussed and adopted by the FATF Plenaries”³⁵.

[34] See A. C. L. Davies, *Global Administrative Law at the International Labour Organization: the Problem of Softer Standards*, Paper presented at the NYU Law School Colloquium on Global Administrative Law, April 2005, p. 3 ff. (<http://www.iilj.org>), also on the recourse to soft law as a means of withholding participation rights.

[35] Additional information on the procedure were provided by the previous “Report on Non-Cooperative Countries and Territories”, 14 February 2000: “[t]he FATF and its members can implement focussed efforts, country by country, to convince non-cooperative jurisdictions to improve legislation and domestic practices and to participate actively in international co-operation. These efforts could take the form of a dialogue, in conjunction with the relevant

A seventh example is the North American Agreement for Labor Cooperation (NAALC). Articles 23-27 of this Treaty provide that, if a dispute between national governments is not resolved through “cooperative consultations”, an “Evaluations Committee of Experts” may be established. This Committee “*may invite written submissions from the Parties and the public*”. It “*may consider, in preparing its report, any information provided by [...] the National Administrative Authority of each Party, organizations institutions and persons with relevant expertise, and the public*”. Finally, “[e]ach Party shall have a reasonable opportunity to review and comment on information that the Evaluation Committee of Experts receives and to make written submissions to the Evaluation Committee” (Article 24, para. 4 – 6).

Let us now compare these examples with the examples of participatory rights in the relations between private parties and national authorities, examined above.

Here the participating party is not a private individual or organization, but the State (though the NAALC also allows for submissions from the public).

Participation is granted in treaty-making and in rule-making procedures (as in the case of amendments to the International Convention for the Regulation of Whaling Schedule and in the case of the adjustment and reduction of production of substances that deplete the ozone), in standard setting proceedings (like in those of

FATF-style regional body or appropriate international organisation/body, with the identified jurisdictions in order to check that their situation has been estimated correctly and to establish whether improvements are already being undertaken. The dialogue could be pursued by a letter from the FATF President to the concerned government explaining the purpose of the FATF’s work in this area once the consolidated list of non-cooperative jurisdictions has been established. This dialogue should prompt them to amend their laws and change their practices. To do so, they could be helped through advice and technical co-operation by FATF, its members, a FATF-style regional body, or an appropriate international organisation/body to implement the necessary changes. Specific actions could also be taken by other multi-lateral fora (e.g., the G-7, the OECD, the Basle Committee, IOSCO and the International Financial Institutions) to seek the issuance of public statements or other appropriate action [...]”.

the Codex Alimentarius Commission), in policy-making procedures (like in those of the North American Agreement for Labor Cooperation-NAALC), in adjudication proceedings (as in the process for the inscription on the world heritage list or in the review processes of the Financial Action Task Force) and in dispute settlement procedures (as for the evaluation of complaints before the ILO).

These proceedings are more loosely structured here than in the previous case. This may be due to the fact that national governments are parties to the global institutions and can therefore influence them from within.

There are three features common to both cases. The participation of national governments in global institutions is established by global rules, imposed from above (though in the FATF case there are no rules, just a practice). There is a provision for notification or communication. Objections or comments by the States are envisaged (in the case of the North American Agreement for Labor Cooperation, there can be a cross-examination, as parties can review and comment on the information received by the Committee. Only in the cases of food standards and labour complaints do global norms require that objections or comments be taken into due consideration).

Some of these procedures are complex. Participation is serial, as in the case of the objections to amendments to the International Convention for the Regulation of Whaling Schedule and also for the nominations for the inscription of properties in the world heritage list. Participation is doubled in a two-step consultation procedure, as in the case of the Codex Alimentarius Commission Standards.

Decision-making falls under the jurisdiction of the executive body of the global organization, or it may be conferred upon a separate body (like in the case of the Commission of Inquiry

which reports to the Governing Body of the ILO on complaints by Members).

Global rules' imposition of a right to participate upon domestic agencies is much less important than requiring global institutions to let the national governments participate in the global decision-making process. The first type is well known in domestic legal orders, while the second has a precedent in the federal and regional States and in supra-national governments (like the European Union), where there are participation procedures for including States in federal or supra-national decision-making.

I shall finally address the same question raised at the end of the previous paragraph: why is participation provided by global rules? For this second type of participation, one can consider three kinds of reasons.

Participation is required by global law because it is a part of the negotiation process that characterizes the international arena. Participation is another way to ensure cooperation among States in establishing rules or amending treaties. This is the case of the regulation of whaling and regulation of the substances that deplete the ozone layer. States have participatory rights because they are political principals in international decision-making and they are parties to a treaty that is implemented by an international organization. This kind of participation does not really fall into the field that I am examining, because participation is here a treaty amending power. States establish participatory rights in order to mutually guarantee the power to amend agreements. This kind of participation is no different from the participation of lower levels of government (municipal or regional) in the decisions of the higher levels of government (regional or central) in national administrations.

Secondly, the participation of national authorities at the global level is necessary for integrating domestic authorities into the global decision-making process and promoting the collaboration of national agencies in global decision-making (as in the case of the process for the inscription of properties on the world heritage list). This is not a separate level of government, but is made up of a global and a multinational component (as in the case of the Codex Alimentarius Commission standard setting process).

Finally, participation is granted at the global level in order to provide the right to a hearing to a government which has been the subject of a complaint filed by another government for not having observed a Convention (as in the case of the ILO) or a “review” of a global organization (as in the case of non-cooperative countries for money laundering).

3. PARTICIPATION GRANTED TO NATIONAL GOVERNMENTS (AND TO INTERESTED PARTIES) VIS-À-VIS OTHER NATIONAL GOVERNMENTS

In the global legal order participatory rights do not operate only vertically (private parties are heard by the State; States are heard by global organizations), but also horizontally (national governments are heard by other national governments; global institutions participate in the decision-making process of other global institutions). I shall now discuss the first of these two types of participatory rights.

The first example is the General Agreement on Trade in Services (GATS). Article VI. 4 provides that “[w]ith a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may estab-

lish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service”.

As an example of the implementation of such rule, one can consider the WTO “Disciplines on domestic regulation for the accountancy sector”. These have a chapter on transparency that provides: “[m]embers shall make publicly available, including through the enquiry and contact points[...], the names and addresses of competent authorities (i.e. governmental or non-governmental entities responsible for the licensing of professionals or firms, or accounting regulations). Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points: (a) where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards; (b) requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities’ monitoring arrangements for ensuring compliance; (c) information on technical standards; (d) and, upon request, confirmation that a particular professional or firm is licensed to practise within their jurisdiction. Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives as referred to in paragraph 2. When introducing measures which significantly affect trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption. [...]”.

A second example is that of the Agreement on the application of sanitary and phytosanitary measures. Article 7, on transparency, establishes that “[m]embers shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B”. Annex B, on “Transparency of sanitary and phytosanitary regulations” regulates the notification procedures in the following manner: “[w]hen ever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall: (a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation; (b) notify other Members, through the Secretariat, of the

*products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account; (c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations; (d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account [...]*³⁶.

A third example is provided by the Agreement on Technical Barriers to Trade (TBT). Article 2.9 provides a regulation similar to that of Annex B, on the “Transparency of sanitary and phytosanitary regulations”³⁷.

[36] Annex B continues by stating: “9. *The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them. 10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex*”. The WTO document on “How to apply the transparency provisions of the SPS agreement”, n. 72 – 74, explains how to deal with comments from others: “[a] prime purpose of notifying proposed regulations is to allow countries that might be affected by them to be consulted during the drafting process. Government authorities that have notified proposed regulations might receive comments on such regulations. Comments will either go to the notification authority or any other address specified in the final box of the notification form. [...] The notification authority should establish good working relationships with relevant agencies, and documented administrative procedures to ensure this happens. When other countries make comments on a notified SPS measure, the country notifying has certain obligations to meet. The country receiving comments should, without further request: (i) acknowledge the receipt of such comments; (ii) explain within a reasonable period of time, and at the earliest possible date before the adoption of the measure, to any Member from which it has received comments, how it will take these comments into account and, where appropriate, provide additional relevant information on the proposed sanitary or phytosanitary regulations concerned; (iii) provide to any Member from which it has received comments, a copy of the corresponding sanitary or phytosanitary regulations as adopted or information that no corresponding sanitary or phytosanitary regulations will be adopted for the time being; (iv) where possible make available to other countries comments and questions it has received and answers it has provided, preferably through electronic facilities”.

[37] Article 2.9 provides that “[w]hen a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall: 2.9.1 publish a notice in a publication at an early appropri-

A fourth example is that of the “Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal” (adopted by the Conference of the Plenipotentiaries on 22 March 1989)³⁸. Article 6, on the transboundary movement between Parties, provides: “1. *[t]he State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes.[...] 2. The State of import shall respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. A copy of the final response of the State of import shall be sent to the competent authorities of the States concerned which are Parties. 3. The State of export shall not allow the generator or exporter to commence the transboundary movement until it has received written confirmation that: (a) The notifier has received the written consent of the State of import; and (b) the notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question. 4. Each State of transit which is a Party shall promptly acknowledge to the notifier receipt of the notification. It may subsequently respond to the notifier in writing, within 60 days, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information*”³⁹.

ate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation; 2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account; 2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards; 2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account”.

[38] G. Handl, cit., p. 131 ff.

[39] Article 6 continues by stating: “[*t]he State of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit. However, if at any time a Party decides not to require prior written consent, either generally or under specific conditions, for transit transboundary movements of hazardous wastes or other wastes, or modifies its requirements in this respect, it shall forthwith inform the other Parties of its decision pursuant to Article 13. In this latter case, if no response is received by the State of export within 60 days of*

A fifth example is that of the Principles for Food Import and Export Inspection and Certification System of the Codex Alimentarius Commission. Articles 14, 15, 16 and 17 on transparency provide: “14. [...]the principles and operations of food inspection and certification systems should be open to scrutiny by consumers and their representative organizations, and other interested parties. 15. Importing countries should provide information on existing requirements and proposed changes to requirements should be published and[...] an adequate time period permitted for comment. The views of exporting countries [...] should be taken into account in taking a final decision. A reasonable period should be allowed before a new requirement takes effect in order to permit exporting countries, and in particular developing countries, to make necessary changes to methods of production and control measures. 16. Importing countries should make available to the exporting countries, upon request, timely advice as to the basis of the decision they have taken regarding the compliance of foods with their relevant requirements. 17. Upon request by the competent authorities of the importing countries, the exporting countries should provide access to view and assess the actual working of their relevant inspection and certification systems”.

Another example is that of the Code of Conduct for Responsible Fisheries. Article 11. 3. 4 provides that “[w]hen a State introduces changes to its legal requirements affecting trade in fish and fishery products with other States, sufficient information and time should be given to allow the States and producers affected to introduce, as appropriate, the changes needed in their processes and procedures. In this connection, consultation with affected States on the time frame for implementation of the changes would be desirable. Due consideration should be given to requests from developing countries for temporary derogations from obligations”.

A seventh example is provided by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994. Article 5. 5 provides: “[...] after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned”. The above-mentioned Article 6.1.3 states that, after an investigation has been initiated, the authorities shall provide the full text of the written application to the known exporters and to

the receipt of a given notification by the State of transit, the State of export may allow the export to proceed through the State of transit. [...]”

the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved⁴⁰.

The eighth example is from the WTO Agreement on Safeguards. Article 12. 3 provides: “[a] Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8”.

The last example is from the General Agreement on Tariffs and Trade (GATT) 1994 itself⁴¹. Article XIX of such agreement regulates emergency action on imports of particular products. Paragraph 2 provides that “[b]efore any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the contracting parties as far in advance as may be practicable and shall afford the contracting parties and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action”. The treaty provides for an agreement. If the agreement is not reached, the affected parties can suspend equivalent concessions⁴².

[40] Article 6.11 states: “[f]or the purposes of this Agreement, “interested parties” shall include: (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; (ii) the government of the exporting Member; and (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member. This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties”.

[41] Article X. 3 a. of the 1994 GATT provides that “[e]ach Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations and decisions and rulings [...]” and requires that Members maintain or institute judicial, arbitral or administrative tribunals or procedures to ensure prompt review and correction of administrative action.

[42] On the basis of this provision the Appellate Body of the WTO has decided that the certifications envisaged by Section 609 of the United States Public Law 101-162: [...] consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the

Horizontal linkages among States, established by global rules, are as dense as the vertical linkages between States and global organizations. Global governance is not made up only of global institutions. It is also made up of multinational and transnational

*certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)[...]. The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, vis-à-vis those Members which are granted certification. The provisions of Article X:3 of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the “laws, regulations, judicial decisions and administrative rulings of general application” described in Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension pro hac vice of the treaty rights of other Members. It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons of the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994”, WTO Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products (AB-1998-4) (WT/DS58/AB/R) 12 October 1998, nn. 180-183. See also WTO Appellate Body, United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (AB-1996-3) (WT/DS24/AB/R) 10 February 1997, para. IV; WTO Appellate Body, Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (AB-2000-12) (WT/DS122/AB/R) 12 March 2001, para 98-112; WTO Appellate Body, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India Recourse to Article 21.5 of the DSU by India (AB-2003-1) (WT/DS141/AB/RW) 8 April 2003, para. 101-146. G. della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, in *European Public Law*, vol. 9, Issue 4, December 2003, p. 574.*

processes. They open national governments up to each other and increase the dialogue between nations.

But horizontally-operating participatory rights also have an additional vertical effect. National governments' compliance with participatory requirements is often monitored by global authorities (like the Council for Trade in Services or the WTO Secretariat). Therefore, the structure is not purely horizontal, as it involves both vertical and horizontal elements.

This kind of participation occurs in rule-making (like in the GATS, SPS and TBT and responsible fisheries cases), adjudicating (as in the trans-boundary movements of hazardous wastes, food inspections, WTO safeguard measures and GATT emergency actions) and quasi-judicial (as in the case regulated by the Agreement on implementation of Article VI of the GATT 1994) procedures.

The duty to grant participation rights falls upon national governments, and the parties that participate are also national governments. Only in some cases, such as the TBT Agreement, the Codex Alimentarius Commission Export Inspection and Certification System, and the Agreement on the Implementation of Article VI of the GATT 1994 can private parties also participate. Participation rights are extended to private economic actors in a similar way as in the first set of cases examined, where global norms oblige national governments to hear private parties. In these cases, domestic governments play a double role: they are participants, but they also protect the interests of private actors.

Global norms require national governments to provide information, or publish notices, or notify parties and some of them also introduce timeliness requirements, such as that information must be given at an early stage or that governments must give sufficient

or adequate time (exemplified by the SPS and TBT Agreements, food inspection and fisheries regulation).

Information is required in order to allow for comments (and the SPS and TBT Agreements require that comments be made in writing) from the States (or other interested parties).

Finally, four norms (GATS, SPS, TBT, and Codex) require the addressee government to give consideration to the comments received or take them into account.

When participation provided by global norms is put under global control, the relations established are not purely horizontal, but triangular, involving both horizontal (national government-to-national government) and vertical (national governments-global institution) links.

Why does global law oblige national governments to hear other national governments? First of all, in order to ensure an exchange of information and the reciprocal adaptation of national rules and conducts, as in the case of the Code of Conduct for Responsible Fisheries.

A second reason is in order to establish not only an exchange of information, but also a process of self-harmonization among States, as in the cases of the GATS, the SPS Agreement, the TBT Agreement, and the Food Import and Export Inspection and Certification System.

The third reason is to promote multinational cooperation, as in the case of transboundary movements of hazardous wastes, anti-dumping procedures and safeguards measures.

4. PARTICIPATION GRANTED TO GLOBAL INSTITUTIONS BEFORE ANOTHER GLOBAL INSTITUTION

A second type of horizontal participatory rights are those rights granted to global institutions vis-à-vis another global institution.

The first example is the United Nations Environment Programme (UNEP). Rule 10 of the Rules of Procedure of the UNEP Governing Council regulates agenda setting: “[a]fter the Governing Council has considered the provisional agenda for the following session, the provisional agenda, incorporating any amendments made by the Governing Council, shall be communicated by the Executive Director to all States Members of the United Nations or members of the specialized agencies and of the International Atomic Energy Agency, the Chairmen of subsidiary organs of the Governing Council as appropriate, the President of the General Assembly when the Assembly is in session, the President of the Economic and Social Council, the appropriate United Nations bodies, the specialized agencies, the International Atomic Energy, the intergovernmental organizations referred to in rule 68 below and the international non-governmental organizations referred to in rule 69 below”.

A second example is that of the already mentioned Codex Alimentarius Commission’s standard-setting procedure. The “Uniform procedure for the elaboration of Codex standards and related texts” (Part 1 of the “Procedures for the Elaboration of Codex Standards and Related Texts”) provides that both the “proposed draft standard” and the “draft standards” are sent not only to members of the Commission, but also to “interested international organizations”. These organizations may make comments on all aspects and the “subsidiary body” of the Commission (see Rule IX of the “Rules of procedure of the Codex Alimentarius Commission”), usually a Committee, “*has the power to consider such comments*”.

In the cases discussed above, participation is granted in agenda-setting and standard-setting proceedings. Other interested global institutions are entitled to participate. The usual procedure of communication-comments-consideration applies. Why do global rules require participation in these cases? Global law is made up of sectoral regimes. But these regimes are interconnected. A global

institution may be member of the governing board of another global institution, or it may – as we are concerned with here – enjoy the right to participate in certain decision-making processes of another global body. Global rules granting participatory rights to a global organization vis-à-vis another global organization establish a line of communication between global regulatory regimes.

This function does not differ from the function of inter-agency consultation and participation procedures in place in national governments. It creates relationships between different authorities and promotes their cooperation.

5. PARTICIPATION GRANTED TO PRIVATE PARTIES BEFORE GLOBAL INSTITUTIONS

I now turn to the most important part of the picture, participatory rights that private parties may exercise directly before global organizations.

Participation of private parties in domestic procedures (1) is well known, as the relevant rights are usually established by domestic legislation. Participation of national governments in global institutions (2) is also a widespread phenomenon. Participation of national governments in foreign governments' decision-making (3) is also common, as bilateral or multilateral agreements open up national legal systems vis-à-vis foreign ones. The peculiarity of the first, in this case, lies in the fact that it is provided by global rules. Therefore, the duty to hear is imposed on the State. The peculiarity of the second and third cases is that here State participation in the global organization does not occur at a "constitutional" level, but at an "administrative" level. It is not participation in the "legislative" process, but participation in the "administrative" process.

What is entirely new is the participation of national civil society in the global decision-making process. This undermines the traditional view of the State as the only global actor: participation in global decision-making is no longer only for the province of national governments.

The participation of national civil society in global institutions is the result of the increasing global regulation of private actors: the more that international organizations establish standards for private actors, the more that these actors seek to participate to global standard setting processes⁴³.

The first example is informal consultation with the financial industry by the Basel Committee on Banking Supervision (BCBS), established by the central-bank Governors of the Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, United Kingdom and United States) at the end of 1974⁴⁴. The “Introduction” to the document on the “Application of Basel II to Trading Activities and the Treatment of Double Default Effects” (July 2005) states: “[i]n releasing the Revised Framework [...], the BCBS re-iterated its intention to maintain its active dialogue with the industry to ensure that the new framework keeps pace with, and can be applied to, ongoing developments in the financial services sector [...]. Given the interest of both banks and securities firms in the potential solutions to these particular issues, the BCBS has worked jointly with the International Organization of Securities Commissions (IOSCO) to consult with industry representatives and other supervisors on these matters. [...] The BCBS released a [first version of this proposal](#)[...] for consultation purposes. Thirty-seven comments have been provided by banks, investment firms, industry associations, supervisory authorities, and other interested institutions. [...] The BCBS and IOSCO worked diligently, in close cooperation with representatives of the industry, to reflect their comments in the present paper”⁴⁵.

[43] See S. Cassese, *Global Standards for National Administrative Procedure*, in *Law and Contemporary Problems*, vol. 68, Summer/Autumn 2005, no. 3 & 4, p. 109

[44] D. Zaring, cit., p. 7-8.

[45] See also M.S. Barr and G.P. Miller, *Global Administrative Law: the View from Basel*, in *European Journal of International Law*, 17, 2006, n.1, p. 17, 24ss., 45.

A second example is the World Trade Organization's (WTO) 23 July 1996 "Guidelines for arrangements on relations with non-governmental organizations", which states: "1. Under Article V:2 of the Marrakesh Agreement establishing the WTO "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO". 2. In deciding on these guidelines for arrangements on relations with non-governmental organizations, Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs. 3. To contribute to achieve greater transparency Members will ensure more information about WTO activities in particular by making available documents[...]. To enhance this process the Secretariat will make available on on-line computer network the material which is accessible to the public, including derestricted documents. 4. The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO".

A third example is the Commission for Environmental Cooperation (CEC), established by the North American Agreement on Environmental Cooperation (1993)⁴⁶. The Commission is comprised of a council, a Secretariat and a "Joint Public Advisory Committee (JPAC)" (Article 8. 2). This

[46] On this treaty, D. L. Markell, *The North American Commission for Environmental Cooperation after Ten Years: Lessons about Institutional Structure and Public Participation in Governance*; J. H. Knox, *Separated at Birth: The North American Agreement on Labor and the Environment*; K. Raustiala, *Police Patrols and Fire Alarms in the NAAEC*; C. Wold, L. Ritchie, D. Scott, and M. Clark, *The Inadequacy of the Citizen Submission Process of Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, in *Loyola of Los Angeles International and Comparative Law Review*, vol. 26, 2004, p. 341 ff., 359 ff., 389 ff., 415 ff.; T. Yang, *The Effectiveness of the Nafta Environmental Side Agreement's Citizen Submission Process: a Case Study of Metales y Derivados*, in *University of Colorado Law Review*, vol. 76, 2005, p. 443 ff.; D. L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submission Process*, in *North Carolina Journal of International Law and Commercial Regulation*, vol. 30, 2005, p. 759 ff.

Committee has adopted “Public Consultation Guidelines”, where one can read: “[...] JPAC has been charged by the Council to reach out to the public that is interested in and affected by the work of the Commission⁴⁷. Invitations to the public to participate in a consultation have a stated purpose, such as to: establish a policy or directive; assist in the preparation of the program of the CEC; obtain views in the context of a specific project; and address a specific issue or set of issues. Information, consultation and participation are different activities engaged by JPAC. The majority of events may be in the nature of a consultation or in gathering information, or both. A consultation is the preferred means of contributing to the decision-making progress on the subject at hand. In addition, JPAC from time to time may consult or seek information or the participation of experts, specific groups and individuals on any relevant issues or projects, and may assist the Secretariat to organize the public input for diverse activities”⁴⁸.

The principles for consultation embodied in the Guidelines are: “[...] consultation meetings will generally provide: information to participants on the purpose and objectives of the meeting; opportunity for participants to express individual views without interruption or contradiction; opportunity to build on views expressed and, whenever possible, to discuss and reach conclusions, consensus or recommendations; and opportunity for the participants to engage in open-ended discussion (generally at the conclusion of the meeting). To achieve these objectives, the Committee should be guided by the following principles: a) Recognize the difference between information, participation and consultation activities. b) Provide a clearly-stated purpose and outcome. c) Any event that is a consultation should include opportunity for: every participant to express his/her views clearly and succinctly, orally and/or in

[47] The Guidelines continue by stating: “1. The purpose of the public consultations is to comply with the provision of the North American Agreement on Environmental Cooperation (NAAEC) which charges JPAC to “[...] provide advice to the Council on any matter within the scope of this Agreement, including on any documents provided to it under paragraph 6, and on the implementation and further elaboration of this Agreement.” In addition, “JPAC may provide relevant technical, scientific or other information to the Secretariat.””

[48] Goals are established by the “Public Consultation Guidelines” in the following manner: “[a]s to consultations, this event should have as an outcome to provide to the Commission: sense of the concerns, priorities and aspirations of the participants; information to shape the policies and programs of the CEC; and whenever possible, specific recommendations and proposals; and to provide to the participants: a forum to interact constructively and make progress towards solutions and actions; and feedback on the results of the consultation and how advice received was taken into account”.

writing, on the issue at hand; exchange between participants and JPAC and between participants themselves; and feedback from JPAC on information received and steps to follow”.

As for the structure of consultation, the Guidelines provide that consultation meetings will be structured along the following lines: *“advance notification; introduction and information; early break-up into work groups or roundtables; at the beginning of each of the smaller group meetings, opportunity for each participant to make a presentation; and a closing plenary session to provide opportunity for workshop reports and recommendations, for short, open discussion between participants and JPAC members”.*

A fourth example is again the North American Agreement on Environmental Cooperation, which provides that “[t]he Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law” (Article 14. 1). The submission must be written, provide sufficient information and be aimed at promoting enforcement. The Secretariat may forward the submission to the domestic authorities, decide that the submission warrants developing a factual record and submit the factual record to the Council. Any Party may provide comments on the accuracy of the draft factual record. The Council may make the final factual record available (Articles 14 and 15)⁴⁹.

A fifth example is the above-mentioned North American Agreement for Labor Cooperation (NAALC), which provides for public submissions to the Evaluation Committees of Experts and empowers these Committees to consider such submissions (Article 24, para. 4 and 5).

A sixth example is the “Code of Conduct for Responsible Fisheries”. As already noted, this provides for consultation and effective participation by States. But it also requires consultation and participation by global institutions. Article 1. 2 states that “[t]he Code is global in scope, and is directed toward members and non-members of FAO, fishing entities, subregional, regional and glo-

[49] “[T]he agreement provides citizens and nongovernmental organizations an opportunity to raise questions about and shed light on a Party government’s effective enforcement of its environmental laws through the submission process”: U.S. General Accounting Office, *U. S. Experience*, cit., p. 9

bal organizations, whether governmental or non-governmental, and all persons concerned with the conservation of fishery resources and management and development of fisheries, such as fishers, those engaged in processing and marketing of fish and fishery products and other users of the aquatic environment in relation to fisheries”.

A seventh example is provided by the Constitution of a global private organization, the International Accounting Standards Committee Foundation (IASCF). Article 31 establishes that the IASB (International Accounting Standards Board), in order to prepare and issue standards, shall “(b) *publish an Exposure Draft on all projects and normally publish a discussion document for public comment on major projects;[...]* (d) (i) *establish procedures for reviewing comments made within a reasonable period on documents published for comment;[...]* (e) *consider holding public hearings to discuss proposed standards, although there is no requirement to hold public hearings for every project;[...]* (g) *give reasons if it does not follow any of the non-mandatory procedures set out in (b), (d)(ii), d(iv), (e) and (f)*”. According to these provisions, accounting standards are developed through an “international due process” that involves financial analysts, users of financial statements, the business community, domestic regulatory agencies and academics⁵⁰.

An eighth example is provided by Article 34 of the 1970 Patent Cooperation Treaty. This regulates the Procedure before the International Preliminary Examining Authority: “[...](2) (a) *The applicant shall have a right to communicate orally and in writing with the International Preliminary Examining Authority. [...]* (c) *The applicant shall receive at least one written opinion from the International Preliminary Examining Authority [...].* (d) *The applicant may respond to the written opinion [...]*”. Article 34 goes on to specify rules for the restriction of the claims.

[50] See IASCF, *Review of the Constitution – Proposals for Change*, November 2004, p. 34, n. 107 on the “significance of appropriate due process and consultative arrangements” and p. 35, n. 112 on the “comply or explain requirement”. Annex to Appendix C explains the steps of due process at p. 72, no. 7. See W.Mattli and T.Buethel, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, in *Law and Contemporary Problems*, 68, 2005, Summer-Autumn, n. 3-4, p. 242 and D. Livshitz, *Holding Professionals Accountable: The Challenge of Privatized International Standard Setting in Accounting and Architecture Service Sectors*, paper presented to the Second Global Administrative Law Seminar, Viterbo, 9-10 June 2006.

A ninth example can be found in the International Labour Organization (ILO) Constitution, Article 24. This provides that “[i]n the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit”. Article 25 then states: “[i]f no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it”.

A tenth example is that of the Internet Corporation for Assigned Names and Numbers (ICANN) Bylaws⁵¹. Article III, section 6 of these Bylaws provides for a notice and comment procedure on policy actions. With respect to any policies that substantially affect third parties, ICANN shall “provide public notice” and “a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments”. Where the policy action affects public policy concerns, the opinion of the Governmental Advisory Committee must be requested. Subsequently, ICANN shall provide “reconsideration” by a “Reconsideration Committee” and “independent review” by an “Independent Review Panel”.

Finally, the above-mentioned World Anti-Doping Code has established the right to a fair hearing before each anti-doping organization. As a consequence, this right is guaranteed to the affected parties not only before national anti-doping organizations, but also before the International Olympic Committee, the International Para-olympic Committee and the International Federations (see Introduction to the Code and Article 8).

It is important to mention that private parties’ participation in global decision-making procedures may also be the result of State action. The Convention on access to information, public participation in decision-making and access to justice in environmental matters (25 June 1998), Article 3. 7, provides

[51] As amended, effective 28 February 2006 (<http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm>)

that “[e]ach Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment”.

The United States Code, title 19, Chapter 22, Subchapter I, Paragraph 3536: Increased transparency states: “[t]he Trade Representative shall seek the adoption by the Ministerial Conference and General Council of procedures that will ensure broader application of the principle of transparency and clarification of the costs and benefits of trade policy actions, through the observance of open and equitable procedures in trade matters by the Ministerial Conference and the General Council, and by the dispute settlement panels and the Appellate Body under the Dispute Settlement Understanding”.

The examination of these cases shows that private participation in global decision-making is both *de facto* (as in the case of the Basel Committee) and *de jure* (in the remaining cases)⁵².

[52] A different set of cases involves the participation of global organizations’ employees in global decision-making (it is mostly devoted to this subject C. de Cooker (ed.), *Accountability, Investigation and Due Process in International Organizations*, Leiden, Martinus Nijhoff, 2005). Here we see the participation of private parties, which do not represent civil society.

Let us take the example of Conditions of service applicable to the staff of the WTO Secretariat (decision adopted by the General Council on 16 October 1998). Regulation 12. 2 provides that “[i]n disputes relating to their conditions of service, staff members have the right to due process, as set out in the Staff Rules”. Rule 105. 2 of the Staff Rules provides that the staff member and the supervisor shall conduct an annual review of the staff member’s performance and accomplishments and that the staff member “may provide written comments on the assessment”. Rule 113.2, on the disciplinary procedure, provides that the Director-General shall notify the staff member and a “joint advisory body” in writing of the proposal to apply a disciplinary measure and of the grounds for such action. “The staff member may provide the body with written observations on the proposal [...]; the body shall hear the staff member [...] and shall call such other witnesses as it or the parties may wish to hear, and report to the Director-general with written observations on the report [...]. The decision of the Director-general on the proposed disciplinary measure shall be notified to the staff member [.....].

What if the global rules fail to guarantee the right to a hearing? This is illustrated by the Skandera case, decided by the World Bank Administrative Tribunal on June 5, 1981 (No. 2). The World Bank Administrative Tribunal held (at paragraphs 28 and 29) that “[...] [n]otice of termination should communicate to the affected staff member the true reasons for the

Participation in global decision-making processes granted by global rules is – as noted – the most important step towards introducing direct links between civil society and global institutions. This may explain why this type of participation is regulated in a somewhat vague and ambiguous manner.

This type of participation has the following peculiarities. It may be exercised in policy formulation proceedings (as in the cases of NGO participation before the WTO, ICANN, or the NAALC), in regulatory procedures (as in the BCBS and the fisheries cases), in standard setting proceedings (as is the case for accounting standards), in procedures aimed at enforcing global standards in domestic jurisdictions (like in the context of the North American environmental standards), in adjudication proceedings (as in the cases of patents, labour standards and anti-doping). In the case of the CEC, consultation is provided for in policy formulation, the preparation of programmes and also in specific projects and issues.

*Bank's decision. It is in the interest of the Bank that the employment of qualified employees not be terminated on the basis of inadequate facts or ill-founded justifications, and one way to assure this is to furnish the staff member at the time of termination with a specific and true assessment which will provide a fair opportunity to the individual to dispute, and possibly to seek rectification of the decision of the Bank. The prompt communication of reasons for termination will also facilitate the preparation and presentation of appeals and other remedies provided in the Bank's dispute-resolution procedure. By failing[...] to inform Mr. Skandera accurately of the reasons for the termination of his appointment, the Bank impaired his ability to protect his interests. Although prompt and candid disclosure of reasons might well not have affected the Tribunal's decision regarding the propriety of the termination, Mr. Skandera was delayed by four months in dealing in an informed manner with the Bank's action" (On this case, see R. A. Gorman, *The Development*, cit., p. 439-440). It has been noticed that "[...] never in subsequent cases has there been any ultimate disagreement as to the more precise components of due process discipline cases – such elements as notice to the staff member of alleged malfeasance, an opportunity to respond, a fair investigation, some measure of confrontation with accusers, prompt delivery of any investigatory report on which discipline will be based, and so forth. The Bank's own published rules set forth many of these elements of due process, but the Tribunal has not been shy about supplying a good number that are unwritten. There is thus a common answer to the question "what is fair treatment?" that transcends cultural differences" (R. A. Gorman, cit., p. 440).*

Participation is granted before public and semi-public bodies (like the Basel Committee, the IASCF, and ICANN) or before *ad hoc* bodies, like the JPAC. It is open to private parties (interested or affected persons, concerned industry, NGO representatives), but also to domestic agencies (as in the case of BCBS, where other supervisors can participate) and national governments (as in the case of “representations” to the ILO, where national governments play the role of respondents).

Global norms provide for consultation, cooperation, submissions, participation, and for ancillary obligations on the part of the institution, like making available information or documents (as in the cases of the WTO and CEC).

Participants may respond or make comments (as in the cases of BCBS, accounting standards, patent examination, environmental and labour standards in North America), view the comments of others (like in the case of ICANN), hold meetings or symposia (as the WTO does with NGOs and also in the case of the CEC) or public hearings (to discuss, for example, accounting standards).

National governments may provide comments or responses to the report prepared by the global authority following the parties’ submissions, as in the cases of labour and environmental standards in North America. In the cases of the BCBS and the IASB, national governments are obliged to consider or review the comments received. In the case of ICANN, the opinion of the Governmental Advisory Committee must be requested. A triangular relationship between private party-global institution-national government is therefore established.

Only in the case of IASB is there an obligation to give reasons, while in the case of ICANN, there is a duty to reply to the interested parties’ comments .

Participation of private parties at the global level is granted for two main reasons.

The first is to promote consultation. As mentioned above, the Basel Committee consulted the regulated industry in order “to ensure that the new framework keeps pace with, and can be applied to, ongoing developments in the financial services sector”. WTO Secretariat interaction with NGOs is provided in order to “contribute to accuracy and richness of the public debate”. The JPAC provides “relevant technical, scientific or other information” to the CEC Secretariat and contributes to the decision-making process through consultation. The same purpose is furthered by the consultation by global organizations in the field of fisheries, by the IASB for accounting standards and by the North American Commissions for Environmental Cooperation and for Labor Cooperation.

The second purpose for granting participation is to promote the right to a hearing. This may be exercised by a patent claimant in the international preliminary examination, by a State accused of having failed to observe an ILO Convention, by third parties affected by ICANN policies, or by persons accused of having violated an anti-doping rule (or by a WTO international civil servant).

III. A GLOBAL DUE PROCESS?

“[...] [A]s supranational organizations take on more of an autonomous decision-making role and face more controversial issues, they tend to develop better governance structures”⁵³. The more global institutions expand their role as regulators, the more that global administrative law matures.

The development of a global law is still questioned by those who regard the supra-state as an “acephalous world”, the product of negotiated understanding. Thus they argue that “*we should be very cautious in representing what are essentially negotiated orders at the regional and global level as legal orders while they remain significantly different from those at the level of the state*”⁵⁴. But this view associates law exclusively with the State (according to Roberts, “[...] *some of these expansive moves to represent law at present as beyond the state, even as having nothing to do with governing, leave us with a diminishing sense of what law is*”⁵⁵), while we have long observed that where there is society, there is law.

This analysis has shown that participation in the global law is multi-faceted. We can observe this by looking at who has the right to participate, which levels of government must grant participation, and which decision-making processes must allow participation.

The parties entitled to participate are private individuals or groups, national governments and global organizations. Participation is granted at the national level to both domestic and foreign

[53] D. C. Esty, *Toward Good Global Governance: The Role of Administrative Law*, paper presented to the NYU Law School Global Administrative Law Conference, 2005

[54] S. Roberts, *After Government? On representing Law Without the State*, in *Modern Law Review*, vol. 68, January 2005, no. 1, p. 23

[55] S. Roberts, *op. cit.*, p. 3

governmental bodies, as well as at the global level. Procedures in which participation is granted are law-making, regulatory, adjudicatory and dispute settlement procedures.

Global norms require that both domestic administrations and global institutions respect due process principles. In both cases, governments and/or private parties are entitled to participate : the domestic-international divide is preserved in the first case, and is overcome in the second.

Participatory rights granted at the global level are more intertwined, as compared to the same rights in national systems. In the WTO system, for instance, global rules requiring States to hear private parties are reinforced by other global rules requiring States to hear foreign States as well. In many regulatory regimes, there is continuity between participation and negotiation, and participation may act as a surrogate for negotiation.

This also produces some ambiguity, as it is difficult to distinguish between participation rights granted to national governments as political principals in international negotiations and participation rights like those exercised by private parties before administrative regulatory authorities.

Secondly, participatory rights have a wider application in global law than in domestic law: participatory rights are granted by private governance regimes that mirror administrative law principles.

Thirdly, participatory rights in the global legal system are always multi-polar, while in domestic law they tend to be dyadic. In the global arena there are many more conflicting interests than in the domestic domain. As the rule of law requires giving these interests a say, the parties in the global administrative proceeding are neces-

sarily numerous. They do not represent only private interests, but also public interests, both national and supra-national.

1. THE MATURITY OF GLOBAL ADMINISTRATIVE LAW

How mature is global administrative law? Are its principles well developed or are they in a primitive stage of growth? Is global proceduralism thus similar to domestic proceduralism? To what extent are participatory rights in the global law different from domestic participatory rights? Do participatory rights in the global arena follow the same path as domestic law participatory rights do? Do these procedures embody administrative law principles as traditionally understood, or just principles of good governance?

This analysis⁵⁶ has shown that participation in the global administrative arenas is not precisely defined; it is loosely structured and not always enforceable by a court.

Participatory rights at the global level have a somewhat rudimentary structure. While in domestic legal systems both notice and comment procedures (i.e. participation in rule-making processes) and hearing procedures (i.e. participation in adjudicatory proceed-

[56] More examples of participatory rights in UN Economic and Social Council, Economic Commission for Europe, *Survey of selected access to information, public participation, and access to justice rules and practices in international forums*, MP.PP/2002/18/Add.1 CEP/2002/13/Add. 1 12 September 2002 and B. Morgan, *Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law*, in *European Journal of International Law*, 17, 2006, n. 1, p. 226-228. See also C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, in *European Journal of International Law*, 17, 2006, n. 1, p. 207: “a universal set of administrative law principles, difficult in any event to identify, is neither welcome nor particularly desirable: diversity and pluralism are greatly to be preferred”

ings) are subject to detailed analytical rules, in the global legal system they are only summarily regulated.

In the global legal system, participatory rights are more or less structured depending on the sector or area. Their regulation is most developed in areas like environmental protection, sports, trade and Internet governance, because of the particular complexity of global regulation and the need to level the playing field.

Another reason why participatory rights are less rudimentary in certain areas is because of the need to grant participation to foreign actors in domestic legal systems. The global legal system has both a vertical dimension (global institutions are superimposed on domestic institutions) and a horizontal one (domestic legal orders are obliged to open up to each other). In the latter dimension, it is crucial to give foreign actors a say vis-à-vis domestic authorities.

Moreover, while participation in the domestic legal order is just one element of a larger body of law, requiring transparency (in order to let participants know the administrative decision being prepared), a reasoned decision (in order to allow the participant know if its point of view has been taken into account) and judicial review (to make the administrative agency respect procedural requirements), transparency, reasoned decision and judicial review requirements are unknown in some of the regulatory regimes of the global legal system. In others, they are at a rudimentary stage of development. One can thus question whether participation alone, without transparency, a requirement to motivate decisions and judicial review, can be likened to the domestic due process of law.

The lines between participation and consultation, participation and negotiation, participation and cooperation are not clear. Participation is granted in order to establish links between civil society and national governments, national governments and global institu-

tions, national governments and other national governments, global institutions and other global organizations, and between civil society and global institutions. But these links are usually established without introducing a precise balance of powers.

The rights of individual participants and the authorities' duties to ensure participation are not well defined. Rights and obligations are more loosely defined in adjudication procedures, while they are better structured in rule-making procedures, due to the central role of rule-making in the global arena. Participation rights and duties are more detailed when addressed to national governments, and less detailed when referred to private actors, due to the persistent centrality of States in the global legal order.

As mentioned above, global agencies are not always required to give reasons: in these cases, the targets of global decisions can participate in the decision-making process, they are not entitled to know the grounds upon which the decision has been based.

In very few cases, participation rights may be enforced by a court empowered to review administrative decisions, and void those taken without consulting or hearing private parties.

Global proceduralism is thus at an elementary stage of development. We can conclude that the rule of law is not fully developed in the global legal system.

The other side of the coin is that global procedures are required more often than domestic procedures to be based on scientific evidence, independent evaluation and deliberative democracy. Being newer than their national equivalents and more removed from politics, global procedures can more easily be subjected to such rules. Moreover, the interaction between global and domestic norms produces at least two consequences. First, when global norms are

added to national ones, there is a reciprocal interpenetration and reinforcement⁵⁷. Second, the more that global norms on participation are imposed on national administrations, the more that global institutions are themselves obliged to comply with due process requirements.

In conclusion, global participatory rights are not comparable to participation rights in national legal systems, but they are no longer at a primitive stage of development. One can foresee that they will make progress with judicial enforcement at the global level, as courts will come to play a threefold role. They will enforce existing rules. They will expand them into new areas. They will develop more general principles, not bound to individual regulatory regimes and more generally applicable.

2. HOW GLOBAL IS GLOBAL ADMINISTRATIVE LAW?

The global legal order is full of rules prescribing participatory rights. But how global is global due process? In spite of the great number of rules providing for participation, participation is far from being a global principle, because the global law is made up of many different, separate and self-contained regimes: each regime has its own due process principle, not every one grants participatory rights and there is a lack of overarching principles, that can be applied to all regulatory regimes.

The European Union Court of First Instance has recently stated that “[...] *it appears that no mandatory rule of public international law requires prior hearing for the persons concerned in circumstances such as those of this case, in which the Security Council, acting under Title VII of*

[57] M. S. Barr and G. F. Miller, *Global Administrative Law* cit., p. 46

*the Charter of the United States, decides, through its Sanctions Committee, that the funds of certain individuals or entities suspected of contributing to the funding of terrorism must be frozen*⁵⁸. As a consequence, no right to a hearing has been granted to the affected parties on the ground that global law provides neither a general “principle of defence”, nor a specific right to be heard when the UN Sanctions Committee orders private funds to be frozen.

There are strong asymmetries among the many different participatory rights granted at the global level. Therefore, the many rules examined have a cumulative effect, but do not establish a general principle in the global legal order.

Although the global legal order consists of the sum of many self-contained regulatory regimes, and participatory rights are not granted everywhere and in general terms, on the other hand, two forces push toward the generalization of participatory rights.

First, participation in the global arena is becoming a “human right”⁵⁹ and thus a universal principle. There is a tension between the limited scope of each regulatory regime providing for participa-

[58] Judgement of the Court of First Instance (Second Chamber, Extended Composition), 21 September 2005, in Case T-306/01, para. 307. See also Case T-49/04, 12 July 2006.

[59] B. S. Chimni, *Global Administrative Law: Winners and Losers*, paper presented at the NYU Law School Colloquium on Global Administrative Law, April 2005. See also R. P. Peerenboom, *Human Rights and Rule of Law: What's the Relationship*, UCLA School of Law, UCLA Public Law Series, year 2005, Paper 5-21. One good example is Article 6 of the European Convention on Human Rights. This provides a right of defence in judicial procedures. The Strasbourg Court is widening this provision, by submitting some national administrative procedures to the participation requirement as well. See N. Mole and C. Harby, *The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights*, Strasbourg, Council of Europe, 2001, p. 10; P. Craig, *The Human Rights Act, Article 6 and Procedural Rights*, in *Public law*, 2003, IV, Winter, p. 753 and Jacobs and White, *The European Convention on Human Rights*, C. Ovey and R. White, Oxford, OUP, 2002, p. 139 ff.

tion and participation conceived as a human right, and therefore as becoming universally applicable.

Second, there is a powerful spill-over effect from one arena to another⁶⁰: principles designed for one regulatory regime pass into other regulatory regimes, in part because of the strong connections among these regimes (for example, the connecting regimes of “trade and”).

But participatory rights in the global legal order ultimately reveal a fundamental weakness. In the many different regulatory regimes making up the global governance, the right to participate in the decision-making process is granted only when prescribed by a specific rule. The right to a hearing and notice and comment procedures are not as well-established in the global legal system as in national ones. The reason for this weakness is the insufficient development of the global judiciary, because only courts can make these principles generally applicable.

3. WHAT IS THE PURPOSE OF PARTICIPATION IN THE GLOBAL LEGAL ORDER?

The functions or justifications of participation in the global legal order are not easy to analyze. As the different participation rights are loosely defined and structured, it is difficult to classify their highly diverse functions. In addition, their functions differ depending on the institutional context and nature of the right in question. Finally, participation rights often serve many purposes. It is therefore only possible to mention the prevailing functions.

[60] G. Silverstein, *Globalization and the rule of law: “A machine that runs of itself?”*, in *International Journal of Constitutional Law*, I, 2003, n. 3, p. 428.

It has a legitimacy-building function. Global regulatory agencies are like a self-contained machine; but through participation, civil society can get closer. Global institutions, as they are established by national governments or by other global organizations, need to link themselves to civil society, in order to get the information, the support, the consensus and the cooperation required to govern.

National governments themselves need more participation rights. They delegate powers to global institutions, but mechanisms of vertical accountability (for example, budgetary controls) are inadequate checks on them. National governments also need to be able to intervene in individual decision-making processes. Moreover, national governments' controls "*need to be supplemented by an increase in horizontal accountability, that is, by an increase in the influence of the addressees of global regulation. This can be carried out by making regulators more transparent and by forcing them to publicly justify rules*"⁶¹.

This legitimizing function makes participation desirable to proponents of cosmopolitan democracy: "[...] *we will need to develop a concept of transnational democracy better equipped to take the legacy of traditional rule of law-virtues seriously*"⁶²

Participation in the global law has a second function: ensuring State involvement in global governance, furthering compliance with global decisions and fostering a horizontal dialogue between

[61] D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, in *Governance*, vol. 18, 2005, no. 4, October, p. 621 – 622.

[62] W. E. Scheuerman, *Cosmopolitan Democracy and the Rule of Law*, in *Ratio Juris*, vol. 15, no.4, December 2002, p. 454. See also D. Archibugi, *Democrazia cosmopolitica: una prospettiva partecipante*, in *Rivista italiana di scienza politica*, A. XXXV, n.2, agosto 2005, p. 261-288, but esp. p.279. On the relations between democracy and rule of law, in general, J. Habermas, *Il nesso interno tra Stato di diritto e democrazia*, in J. Habermas, *L'inclusione dell'altro. Studi di teoria politica*, Milano, Feltrinelli, 1988, p. 249 – 259. and J. M. Maravall and A. Przeworski (eds.), *Democracy and the Rule of Law*, Cambridge University Press, 2003.

States. Participation integrates domestic authorities into the global decision-making process, and provides national and sub-national interests with a forum, in order to guarantee them a degree of protection. It serves, in this case, a corporatist function, because is a means for exchanging information and establishing networks, as in the “interest representation model”⁶³.

The third prevailing function of participation in the global legal system is familiar to us from domestic legal systems: furthering the right of defence. The right to a hearing prior to a decision provides national governments or private actors with an opportunity to present their views and protect their interests.

Finally, participation as organized discussion and negotiation (a hallmark of the international legal order) is expanding in a piecemeal fashion. The global law is based on reciprocity. Therefore, each State cannot avoid providing due process to foreign States and nationals, if it wants to benefit from the same principle.

There is a link between function and structure. If the purpose of participation is to provide legitimacy or interest representation, the parties included in the procedure will be “all interested parties” (as in the case of environmental protection). If the purpose is to provide a defence, parties will be only the affected persons (as in the case of the anti-doping procedures).

[63] R. B. Stewart, *The Reformation of American Administrative Law*, in *Harvard Law Review*, vol. 88, June 1975, number 8, p. 1667 ff. and R. B. Stewart, *U. S. Administrative Law: A Model for Global Administrative Law?*, in *Law and Contemporary Problems*, 2005, 68, n. 3, Summer 2005, p. 55 ff.

4. PARTICIPATION AT THE GLOBAL AND THE DOMESTIC LEVELS

What if more participation is provided at the national level than at the global one? Allocation of regulatory power to the global level withholds participation rights from domestic stakeholders and poses therefore potential legitimacy problems⁶⁴. The growth of global regulation can “marginalize opportunities for public participation”⁶⁵.

To solve this problem, different strategies can be employed. The first is to develop participation rights at the global level. The second is to enable interested parties to participate in the national government decision-making processes necessary for participating in global organizations. The third is the participation of public interest organizations in the official delegations to the meetings⁶⁶. In the first case, umbrella organizations are established in order to bring the concerns of their constituencies to the attention of global regulators⁶⁷. An example of the second case is the United States law that requires public participation in the formulation of United States negotiating priorities in multilateral negotiations. Costs are the main limitations upon the third strategy.

[64] D. Livshiz, *Updating American Administrative Law: WTO, International Standards, Domestic Implementation, and Public Participation*, in *Wisconsin International Law Journal*, 2006 (forthcoming), p. 7, argues that participation ought to be available both domestically and internationally. See also S. S. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, in 54 *Administrative Law Review* 2002, p. 435, but especially p. 449, on the preclusion of effective citizen participation because of globalization.

[65] D. Livshiz, cit., p. 31.

[66] D. Livshiz, cit., p. 33-34.

[67] For example, the Trans Atlantic Consumer Dialogue (TACD) and the Trans Atlantic Business Dialogue (TABD): see D. Livshiz, cit., p. 45 ff.

In conclusion, legal globalization cannot be reduced to a process of Americanization⁶⁸. Global legalism – or at least global participation – accomplishes many functions: requiring reluctant national governments to respect the right to be heard; giving national governments a voice in global organizations; opening up communication between States and between global institutions, compelling them to listen, if not to cooperate; and, only at the end, giving civil society a voice vis-à-vis international organizations. Civil society or interest groups’ participation in the executive decision-making process is the dominant but not exclusive feature of the American experience⁶⁹.

IV. THE VALUE OF PARTICIPATION IN THE GLOBAL LEGAL ORDER

The most important participatory rights imposed by global rules are those addressed to national governments and international institutions, for the benefit of private parties. I shall therefore conclude by focusing on the first and the last of the five categories outlined above.

Both these two participatory rights present peculiarities. The first, because State – private parties relationships are traditionally

[68] According to M. Shapiro, *The Globalization*, cit., p. 48, “[...] Americanization and globalization partially overlap” because the American constitutional experience serves as a world model. According to D. Keleman and E. C. Sibbitt, *The Globalization of American Law*, in *International Organization*, vol. 58, Winter 2004, no. 1, p. 103 – 136, the factors determining the spread of American law are economic liberalization, political fragmentation, judicialization and the influx of American law firms. See also M.-C. Ponthoreau, *Trois interprétations de la globalisation juridique*, in *AJDA*, 2006, no. 1, 9 Janvier 2006, p. 20 – 25.

[69] According to R. Stewart, *The Reformation*, cit. See the symposium on Stewart’s article in “Issues in Legal Scholarship” on The Berkeley Electronic Press (bepress) 2005.

reserved to State regulation. The second because, by establishing direct links between the global level and civil societies, global rules bypass national governments. Both types of participatory rights challenge the State.

*“As the locus of regulatory activity has increasingly shifted “upwards”, the actors and procedural rules that facilitate effective and fair regulation domestically have followed”*⁷⁰. Globalization produces two peculiar results. First, it establishes an additional level of government, which makes normative claims upon national governments. This creates a strong need to develop mechanisms for making national governments accountable to the global level.

This new level of government, however, lacks the common features of popular democracy. It is therefore in need of legitimation.

These two peculiar features of the global legal order help to explain why it is crucial for it to incorporate liberal democratic principles⁷¹. The global legal order redefines the relationships between government and citizens at both the national and the global levels in order to ensure compliance with global rules at the national level, and to legitimize global decision-making processes.

Let us consider the duty to hear private parties. This duty is established by global rules and addressed to national governments. Does the global legal order seek to enhance the efficiency or the accountability of national governments by subjecting them to this obligation? Or does this duty promote national governments’ compliance with global rules?

[70] K. Raustiala, *The “participatory revolution”* cit., p. 585.

[71] J. H. Knox, *Separated at Birth* cit., p. 361.

Global actors do not need to worry about the efficiency or the legitimacy of national institutions. These institutions do not generally need to improve their legitimacy, as popular elections accord them a certain measure of support. And it would be paradoxical that global institutions, relying for their legitimacy on the States, should concern themselves with the degree of legitimacy of the States providing the duty of the national governments to consult their citizens before, for example, to take environmental decisions.

The participation rights created by global rules, by contrast, benefit global actors, as private actors are “possessors of significant compliance-relevant information”⁷². Empowering private actors vis-à-vis national governments makes them actors in a “fire alarm” process⁷³. Their participation triggers an investigation by national authorities, which must review their own action in light of global standards⁷⁴.

Private parties are instrumental to the implementation of global rules. These rules are addressed to the national governments, that must implement them. It would be too much complicated for the global institutions to create a compliance control mechanism from above, in order to check the compliance with the global standards at the national level. It is easier to resort to the cooperation of private parties.

Establishing such a duty of national governments to consult as a means of keeping under control State’s action is a crafty devise, as

[72] K. Raustiala, *Police patrols* cit., p. 405.

[73] M. D. McCubbins and T. Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarm*, 28 *American Journal of Political Science*, 1984, p. 165 ff.

[74] There are more effective procedures for reaching the same goal. An example is the right to make submissions to a supranational body in order to have a domestic decision reviewed.

the global legal order takes advantage of private parties as agent of that order. But how much effective can this device be? More than a control mechanism, private participation may signal the need of a check. Private parties themselves are not necessarily instrumental to global rules. National agencies may disregard private submissions. Compliance is, therefore, incidental.

This control function is strengthened by requiring national governments to hear private parties who are not nationals of the forum State, and by establishing international organs to monitor participation at the national level (as in the WTO Agreement on Safeguards, Article 3).

The duty imposed by global rules upon national governments to hear private parties aims less at making domestic institutions more efficient or accountable to their population than at making them comply with global rules.

While participation at the national level serves mainly to induce national compliance with global rules, participation at the global level is more effective as a legitimation mechanism⁷⁵.

At the global level, there is less need to control compliance. Those who create the rules and those who implement them do not belong to different legal orders. On the contrary, there is a strong need of legitimation.

An analysis of accountability in the global legal order must be premised upon an important consideration: the members of global bodies are not popularly elected. We ought therefore to abandon

[75] In general on interest representation as a way of promoting legitimacy of administrative governance, E. Magill, *Images of Representation*, in *Issues in Legal Scholarship*, Symposium : The reformation of American Administrative Law cit., p. 1 ff.

the domestic analogy. The global legal order has created unique accountability mechanisms, based mainly on information. This has been called “a pluralistic accountability system for world politics”⁷⁶.

In confronting the problem of legitimating global decision-making processes, it is crucial to establish the conditions under which a procedure can be considered legitimate.

Drawing upon studies on procedural justice, one can say that there is a parallel between legislative legitimacy and procedural legitimacy. “For the exercise of legislative power to be legitimate, the legislation must be the outcome of a process that satisfies norms of democratic participation”. Similarly, for a proceeding to be legitimate, the affected parties must become the “authors” (though not the only authors) of the proceeding. Participation has an independent value that “cannot be reduced to a function of the effect of participation on outcomes”⁷⁷.

There are four crucial questions here. Should decision-making processes – and hence participation - be located at the local, national or global level? To whom should participation extend in order to lend legitimacy to the proceeding? What should the scope of participation be, in order to legitimize the proceeding? Do legitimate global decision-making processes suffice to make legitimate global bodies?

[76] R. O. Keohane, *Accountability in World Politics*, in 29 *Scandinavian Political Studies*, n. 2, 2006, p. 82.

[77] L. B. Solum, *Procedural Justice*, University of San Diego School of Law, Law and Economics Research Paper Series, 2005, 12, on The Berkeley Electronic Press (bepress), p. 276, 280 and 321.

I do not have an answer to these questions, but can contribute a few sub-questions, to facilitate the work of those willing to go into this mine-field.

As for the first question, if the decision is shifted from the local and the national levels to the global one, local and national participation becomes more difficult. However, local interests can take advantage of opportunities to participate at the global level to take decisions and participation out of the reach of national authorities⁷⁸. This has the effect of crowding out the national agencies, that are not any more the final arbitrating authority among national interests.

As for the second question, it is clear that if the affected parties must be the co-authors of the decision, they must all be entitled to participate (or to at least waive their participation right). But who are affected parties? Those that are bound by the final decision? Or those who have a substantial interest in the final decision? And what about when they are an indeterminate mass?

As for the third question, it is clear that participation should be timely and include a minimum of notice and the opportunity to be heard. But there can be no discussion between competing interests unless cross-examination is provided. The final decision remains inscrutable unless the proceeding authority has a duty to provide reasons. There is no appeal unless there is some kind of judicial review.

[78] As in the case of land protection, giving rise to national reactions, like the proposal of “American Land Sovereignty Protection Act” (May 13, 1999). See J. Rabkin, *The Yellowstone Affair: Environmental Protection, International Treaties and National Sovereignty*, Competitive Enterprise Institute, Environmental Studies Program, May 1997 (www.heartland.org/Article.cfm?artId=3966).

As for the fourth and most difficult question, participation does not imply actual decision-making. Participants only have the general right to be heard: therefore, “participation is a weak substitute for self-government”⁷⁹. But consider the fact that what we call democracy at the national level is in fact oligarchy: officials elected periodically by the people take decisions in their name; the people themselves do not take decisions (except in the case of referenda), they only choose their representatives. This is why national legal orders supplement mere electoral democracy with interest representation in domestic decision-making processes (deliberative democracy).

V. CONCLUSION

While national administrative laws are two centuries old, a general obligation of administrative agencies to consult the interested parties has developed at the domestic level only in recent times and among many difficulties. Such general duty has been established by the legislators in 1925 in Austria, in 1946 in the United States, in 1978 in Germany, in 1990 in Italy, while in France and in the United Kingdom it has not yet been recognized by a statute.

Why, on the opposite, at the global level, an obligation to consult has developed so quickly and has spread so widely? Is there an explanation for such a maze of participatory rights (vertical and horizontal; local, national and global), that does not constrain data in received conceptual categories and distinctions⁸⁰?

[79] C. Möllers, Patterns of Legitimacy in Global Administrative Law: Trade-offs between due process and democratic accountability, paper presented to the Second Global Administrative Law Seminar, Viterbo, June, 9-10 June 2006, p. 3.

[80] L. Nader, *Le forze vive del diritto. Un'introduzione all'antropologia giuridica*, Napoli, Edizioni Scientifiche Italiane, 2003, p.62-63 and 68:

Firstly, the context is relevant. The global legal order is made of a mosaic of legal systems, with different layers (local, national, regional, global) and a plurality of sectorial regulatory regimes. There is competition and overlapping, but there is also lack of communication and coordination. It is far from being an harmonious system of law⁸¹.

Secondly, is relevant the institutional setting. This is characterised by atrophy of the legislative and the judicial branches. There is not participation at the global level through elections. There is limited availability of recourse to courts. By contrast, negotiation plays a dominant role⁸².

Thirdly, is relevant the nature of institutional relations. These are not international relations, where national governments – the States - play the role of main actors. Are, instead, inter-administrative relations, where national bureaucracies have a dominant role.

The context, the institutional setting and the nature of institutional relations are entirely new and unknown to lawyers as well as to political scientists. They are accustomed to dealing with unitary legal orders (or with a plurality of legal orders with some hierarchical structure), with institutional settings where there are three equally developed branches (legislative, judicial and executive), with relationships clearly defined by rules.

The nature of these three elements determine the method of decision and of solution of conflicts⁸³. Consultation and participation are instrumental to establish links between national legal orders,

[81] Again, compare with the legal systems studied by the anthropologists: L. Nader, cit. p. 68, 85, 97:

[82] L. Nader, cit., p. 21

[83] L. Nader, cit., p. 66

to make possible a dialogue among the local, national regional and global levels of management, to surrogate parliamentary and judicial procedures, to prevent conflicts. Consultation and participation mimic – in a very inefficient way – parliaments and courts.

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