I. ADMINISTRATIVE LAW WITHOUT THE STATE? THE CHALLENGE OF GLOBAL REGULATION*

The giraffe is like a machine that, though made out of pieces from different machines, still functions perfectly… Mr. Palomar…wondered why he was so interested in giraffes. Perhaps because the world around him moved in disharmony and he always hoped to uncover a design, a constant.[1]

1. TUNA FISHING: HOW GLOBAL ADMINISTRATIVE LAW WAS BORN

In early 1960s, the fishing of Southern Bluefin Tuna rose to over seventy thousand tons per year, leading to a marked decrease in mature tuna[2]. As a result, the catch began to suffer.

* I wish to thank Lorenzo Casini for his assistance with research on the ICANN and Stefano Battini and Francesca Bignami for their comments on an earlier draft.

[1] I. Calvino, "La corsa delle giraffe", in C. Milanini (a cura di) *Romanzi e racconti*, Milano, Mondadori, 1992, p. 940-941.

[2] M. Hayashi, "The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea", in *Tulane Environmental Law Journal*, 2000, vol. 13, p. 361-365, citing Statement of Claim and Grounds on Which it Is Based at t 3, Austl. v. Japan (lnt'l Trib. of the Law of the Sea) (July 15, 1999) [hereinafter Australian Southern Bluefin Tuna Claim]; New Zealand Ministery of Foreign Affairs and Trade, Backgrounder: Dispute between New Zealand and Japan concerning Southern Bluefin Tuna, http://www.mfat.govt.nz/support/legal/disputes/ disputeontuna.html [hereinafter New Zealand Backgrounder].

In 1973, the third United Nations Conference on the Law of the Sea met in New York.[3] It concluded its work in 1982 with a new treaty-the United Nations Convention on the Law of the Sea (UNCLOS).[4] This treaty went into force in 1994, with the signature of the seventieth state, Guyana. [5]Article 64 of the UNCLOS provides that "[t]he coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone."[6]

Articles 116 through 119 contain other provisions on the conservation of marine resources.[7] The Southern Bluefin Tuna is included in the list in Annex 1.[8]

In 1985, Australia, Japan, and New Zealand – which are the countries that do the most fishing of this type of tuna – stipulated voluntary agreements on tuna fishing.[9] These agreements proved to be inadequate because they were nonbinding, so in 1993, these three nations signed the Convention for the Conservation of Southern Bluefin Tuna (CCSBT), which went into force in 1994.[10] Other countries later acceded to this treaty.[11]

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[3] See generally E. L. Miles, *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea 1973-1982*, The Hague, Martinus Nijhoff publishers, 1998.

[4] United Nations Convention on the Law of the Sea, opened for signature December 10, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

[5] The treaty entered into force on November 16, 1994.

[6] Id. art. 64(1).

[7] Id. art. 116-19.

[8] Id. annex I.

[9] M. Hayashi, *The Southern Bluefin Tuna Cases*, cit., p. 365.

[10] See generally Convention for the Conservation of Southern Bluefin Tuna, Austl.-Japan-N.Z., May 10, 1993, 1819 U.N.T.S. 360 (entered into force May 20, 1994) [hereinafter Bluefin Tuna Convention].

[11] Taiwan and the Republic of Korea have acceded to the convention, the Philippines was accepted as a formal cooperating non-member, and discussions with Indonesia and South Africa regarding non-member status are under way. Commission for the Conservation of Southern Bluefin Tuna [CCSBTJ, About the Commission, http://www.ccbst.org/docs/about.html (last visited Nov. 11, 2005) [hereinafter CCSBT].

The 1994 Convention establishes a Commission for the Conservation of Southern Bluefin Tuna.[12] The Commission has legal personality,[13] a budget and rules governing accounting and employment relations,[14] a Secretariat with its own staff,[15] and headquarters in Canberra.[16]

Within it, separate bodies carry out oversight and consultation tasks.[17] In 2001, the Commission established an Extended Commission, made up not only of the Commission's member states, but also of other "entities or fishing entities" whose flagships fish for tuna.[18]

With authority from the CCSBT treaty and the acts subsequently adopted, the Commission is in charge of gathering statistical and scientific information on tuna and similar species, adopting binding decisions establishing quotas of tuna that may be fished annually by each treaty adherent, monitoring respect for fixed trade limitations – for example, the Commission has established that the importation of tuna by party states must be accompanied by statistical information on its provenance[19] – adopting, "if necessary, additional measures,"[20] control-

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[12] Bluefin Tuna Convention, cit., art. 6.

[13] Id. art. 6, 9 (granting legal personality to the Commission).

[14] Id. art. 11 (giving the Commission power to decide on a budget); Staff Regulations (Sept. 11 1995) (amended Sept. 24-28 1996), CCSBT, http:/ /www.ccsbt.org/docs/pdf/about_the_commission/staff_regulations.pdf (establishing employment policies for Commission employees).

[15] Id. art. 10, 11 (establishing the Secretariat).

[16] CCSBT, *Headquarters Agreement between the Commission for the Conservation of Southern Bluefin Tuna and the Government of Australia* art. 4, (March 10, 1999), http://www.ccsbt.org/docs/pdf/about_the_commission/ headquarters_agreement.pdf) (agreeing on Canberra as the Commission's headquarters).

[17] See, e.g., Bluefin Tuna Convention, cit., art. 10, 3 (establishing Commission oversight of the Secretariat), art. 9 (establishing Commission oversight of the Scientific Committee).

[18] CCSBT, *Resolution to Establish an Extended Commission and an Extended Scientific Committee and Rules of Procedure of the Extended Commission for the Conservation of Southern Bluefin Tuna* 1 (Apr. 18-21, 2001) (revised Oct. 7-10, 2003), https://www.ccsbt.org/userfiles/file/docs_english/basic_documents/the%20Extended%20Commission.pdf.

[19] Quotas are assigned to the party States but addressed to fishers. States in turn distribute the national quota among fishers.

[20] See Bluefin Tuna Convention, cit., art. 8, 1(a) (regarding the obligation of the Commission to gather statistical and scientific information), art. 8, 3(b)(obligating the Commission to determine the total allowable catch for each treaty adherent), art. 8, 1 3(b) (regarding additional measures which the Commission may adopt if necessary); CCSBT, *Southern Bluefin Tuna Statistical Document Program* 1, 1.1 (Oct. 2003), http://www. ccsbt.org/docs/pdf/about_the_commission/

ling illegal fishing on the basis of the Food and Agriculture Organization's (FAO) International Plan of Action for Illegal, Unregulated and Unreported Fishing,[21] and inviting non-party states to respect the treaty's objectives.[22]

The treaty binds the parties, but it also requires them to cooperate in deterring tuna fishing by "nationals, residents or vessels of any State or entity not party to this Convention, where such activity could affect adversely the attainment of the objective of this Convention."[23]

The Commission fixed national quotas in 1994.[24] Thereafter, however, it was unable to reach an agreement for updating them. The quotas thus remained unchanged, despite Japan's pressure to increase them.

In 1998 and 1999, Japan undertook an experimental fishing program, which exceeded the limits established by the Commission.[25] In response, Australia and New Zealand initiated arbitration before the appropriate tribunal, as provided by Article 287 and Annex VII of the UNCLOS.[26] The two countries also filed a request for interim measures before the International Tribunal for the Law of the Sea (ITLOS) on the basis of Article 290.5 of the UNCLOS.[27] In addition, in response to the unilat-

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trade_information_scheme.pdf (regarding the Commission's role in monitoring limitations on trade).

[21] See CCSBT, *Resolution on Illegal Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessels Over 24 Meters Authorized to Fish for Southern Bluefin Tuna* (Oct. 7-10, 2003), http://www.ccsbt.org/docs/pdf/about_the_commission/resolution_on_authorized_24m_vessel_list.pdf (regarding obligations of the Commission to control illegal fishing).

[22] See CCSBT, *Resolution to Establish the Status of Co-operating Non-Member of the Extended Commission and the Extended Scientific Committee* 2, 2 (Oct. 7-10, 2003), http://www.ccsbt.org/docs/pdf/about_the_commission/Resolution_To_Establish_CooperatingNonMember_Status.pdf (regarding the obligation of the Commission to invite non-members to join the Convention).

[23] See Bluefin Tuna Convention, cit., art. 15, 4.

[24] M. Hayashi, *The Southern Bluefin Tuna Cases*, cit., p. 366-367.

[25] Id. p. 368.

[26] UNCLOS, cit.; M. Hayashi, *The Southern Bluefin Tuna Cases*, cit., p. 362.

[27] UNCLOS, cit., art. 290(5); M. Hayashi, *The Southern Bluefin Tuna Cases*, cit., p. 361-362, p. 371.

eral action by Japan, New Zealand banned Japanese tuna fishing ships from its harbors.[28]

On August 27, 1999, the ITLOS handed down its decision in the Southern Bluefin Tuna Cases (New Zealand v. Japan and Australia v. Japan), ruling that the three countries were not allowed to exceed the fishing limits decided upon by common agreement and that even experimental fishing programs had to respect those limits. It also ordered the parties to resume negotiations.[29] These three countries complied with the ITLOS's order, and negotiations resumed.

In the meantime, the arbitration panel was set up. This tribunal decided to avail itself of the secretariat and chancellery of the International Centre for the Settlement of Investment Disputes (ICSID).[30]

The arbitral tribunal issued its decision on August 4, 2000. It held that without Japan's consent to refer the controversy to the arbitral tribunal, it "lack[ed] jurisdiction to entertain the merits of the dispute brought by Australia and New Zealand against Japan."[31] It acknowledged that the 1994 Convention established "the consensual nature of any reference of a dispute to either judicial settlement or arbitration" and added that "these provisions are meant to exclude compulsory jurisdiction."[32] It thus revoked the provisional measures ordered by the ITLOS but added: "[h]owever, revocation of the Order prescribing provisional measures does not mean that the parties may disregard the effects of that order or their own decisions made in conformity with it."[33] The arbitral tribunal stressed the "possibility of renewed negotiations,"[34] in accordance with

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[28] C. Bell, *Japanese Tuna Boat Banned from NZ Ports*, in *The Dominion Post*, July 14, 1998, p. 2.

[29] *S. Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan)*, 38 I.L.M. 1624 (lnt'l Trib. L. of the Sea 1999). See J. S. Barkin and E. R. DeSombre, "Unilateralism and Multilateralism in International Fisheries Management", in *Global Governance*, 2000, vol. 6, p. 339, for an overview of international fishing and related issues.

[30] International Centre for Settlement of Investment Disputes, http:// www.worldbank.org/icsid/about/about.htm. Note that this was the first arbitral tribunal established on the basis of Annex VII of the UNCLOS.

[31] *S. Bluefin Tuna Case (N.Z.V. Japan; Austl. V. Japan)*, 39 I.L.M. 1359, 1391 (UNCLOS Arb. Trib. 2000).

[32] Id. p. 1389-1390.

[33] Id.

[34] Id. p. 1392.

Article 16.2 of the 1994 Convention, for which "failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph I above."[35]

In response to this decision, in December 2000, New Zealand revoked the prohibition on Japanese tuna fishing ships in its harbors.[36] Negotiations continued that led to a decision in 2001 to undertake a scientific program to measure the volume of the tuna stock.[37] This program was carried out by independent experts and included placing observers on board fishing ships to control the quantity of tuna fished.

On examination, this case exemplifies all distinctive features of administrative law.[38] There is an organization vested with authoritative powers. It adopts administrative decisions addressed to both constituent parties and other actors. Finally, there are judges empowered to settle disputes between the regulated actors arising out of the organization's decisions.

Once adopted, the global level decision – specifically, the Commission's decision – should be implemented by the States. In this regard, article 117 of the UNCLOS requires that "[a]ll States have the duty to take, or to cooperate with other States in taking, such measures for their respective

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[35] «Negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.» Bluefin Tuna Convention, cit., art. 16(1).

[36] New Zealand Backgrounder, cit.

[37] Id.

[38] See generally C. Romano, "The Southern Bluefin Tuna Dispute: Hints of a World to Come…Like it or Not", in *Ocean Development and International Law*, 2001, vol. 32, p. 313; V. Roben, "The Southern Bluefin Tuna Cases: Re-Regionalization of the Settlement of Law of the Sea Disputes?", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2002, vol. 62, p. 61; A. Boyle, "The Southern Bluefin Tuna Arbitration", in *International and Comparative Law Quarterly*, 2001, vol. 50, p. 447; D. J. Devine, "Compulsory Dispute Settlement in UNCLOS Undermined? Southern Bluefin Tuna Case: Australia and New Zealand v. Japan 4 August 2000", in *South African Yearbook of International Law*, 2000, vol. 25, p. 97; C. E. Foster, "The "Real Dispute" in the Southern Bluefin Tuna Case: A Scientific Dispute?", in *International Journal of Marine and Coastal Law*, 2001, vol. 16, p. 571; M. Hayashi, *The Southern Bluefin Tuna Cases*, cit.; J. Peel, "A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes Under UNCLOS in the Aftermath of Southern Bluefin Tuna Arbitration", in *Melbourne Journal of International Law*, 2002, vol. 3, p. 53; L. Sturtz, "Southern Bluefin Tuna Case: Australia and New Zealand V. Japan", in *Ecology Law Quarterly*, 2001, vol. 28, p. 455.

nationals as may be necessary for the conservation of the living resources of the high seas."[39] Yet, even in the top-down phase of implementation, the Commission interacts with members of domestic systems.

Compared to the more familiar State-level administrative law, global administrative law bears some differences. A first difference is the lack of exclusivity among international regimes. The rules governing tuna fishing are rooted in both a specific regime-the treaty for the protection of tuna-and in the general regime of the law of the sea.[40] The Commission for the Conservation of Southern Bluefin Tuna applies not only the norms of the treaty establishing it, but also decisions adopted by another international organization, the FAO.[41] In other words, three different international orders are inter-twined.

A second difference between global and State administrative law is the global law's high degree of self-regulation as regulators and the regulated exist on the same plane. The former collectively decide to submit to shared rules. Invitations to cooperate are used in order to ensure application of the same rules by third parties.

A third difference is that decisions made by independent committees on the basis of scientific criteria and negotiations concluded by agreements play a more important role in global administrative law than in domestic law. In domestic administrative law, decisions made by representative bodies are political decisions, and the unilateral decisions typical of "command and control" prevail.

A fourth difference is that the line between public and private is hardly clear at the global level. Extended members of the Commission include member States as well as fishing entities, which may be sub-State bodies or even private actors.[42]

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[39] UNCLOS, cit., art. 117.

[40] See *Southern Bluefin Tuna Case (Australia & New Zealand v. Japan)*, ICSID (W. Bank) 91, 91-93, available at http://www.worldbank.org/icsid/bluefintuna/award080400.pdf, (Arbitral Tribunal UN Convention on the Law of the Sea 2000) (deciding to treat the controversy as «a single dispute arising under both Conventions» invoking the «parallelism of treaties» and admitting that «[t]he current range of international legal obligations benefits from a process of accretion and accumulation»).

[41] Food and Agriculture Organization of the United Nations, http:// www.fao.org/.

[42] Neither the treaty norms nor the norms adopted by the organization define the nature of «fishing entities». They must however have ships flying their own flag.

The administrative law inherent in the Bluefin Tuna case may be defined as global[43] even though this qualification may seem unacceptable to those who believe that administrative law cannot be global by definition. Some believe that administrative law is always domestic *par excellence* and that if it is global, then it cannot be administrative law, since global law concerns relations between States.

In this section, I respond to some of the current questions regarding global administrative law. First, how is it structured? Does it operate according to international law by means of negotiation or according to traditional administrative law by "command and control"?

Second, on which grounds does global administrative law rest? National administrative laws are sustained by a constitutional framework that exists above and beyond the State. Beyond the State, there lies a global legal space, which is, at most, a system of "global governance." Can there then be a world administration without a world government?

Finally, what are the relationships between global administrative law and domestic administrative law? 1s there a mismatch, an overlap, or integration between the two levels? Does the emergence of global administrative law alter the structure of national public powers?

[43] This term calls for an immediate specification. It is the most commonly used. There are, however, two alternative terms: the more traditional «universal law» and «world-wide law» (*droit mondial*) preferred by the French. See, e.g., G. D. Romagnosi, *Diritto pubblico universale* [Universal Public Law] (3rd ed. 1833); M. Delmas-Marty, *Trois défis pour un droit mondial*, Paris, Seuil, 1998. Here the term «international law,» coined by Jeremy Bentham to indicate the relations between sovereign States as unitary actors, is to be avoided. J. Bentham, *An Introduction To The Principles of Morals and Legislation* (1789), p. 6 (J.H. Burns and H.L.A. Hart eds., Oxford University Press, rev. ed. 1996); see generally M. W. Janis, "Jeremy Bentham and the Fashioning of International Law", in *American Journal of International Law*, 1984, vol. 78, p. 405. The expression "international institutional law" has been used to indicate the law of international organizations, but mainly with regard to their internal features (like the relations between international organizations and their employees).

2. THE SPREAD OF GLOBAL REGULATORY SYSTEMS

Global regulatory systems[44] are quite widespread. A quick overview of the areas in which they operate, and of the number and multiplicity of regulators in many sectors, illustrates the density of global regulation.

Trade, finance, the environment, fishing, exploitation of marine resources, air and maritime navigation, agriculture, food, postal services, telecommunications, intellectual property, the use of space, nuclear energy, and energy sources are all subject to global regulation. But global regulation involves many other sectors as well, such as the production of sugar, pepper, tea, and olive oil. It can be said that there is no realm of human activity wholly untouched by ultra-State or global rules.[45]

Goods and functions that escape State control are regulated at the global level.[46] States are not able to control the fishing of migratory fish species, just as they are powerless to unilaterally limit the use of greenhouse effect-producing gases or to prevent the spread of financial crises. When their borders and functions overlap and conflict, as in the case of high seas fishing, States benefit by giving up their regulatory powers to other global, public authorities.

These needs lead to the establishment of global regulatory bodies, called international or intergovernmental organizations. Their current number varies according to the criteria used to define them. According to an assessment based on more restrictive criteria, there were two hundred and forty-five such organizations in 2004; according to surveys based on more open-ended criteria, there were one thousand; and according to a

[44] The term «global regulatory system» is preferable to the frequently used «global governance» (which indicates the activity of governing in the absence of an institution – the government), «international regime» (which depends upon a term to be avoided in this framework, as mentioned above) and «international organization» (descriptive and limited to the structural nature). This section does not examine «regional» bodies, like the European Union, which have developed public powers similar to those of the States, even though they themselves are different from States.

[45] See generally R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making*, Berlin, Springer, 2005, for an overview of the breadth of global administrative law.

[46] P. G. Cerny, "Globalization and the Changing Logic of Collective Action", in *International Organization*, 1995, vol. 49, p. 595, p. 618.

count based on even more liberal criteria, there exist 7306.[47] To appreciate the meaning of these numbers, consider that there are more of such organizations than there are States (one hundred and ninety-three States belong to the United Nations).[48]

Also interesting is the speed with which these organizations have been established, mostly within the last quarter of a century. In this same period, moreover, the participation of national public authorities in such organizations has tripled.[49] Furthermore, in several sectors, there is more than one regulatory authority, and each body has a different responsibility within the same sector. The International Maritime Organization (IMO)[50] and the International Seabed Authority (ISA)[51] regulate the use of the seas, as does the International Tribunal for the Law of the Sea (ITLOS).[52] The environment is regulated by the World Meteorological Organization (WMO),[53] the United Nations Convention on Climate Change-Clean Development Mechanism (UNFCCC-CDM),[54] the Global Environmental Facility (GEF),[55] and their respective implementation bodies – the United Nations Environment

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[47] See Union of International Associations, *Yearbook of International Organizations: Guide to Global and Civil Society Networks 2004-2005*, 2005, vol. 1, p. 2914. See also N. M. Blokker and H. G. Schermers (eds.), *Proliferation of International Organizations: Legal Issues*, The Hague, Kluwer Law International, 2001, pp. 3-4.

[48] Growth in United Nations Membership, 1945-2005, http://www.un. org/Overview/unmember.html.

[49] Union of International Associations, *Yearbook of International Organizations: Guide to Global and Civil Society Networks 2004-2005*, cit., p. 38-39.

[50] See International Maritime Organization, Introduction to IMO, http://www.imo.org/About/mainframe.asp?topic_id=3.

[51] See International Seabed Authority, About the Authority, http://isa.org.jm/en/about/default.htm.

[52] See International Tribunal for the Law of the Sea, General Information: Overview Introduction, http://www.itlos.org/general_information/ overview/intro_en.shtml.

[53] See World Meteorological Organization, About WMO, http://www. wmo.ch/web-en/about.html.

[54] U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 165 [hereinafter UNFCCC]. See also UNFCCC, The Mechanisms under the Kyoto Protocol: Joint Implementation, the Clean Development Mechanism and Emissions Trading, http://unfccc.int/kyoto_mechanisms/items/1673.php (last visited Jan. 23, 2006).

[55] Global Environmental Facility, http://www.gefweb.org.

Program,[56] the United Nations Development Program,[57] and the World Bank.[58]

Many bodies are active in the economic and financial area, such as the International Monetary Fund,[59]the World Bank,[60] the Basel Committee on Banking Supervision,[61] the Financial Stability Forum (FSF),[62] the Financial Stability Institute (FSI),[63] the Committee on Payment and Settlement Systems,[64] the Egmont Group,[65] the Financial Action Task Force on Money Laundering (FATF),[66] the International Organization of Securities Commissioners (IOSCO),[67] the International Association of Insurance Supervisors (IAIS),[68] and the International Accounting Standard Board (IASB).[69] The need to coordinate all of these organizations leads to the creation of additional bodies in which several organizations participate, like the Joint Forum, established in 1996 between IOSCO and IAIS under the aegis of the Basel Committee.[70]

To summarize, there are lots of global regulatory systems. The centrality of the State to the notion of public powers has become an optical illusion. This does not mean, however, that the global legal order has supplanted the State, nor that it has become dominant, inasmuch as it

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[56] U.N. Environment Program, http://www.unep.org.

[57] U.N. Development Program, http://www.undp.org.

[58] The World Bank, http://www.worldbank.org (last visited Nov. 23, 2005).

[59] International Monetary Fund, http://www.imf.org/external/index.htm.

[60] The World Bank, http://www.worldbank.org.

[61] Basel Committee on Banking Supervision, http://www.bis.org/bcbs/.

[62] Financial Stability Forum, http://www.fsforum.org/home/home. html.

[63] Financial Stability Institute, http://www.bis.org/fsi.

[64] Committee on Payment and Settlement Systems Background Information, http://www.bis.org/cpss/cpssinfo0l.htm.

[65] The Egmont Group Financial Intelligence Units, http://www.egmont group.org/about_egmont.pdf.

[66] The Financial Action Task Force, http://www.fatf-gafi.org.

[67] General information on IOSCO, http://www.iosco.org/about/.

[68] International Association of Insurance Supervisors, http://www.iais web.org/132_ENU_HTML.asp.

[69] International Accounting Standards Board: History, http://www.iasb.org/about/history.asp.

[70] IAIS - Joint Forum, http://www.iaisweb.org/l34_l343_ENU_HTML.asp.

is also through global regulatory systems that domestic public powers are able to make their voices heard.

This also suggests that the global legal order is a "plural" order in the sense that it lacks unity. Even larger bodies, like the UN family, are not hierarchically superior to the others, nor are they more influential.

3. DEVELOPMENT THROUGH MUTUAL CONNECTIONS

States develop from and around a center. Global administrative institutions develop through mutual connections from peripheral points, in federative or associate forms.

The simplest and most common way that global administrative institutions develop is when States associate in order to establish an ultra-State body; like when the UN international organizations arise from agreements between States but also promote other agreements. For example, the International Maritime Organization has promoted agreements in the areas of security, protection of the marine environment, and the maritime transport of nuclear materials.[71]

In addition to States, sub-State organs may also join to establish international bodies. National bodies for the regulation of financial markets are associated in the IOSCO, national insurance regulating bodies come together in the IAIS, the International Competition Network (ICN) brings together national competition authorities, the Financial Stability Forum (FSI), promoted by the finance ministries and central banks of the G7 countries, brings together finance ministers and heads of the central banks.

A third type of global organization is comprised of neither States, nor of lower level, sub-State entities, but of other global organizations, acting alone or together. For instance, the Commission on Phytosanitary Measures was established by the FAO,[72] and the International

[71] See, e.g., Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, http://www.imo.org/home.asp.

[72] Food and Agriculture Organization of the United Nations, http://www.fao.org/documents/show_cdr.asp?url_fils=/Docrep/W9474T/w9474t 04.htm.

Centre for Settlement of Investment Disputes was established by the World Bank.[73]

In other cases, different global organizations get together to establish another global organization. The Financial Stability Institute (FSI) was set up in 1999 by the Bank for International Settlements and the Basel Committee on Banking Supervision. The *Codex Alimentarius* Commission[74] was established by the FAO and the World Health Organization (WHO). The World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD) together established the International Trade Centre.[75]

The horizontal interpenetration of global structures is reinforced by organizational and functional relationships. Examples of organizational ties are the participation of the WTO's Director General on the Executive Board of the UN, the World Bank President's concurrent presidency of the Administrative Council of the International Centre for Settlement of Investment Disputes, the FAO Director General's nomination of the Secretary of the Commission on Phytosanitary Measures, and the appointment of the Secretary of the UNFCC-CDM by the Secretary General of the UN.

Examples of functional relationships are the network of agreements between the World Intellectual Property Organization (WIPO) and the WTO; the close relationship between the Universal Postal Union (UPU), the International Civil Aviation Organization (ICAO), and the International Telecommunication Union (ITU); between the Office International des Epizooties (OIE) and the FAO, WTO, *Codex Alimentarius* Commission, and the WHO; between the Financial Stability Forum (FSF), the IOSCO and IAIS; and between the International Olive Oil Council and the *Codex Alimentarius* Commission.[76]

Even closer are the functional relationships between the WTO and the Commission on Phytosanitary Measures, and between the WTO

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[73] International Centre for Settlement of Investment Disputes, http://www.worldbank.org/icsid/about/about.htm

[74] *Codex alimentarius*, http://www.codexalimentarius.net/web/index_ en.jsp.

[75] International Trade Centre UNCTAD/WTO, http://www.intracen.org/menus/itc.htm.

[76] See C. Tietje, "Global Governance and Inter-Agency Co-operation in International Economic Law", in *Journal of World Trade*, 2002, vol. 36, p. 501 for a characterization of inter-agency cooperation as a "central element of global economic governance."

and the OIE. The standards set forth by the Commission are not binding in themselves, but have become so within the framework of the WTO because WTO members must establish their phytosanitary measures on the basis of the Commission's standards. The same holds true for the standards of the OIE.[77] Thus, standards established by one organization become binding rules by virtue of the force given to them by another organization.[78]

Finally, the connection between different global regimes is strengthened by the fact that some regimes "lend" their institutions to others for the resolution of disputes. For instance, the International Centre for Settlement of Investment Disputes, instituted for the resolution of controversies regarding World Bank investments, also decides conflicts regarding the North American Free Trade Agreement, the Energy Charter

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[77] The WTO provides that «Members shall base their sanitary or phytosanitary measures on international standards...»and that «[s]anitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.» World Trade Org. Agreement on the Application of Sanitary and Phytosanitary Measures art. 3.1-3.2, Apr. 15, 1994, available at http://docsonline.wto.org/ (follow «Browse documents, Frequently Consulted, Legal Texts and Agreements» hyperlink; then follow «Agreement on the Application of Sanitary and Phytosanitary Measures» hyperlink). The OIE, established in 1924, now has 164 members. Office Int'l des Epizooties, What is the OIE? Home Page, http://www.oie.int/eng/OIE/en_oie.htm (last visited Oct. 18, 2005). In 1998 it signed an official agreement with the WTO which provides for cooperation, consultation, participation, exchange of information and documents and joint action concerning the standards, guidelines or recommendations of the OIE. Agreement between the World Trade Org. and the Office Int'I des Epizooties, WTO-OIE, May 4, 1998, http://www.oie.int/eng/oie/accords/en_accord_omc.htm.

[78] See K. Raustiala and D. G. Victor, "The Regime Complex for Plant Genetic Resources", in *International Organization*, 2004, vol. 58, n. 2, p. 277, for a discussion in this vein of the "regime complex," made up of "elemental regimes" which are characterized by a "horizontal, overlapping structure" and the "presence of divergent rules and norms." In other cases, the standards set forth by global bodies become binding by virtue of the decisions of national administrations, as in the case of norms established by the Basel Committee on Banking Supervision, which are given executive force by national central banks. See Basel Committee on Banking Supervision, History of the Basel Committee and its Membership, (Oct. 2004), http://www.bis.org/bcbs/history.pdf. This poses the problem of "private governance regimes," on which, for American law, see H. Schepel, "Constituting Private Governance Regimes: Standards Bodies in American Law", in C. Joerges, I.-J. Sand and G. Teubner (eds), *Transnational Governance and Constitutionalism*, Oxford, Hart, 2004, p. 161.

Treaty, the Cartagena Free Trade Agreement, and the Colonia Investment Protocol of Mercosur.[79]

This system of separate regimes, which are connected into a network by piecemeal ties and cross-references, is not the result of a unitary design and, as we have already seen, does not embody a unitary structure. Instead, it has the following characteristics: it is cooperative and non-hierarchical; it has no center; it does not develop according to a plan, but spontaneously and incrementally; it creates a thick regulatory mass.

Finally, though originating in the States – which continue to keep it under control – this system becomes increasingly less dependent on them as it develops autonomously through voluntary, spontaneous processes.[80] As we shall see ahead, national public powers compensate their relative loss of power by participating in the decision-making processes of global bodies. The incremental and progressive nature of this process advises against attempting a taxonomy. It is instead important to outline its fundamental traits and trace the path of its development.

4. A FLUID ORGANIZATION

As we have seen, the establishment of global regulatory systems is driven by three tendencies: the States' pooling of some of their own tasks in bodies operating at a level other than their own, the need of sub-State bodies to forge relationships with each other, and increased co-operation among international organizations at the global level.

The recurrence of these three factors might suggest that these organizations are constituted according to a homogeneous pattern. On the contrary, their functions vary – there is no real separation of powers

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[79] See International Centre for Settlement of Investment Disputes, About ICSID, 7 (2005), htpp://www.worldbank.org/icsid/about/about.htm.

[80] C. Moellers, "Transnational Governance without a Public Law?", in *Transnational Governance and Constitutionalism*, cit., p. 327, (observing that there is a "generation of norms as a spontaneous coordination process, normally between formally equal actors").

within them, and the distinctions between participants and non-participants, and between public and private participants, are uncertain.[81]

The most recurrent functions in global regulatory systems are coordination, the promotion of cooperation, harmonization, and standardization. But there are also additional functions, like the allocation of scarce resources (for instance, the allocation of radio frequencies by the International Telecommunication Union),[82] assistance and the provision of services (for example, the work of the International Organization for Migration,[83] the WHO, and the OIE), and protection (for instance, the United Nations High Commissioner for Refugees (UNHCR)).[84]

The organizational structure of global organizations can usually be broken down into four parts: a collegial body, usually referred to as an assembly, in which all of the participants – States, other national organizations, and international organizations – are present; a more restricted collegial body, usually called a council, whose members are elected by the assembly; an executive body, called secretariat, made up of regular employees of the organization; and committees, generally made up of functionaries of national administrations.

The structures vary from one organization to another. There are some, for instance, that do not have their own secretariat. The Basel Committee on Banking Supervision Secretariat is provided by the Bank for International Settlements,[85] and the Paris Club committee (1956) is supported by the French Finance Ministry.[86] Other global organizations have additional regional or decentralized apparatuses. Still others are constituted in the form of a "group." This is the case of the World Bank Group, which is made up of five different institutions – the International

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[81] See B. Koremonos, C. Lipson and D. Snidal, "The Rational Design of International Institutions", in *International Organization*, 2001, vol. 55, p. 761 for a discussion on the "flexibility of arrangements" of global institutions.

[82] International Telecommunications Union, Purposes (2004), http:// www.itu.int/aboutitu/ overview/ purposes.html.

[83] The International Organization for Migration was first established in 1951 as the «Intergovernmental Committee for European Migrations.»

[84] United Nations High Commissioner for Refugees, Basic Facts, 1 (2005), http://www/ unhcr.ch/cgi-bin/texis/vtx/basics.

[85] Basel Committee on Banking Supervision, http://www.bis.org/bcbs.

[86] Paris Club, http://www.clubdeparis.org/en/index.php.

Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).[87]

While States have a stable division of powers between their different organs, global institutions have, at most, a division of functions between the different organs. And there are even organs that are made up of the same participants but have different capacities and perform different tasks. Within the WTO, this is the case of the General Council, the Dispute Settlement Body, and the Trade Policy Review Body.

The lines distinguishing participants from non-participants and States from private organizations (governmental and non-governmental organizations, to use the common terminology) are also unclear. In the International Civil Defense Organization (ICDO), both affiliated members and associated members without the right to vote participate.[88] In the IAIS, observers such as insurance companies, associations thereof, practitioners, and consultants participate.[89] There are many governmental organizations that admit non-governmental organizations as members: the UPU, ITU, WMO, ILO, WIPO, and the International Civil Aviation Organization (ICAO). In the ICAO, for example, the International Air Transport Association, the Airports Council, the International Federation of Airline Pilots' Associations, and the International Council of Aircraft Owner and Pilot Associations all participate.[90] Finally, many global organizations accept unions of States (mainly the European Union) as a member. The WTO, ICDO, and the International Olive Oil Council all do this.[91]

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[87] International Bank for Reconstruction and Development, http:// www.web.worldbank.org; International Development Association, http:// www.web.worldbank.org; International Centre for Settlement of Investment Disputes, http://www.worldbank.org/icsid/about/about.htm; International Finance Corporation, http://www.ifc.org/about; Multilateral Investment Guarantee Agency, http://www.miga.org.

[88] International Civil Defense Organization, About ICDO Membership (2005), http://www.icdo.org/conmem.htm.

[89] International Association of Insurance Supervisors, About IAIS (2005), http://www.iaisweb.org/132_ENU_HTML.asp.

[90] International Civil Aviation Organization, How it Works (2005), http://www.icao.int/cgi/goto_m.pi?/icao/en/howworks.htm.

[91] See e.g., Understanding the WTO: The Organization (2005), http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.

As we move farther away from the State, the line between public and private becomes more and more unclear. From the organizational standpoint, the global legal order does not follow a single model. It is instead an example of "ad-hoc-cracy," in the sense that it adapts to the functions to be performed, sector by sector. Functions, organizations, the internal balance of powers, and the relationship between public and private all vary according to specific needs.

5. THE JOINT DECISION-MAKING TECHNIQUE

The above examination of global organizations suggests that global administration does not exist in isolation from the national level. Examining their decision-making processes confirms this diagnosis. Global administrations are inspired by the techniques of joint action, mutual conditioning, composition and balancing, and progressiveness.[92]

It is just as misguided to argue that States have an exclusive hold on the reins of global power, as it is to think that global decisions escape their power.[93] There is a mixed, gray area between global regulatory systems and national regulators. This can serve the States and the global system, and sometimes both at the same time-States in making their voices heard in the global system, and the global system in penetrating States to reach civil society and local actors, even if this reach is generally lacking in global public powers. The global legal order is a saprophyte order unable to live on its own; it is necessarily related with others, and it makes them permeable, while reinforcing them at the same time. In contrast with international law, in global law, the two levels come together.

The committees of global organizations comprised of national representatives, the mixed (global-domestic) network of offices, and the

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[92] Note that according to Bentham, international law and national law are independent of each other, and the question of whether an international law norm applies to national law depends on whether this norm has been accepted into national law. J. Bentham, *An Introduction To The Principles of Morals and Legislation* (1789), cit., p. 296. See also M. W. Janis, *Jeremy Bentham and the Fashioning of International Law*, cit., p. 408.

[93] For a discussion of the different roles and functions of international organizations, see A. Caffarena, *Le organizzazioni internazionali*, Bologna, il Mulino, 2001, pp. 36-43.

national implementation of global decisions all constitute elements of the gray area in which global and domestic regulatory systems co-operate to pursue a common interest, even if for different reasons.

Global regulatory systems relive the States' formative experience of "polysynody."[94] There is a panoply of committees, mainly consultative, in which proposals are elaborated. These committees are made up of national civil servants or experts, or representatives of national interests. The distribution of work is clear. Representatives of domestic political bodies sit in the highest bodies of the global administrations. To see how this works, take the examples of the WMO, the Commission on Phytosanitary Measures, the *Codex Alimentarius* Commission, and the IAIS.

This polysynody addresses the need for specialization, but it mainly serves the purpose of communicating with national administrations and civil society. In fact, it is through the committees that global regulators are able to stretch their own scope of action within States, to listen to their needs, and to acquire information. At the same time, committees serve States and national interests in making their voices heard at the global level, and in keeping global decision making processes under control. The conditioning is mutual.

Joint decision making also occurs in the sharing of functions between national offices and the offices of global regulatory systems. An example of this is the tuna fishing case, in which the Commission has direct relations with the States and with fishing entities. Likewise, in most other cases, the global organization has relationships with both member States and the national offices. These offices are directly designated by the international organization concerned, and usually operate on the basis of orders by, and respond to, the same organization. For instance, the OIE has direct relations with the State sectoral offices of the different

[94] On this matter see the pivotal work by C.I. De Saint-Pierre, *Discours sur la Polysynodie* (1718), Italian translation in C.I. De Saint-Pierre, *Scritti politici. Per la pace perpetua e sulla polisinodia*, Lecce, Milella, 1996. Saint-Pierre's ideas were subsequently discussed by Rousseau. The plurality of councils was supposed to help the king by placing competent persons at his side, in order to provide counsel and information. The polysynody was opposed to the absolute power, defined as "vizery." This is one of the first theories of bureaucracy as a stable body of experts.

countries.[95] Article IV of the International Plant Protection Convention established the Commission on Phytosanitary Measures and provided that each contracting party shall establish a national plant protection organization, corresponding to the global institution,[96] set forth the tasks to be assigned to it, and required that such organization cooperate at the international level.[97] Furthermore, Article VIII.1 provides that member States undertake to cooperate with one another in establishing regional (meaning pluri-State) plant protection organizations in appropriate areas.[98]

The global and domestic administrative levels depend on each other in the sense that decision-making processes begin at the global level, either with preliminary examination or a decision, and they conclude at the national level, either with a decision or with the implementation of the global decision. In the first case, the domestic decision depends on preliminary examination, carried out by the international organization. In the second case, the effectiveness of the decision adopted by an international organization depends on the implementation by national offices.

An example of the first type of decision making process is that provided and regulated by the Patent Cooperation Treaty. This provides that a patent application can be submitted to the international organization, which carries out a preliminary examination and then transfers the procedure to the national office specified by the applicant. The national office carries out further examinations and makes a decision.[99]

Much more frequent is the second type of decision-making process, where enforcement lies with member States. This is because, with a few exceptions, global regulatory systems lack executive apparatuses. For

[95] International Agreement for the Creation at Paris of an International Office for Epizootics, Annex, art. II, Jan. 17, 1925, 57 L.N.T.S. 135.

[96] The norm provides that «[e]ach contracting party shall make provision, to the best of its ability, for an official plant protection organization with the main responsibilities set out in this Article.» International Plant Protection Convention art. IV, Dec. 6, 1951-May 1, 1952, 23 U.S.T. 2767, 150 U.N.T.S. 67.

[97] Id. art. Xl.

[98] Id. art. IX.

[99] Patent Cooperation Treaty, arts. 31-42, June 19, 1970, 28 U.S.T. 7645, 7677-87, 1160 U.N.T.S. 231, 247-52.

example, according to Annex C (control, inspection and approval procedures) of the Agreement on the application of sanitary and phytosanitary measures, WTO members must ensure procedures to fulfill global sanitary and phytosanitary measures.[100]

In both cases, global administrative functions condition domestic administrative functions, and global administrations eventually appropriate some of the States' own tasks.

Both when global administrative acts are non-binding and when compliance is voluntary,[101] and when they are binding but depend on national offices for their implementation, global regulatory systems compensate for their weakness by keeping execution under their control. For example, the WIPO provides for an Advisory Committee on Enforcement of Industrial Property Rights, which elaborates best practices and implementation procedures.[102] Other organizations check up on implementation, or make use of the assistance of national offices or enable private actors to call their attention to implementation gaps. In this way, the acts are non-binding, while the procedures implementing them are binding.[103]

The mixture of global and national is, in these cases, particularly strong and complex. Domestic administrations that have collaborated to reach a decision must collaborate again, this time individually, to ensure implementation. Mediation at the national level is fundamental. The decision-making process is mixed, and cannot be labeled as exclusively global or national. Therefore, there is no clear separation between global law and domestic law. Joint decision-making renders national legal systems porous. It disaggregates them, undermining the paradigm of the State as a unity, as when, for instance, it is the global regulatory system

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[100] Agreement on Sanitary and Phytosanitary Measures Annex C, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, available at http://www.wto.org/English/docs_e/legal_e/legal_e.htm.

[101] This is the case with many standards. See, e.g., S. A. Shapiro, "International Trade Agreements, Regulatory Protection, and Public Accountability", in *Administrative Law Review*, 2002, vol. 54, p. 435 and 438-440.

[102] Press Release, WIPO, Advisory Committee on Enforcement Holds Inaugural Meeting (June 16, 2003), http://www.wipo.int/wilma/pressinfo-en/ 200306/msg0000l.html.

[103] F. Morgenstern, *Legal Problems of International Organization*, Cambridge, Cambridge University Press, 1986, p. 125.

that designates the competent national office to maintain direct relations with it. It penetrates into the national systems, which thus lose their impermeability or exclusivity and are required to cooperate with the higher level. It by-passes the States, insofar as it directly addresses national citizens, organizations and corporations, which become the targets of global decisions. Finally, it fosters the lateral opening of national systems, which become able to communicate with each other by means of equivalence agreements. These render arbitrage between national legal systems possible. As a result, the boundary between the State and the global is blurred.[104]

Similarly, in the opposite direction, there is a continuous exchange from the State level to the global one, in that the global level absorbs principles common to domestic systems like a sponge, but this creates additional problems. The national models in circulation are in fact those of the dominant countries or at least those of States with an evolved administrative law. But these do not easily fit other countries, as is demonstrated by the principle of open bidding for the tender of public contracts, which encounters difficulties in those countries in which public contracts are used for the pursuit of other public ends, such as the development of particular zones, and ad hoc, preferential, regimes are set up to favor this.

In conclusion, the porousness of national legal orders and the sponge-like nature of the global one make mutual conditioning possible. If the States can capture global organizations, global organizations, in turn, can also capture the States.[105]

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[104] S. Sassen, "The Participation of States and Citizens in Global Governance", in *Indiana Journal of Global Legal Studies*, 2003, vol. 10, p. 5, 8.

[105] On «integrated decision-making,» see J. C. Dernbach, "Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking", in *Indiana Journal of Global Legal Studies*, 2003, vol. 10, p. 247, 279-280. On regulatory agencies becoming captives of the regulated industry and the "capture" theory, see M. H. Bernstein, *Regulating Business by Independent Commission*, 157 (1955); J. Q. Wilson, "The Politics of Regulation", in J. Q. Wilson (ed.), *The Politics of Regulation*, New York, Basic Books, 1980, p. 357- 360.

6. THE GLOBAL AND THE DOMESTIC ARE NOT TWO SEPARATE LEVELS

We have seen that between the global and the domestic spheres there is a gray area of mixed bodies and procedures, joint decisions and parasitical systems. All of this enables us to understand that there is no clear line of separation between the global and the national.

In these cases, the distinction between international and domestic law does not hold. The weakness of the recurring metaphor of levels is also clear. According to this metaphor, public powers are set up on such different levels: regional, national, and global.

The continuity between the two orders under examination here – the national and the global[106] – is clear if we consider the relationships between citizens (or better yet, nationals, in the sense of persons belonging to a nation) and global administrations. Global administrative law ascribes two fundamental rights to citizens, and these are derived from domestic administrative law: the right to participation and the right to defense. The former consists of the chance to intervene in the course of a global or mixed administrative proceeding; the latter implies a citizen's right to appeal to a global judicial authority for the review of national (or global) decisions.

An example of participation in an individual administrative proceeding (and thus of adjudication) is in the abovementioned Patent Cooperation Treaty. This provides that, during the International Preliminary Examination, the applicant has "a right to communicate orally and in writing" with the "International Preliminary Examining Authority," which must, in turn, issue a written opinion, to which the applicant may respond.

The participation in an administrative proceeding in which multiple parties are interested, and that thus has a general character, is provided for in the projects financed by the IBRD and the IDA. Interested parties may request the partially independent World Bank Inspection Panel for an opinion.[107]

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[106] An analogous examination of the relations between the regional and global level ought to be undertaken.

[107] See, e.g., The Inspection Panel, India: Mumbai Urban Transport Project (2004). See also B. Kingsbury, N. Krisch and R. B. Stewart, *The Emergence of Global Administrative Law*, p. 20-21 (N.Y.U. School of Law Inst. far Int'l Law and Justice, Working Paper No. 1, 2004),

A genuine administrative judicial system has thus evolved in the global legal system. We will turn to this later. It is interesting now to underscore the quantity and the variety of the relationships being established between national citizens or businesses, global adjudicating bodies, and domestic administrations.

Disputes between the corporations of one State and the public authorities of another may be brought before the ICSID, a global organization with the task of conciliation and arbitration.[108] Likewise, chapter 19, Article 1904 of the NAFTA treaty empowers a Bi-national Review Panel to review the decision of a national administrative body, on the basis of the national law of that State and upon the application of a private business from another State.[109]

The World Intellectual Property Organization Arbitration and Mediation Center (WIPO) can hear disputes between a domain name registrant and a third party holding the same registration in the context of country code top-level domain names, like ".fr" or ".ro" The question is brought before a Dispute Resolution Service Provider approved by the Internet Corporation for Assigned Names and Numbers (ICANN), which then names an administrative panel to rule upon the application. The decision then must be implemented by the national registration administrator, which in many countries has a public character.[110] The "WTO Dispute Settlement Body also has the job of reviewing the deci-

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available at http://www.iilj.org/global_adlaw/documents/10l20502_KingsburyKrischStewart.pdf.

[108] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1966 art. 25, Aug. 27, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966). See also *Tokios Tokeles v. Ukraine*, Case No. ARB/02/18, Decision on Jurisdiction (Int'l Ctr. For Settlement of Inv. Disputes 2004) (action by Lithuanian business enterprise against government of Ukraine).

[109] For an example of a Panel decision conducted pursuant to Article 1904, see In the Matter of: Certain Iodinated Contrast Media Used for Radiographic Imaging, Originating in or Exported from the United States of America (including the Commonwealth of Puerto Rico), CDA-USA-2000-1904-02 (Binational Panel Pursuant to the N. Am. Free Trade Agreement 2003). See also G. R Winham, "NAFTA Chapter 19 and the Development of International Administrative Law - Applications in Antidumping and Competition Law", in *Journal of World Trade*, 1998, vol. 32, p. 65, 70-71 (describing general details of Chapter 19).

[110] See generally WIPO, *WIPO Arbitration and Mediation Rules*, Pub. No. 446 (E) (effective Oct. 1, 2002), http://arbiter.wipo.int/center/publications/e446.pdf. For an example of a WIPO decision, see Casio Keisanki Kabushki Kaisha v. Fulviu Mihai Fodoreanu, No. DRO2003-0002.

sions of national administrations. For instance, it reviews whether or not a national body has fulfilled its duty to give a "reasoned and adequate explanation."[111]

These examples are paradigmatic in explaining the continuity between the domestic administrative order and the global one. Actors belonging to a given national administrative system appeal to global judicial organs for the review of contested decisions in disputes with the public organs of States other than those of which they are nationals. As we have seen, this does not unfold in a stereotypical way according to fixed and conventional models. Some global judicial organs decide according to global law, others according to domestic law. Sometimes they handle disputes between a private actor and the public body of another domestic system; other times they adjudicate controversies between two private actors that also, albeit indirectly, involve a domestic administrative authority.

As we have seen, the quantity and variety of these intersecting ties between the "two levels" demonstrates that there is continuity – not cleavage – between them.

7. AN ADMINISTRATION WITH NO CONSTITUTIONAL FOUNDATION

Administrative law has thus moved beyond its natural domain of the State into a territory where it was formerly denied citizenship. It has developed rapidly, quickly losing its embryonic character and developing unique features, distinct from those of State administrative law. But in contrast to the State legal system, in the global legal order, administrative law does not have a constitutional foundation.

The constitutional framework holding up domestic administrative law is lacking in the global arena. Here, there is no government or higher institution, but just a body of sectoral sub-governments. There are, however, signs that international law is beginning a process of con-

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(WIPO July 22, 2003), http://arbiter.wipo.int/domains/decisions/html/2003/dro2003-0002.html.

[111] Appellate Body Report, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, 5, WT/DS248/AB/R (Nov. 10, 2003).

stitutionalization.[112] The recognition of human rights, rules governing the sources of law, and the rise of a penal system are preliminary signs. But these are still rudimentary and, in any case, less developed than the rules and principles of national administrative law. For this reason, global administrative law is known as a "private law framework of public institutions."[113]

The absence of a constitutional foundation to global administration and administrative law raises the much-discussed issue of their accountability.[114] This is because, unlike in the States, there is no intermediary between a representative body and the executive – that is, the government or cabinet. The following argument is commonly advanced: the State is the locus of democracy. If we escape from the State, democracy will be eroded, and we will have a global technocracy, capable of dialogue only with national bureaucracies.[115]

Yet, the absence of an executive vertex, accountable before a representative body, actually increases the pressure on global adminis-

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[112] See generally D. Z. Cass, "The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade", in *European Journal of International Law*, 2001, vol. 12, p. 39 (arguing that 'constitutionalization' results from the generation of constitutional-type norms and structures by the decision-making of the Appellate Body of the World Trade Organization); B.-O. Bryde, "Konstitutionalisierung des Voelkerrechts und Internationalisierung des Verfassungsrechts", in *Der Staat*, 2003, vol. 42, p. 61-75 (discussing the constitutionalization of international law and the internationalization of constitutional law as related processes that have a common source in twentieth century thought that only accepts political authority as legitimate when it protects human rights).

[113] C. Moellers, *Transnational Governance without a Public Law?*, cit., p. 327. See also P. G. Cerny, *Globalization and the Changing Logic of Collective Action*, cit., p. 618.

[114] This issue is rooted in some questionable assumptions. One holds that democracy is the only form for the legitimation of power (law is another form of legitimation). Another is the assumption that democracy in global institutions ought to take the same form as in national legal systems (but must global institutions adapt to the democracy of the States, or should democracy instead adapt to global institutions?).

[115] See M. Shapiro, *"Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?*, p. 5-7 (N.Y.U. School of Law Inst. for Int'l Law and justice, Working Paper No.5, 2004), available at http://www.iilj.org/papers/2004/2004.5.htm; cf. R. W. Grant and R. O. Keohane, *Accountability and Abuses of Power in World Politics*, p. 12-13 (N.Y.U. School of Law Inst. for Int'l Law and justice, Working Paper No.7, 2004), available at http://www.iilj.org/papers/2004/2004.7.htm (arguing that we must look beyond democracy for accountability at the global level).

trative law towards greater openness, participation and transparency. These features may make up for the democratic deficit caused by the absence of a constitutional foundation to global administrative law. Insofar as the global legal order lacks top-down legitimacy, it could be, at least partially, compensated by means of reinforced guarantees for civil society. The need for such guarantees magnifies the problem of asymmetric participation by private actors in the adoption of global administrative (either general or individual) decisions. The issue is particularly sensitive in those countries in which public administrations accord wide space to private interests – for example, in the United States, where the "interest representation model" applies. Shifting decision-making from the national to the global level deprives citizens and corporations of these participatory rights. Hence, there should be greater participation in the formation of the national position ahead of global administrative negotiations, or actual participation in these negotiations, directly or through (similarly global) non-governmental organizations.[116]

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[116] For a discussion of the problem, see S. A. Shapiro, *International Trade Agreements*, cit., p. 449-453.

As mentioned above, the forms of participation are different. Some of these forms are organic: actors not belonging to the organization are admitted to the body with observer status. See, e.g., *Codex Alimentarius* Commission, Codex Alimentarius Commission: 14Th Procedural Manual 12-13 (2004), http://www.codexalimentarius.net/web/procedural_manualJsp. Other forms are procedural, in the sense that non-members are informed of decisions affecting them and are able to submit observations. For example, the Financial Action Task Force informs Non-Cooperative Countries and Territories of evaluations regarding them and permits them to present comments. Financial Action Task Force, *Annual and Overall Review of Non-Cooperative Countries or Territories*, p. 3-4 (2005), http://www.fatf-gafi.org/dataoecd/41/26/34988035.pdf.

For a discussion of the importance of dialogue with civil society, see Report by the Consultative Board to the Director-General S. Panitchpakdi, *The Future of the WTO: Addressing institutional challenges in the new millennium*, p. 53 (prepared by Peter Sutherland, Jagdish Baghwati et al.), available at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf and the analysis by F. Bignami, "Civil Society and International Organizations: A Liberal Framework for Global Governance", Duke Law Faculty Scholarship Paper n. 1126/2007.

8. THE LEGALIZATION OF GLOBAL ADMINISTRATIVE NETWORKS: TOWARDS A UNIVERSAL RULE OF LAW?

Economic globalization, while often opposed in the name of domestic rights, also creates rights. These rights do not only concern the private sphere (eliminating, for instance, trade barriers in order to sell in wider markets) but also the public sphere (for instance, norms on the relations between national offices and global organizations, or between national legal subjects and the global legal order). It might be argued that the universalization of rights, rather than the universalization of the market, is the most characteristic feature of globalization.

Up until about twenty years ago, one could rightfully lament the inadequacy of the law applying to international organizations.[117] But as we have seen in the last quarter-century, the global legal order has made great strides, so that law now plays a decisive role in the global arena.

The global legal order is held up by a complicated system of norms. There are norms arising out of treaties, unilateral norms, externally imposed norms, and norms created by the institutions themselves.[118] There are global norms and national norms that apply to global institutions (for instance, those of the country hosting the organization's headquarters), as well as hard law and soft law. As noted above, the body that creates the norms is not always the same one that gives them binding force. There is no precise hierarchical order of norms. Finally, these norms are not uniformly applied: for example, the Government Procurement Agreement of the WTO provides for access to sub-central government organs on the condition that others make an equal offer.[119] Obligations are not always applied in a uniform fashion.

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[117] F. Morgenstern, *Legal Problems of International Organization*, cit., p. 136.

[118] Some of which are directed outwards, others of which address components of the institution that issued them; an example of this latter kind of norm is provided by the World Bank Group's Code of Professional Ethics, which applies to the Group's staff of managers, consultants and temporary employees. Prof'l Ethics Office, World Bank Group, Code of Professional Ethics 5 (1999), http://wbln00l8.worldbank.org/crn/ope/ethics.nsf/(BillboardPictures)/ code/$-FILE/ code.pdf.

[119] Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf. See also V. Mosoti, "The WTO Agreement on Government Pro-

As we have seen, a body of general principles is being consolidated in the global arena: the principle of legality, the right to participate in the formation of norms ("notice and comment," as recognized by the OIE), the duty of consultation (imposed by the World Bank on domestic administrations in the context of the Heavily Indebted Poor Countries Initiative),[120] the right to be heard ("procedural participation" recognized by the FATF and the WTO Appellate Body),[121] the right to access administrative documents, the duty to give reasons for administrative acts (the duty to give a reasoned decision, affirmed by the WTO Appellate Body[122]), the right to decisions based upon scientific and testable data, and the principle of proportionality.[123]The global development of these principles are rooted in traditional administrative law rights (participation, transparency, reasoned decision, proportionality, reasonableness), which creates a paradox. On the one hand, the greater the weight of civil society and the direct relations between private actors and global

curement: A Necessary Evil in the Legal Strategy for Development in the Poor World?", in *University of Pennsylvania Journal of International Economic Law*, 2004, vol. 25, p. 593.

[120] See International Monetary Fund, Debt Relief Under the Heavily Indebted Poor Countires (HIPC) Initiative, http://www.imf.org/external/np/exr/facts/hipc.htm (last visited Jan. 31, 2006).

[121] See Appellate Body Report, *United States - Restrictions on Imports of Cotton Man-made Fibre Underwear*, p. 21, WT/DS24/AB/R (Feb. 10, 1997). See also S. Charnovitz, "Transparency and Participation in the World Trade Organization", in *Rutgers University Law Review*, 2004, vol. 56, p. 927.

[122] See Appellate Body Report, *Mexico - Antidumping Investigation of High Fructose Corn Syrup (HFCS) From the United States*, 106, WT/DS132/AB/RW (Oct. 22, 2001). See also Understanding on Rules and Procedures Governing The Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

[123] Some of these principles directly apply to citizens, others to Member States, and others to international organizations, often in a contradictory way, such as when global judges apply to States principles that do not apply to global organizations themselves (for instance, the principle of transparency is obligatory for the Member States of the WTO, but not for the WTO itself). See, e.g., General Agreement on Trade in Services and Annexes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex lB, 33 I.L.M. 1129 (1994). For opposing views on the process of legalization, compare J. Goldstein, M. Kahler, et al., *Introduction: Legalization and World Politics*, in *International Organization*, 2000, vol. 54, p. 385 (discussing the global movement towards law as a resolving force in many issues) with P. Sands, *Lawless World: America and the Making and Breaking of Global Rules*, London, Penguin, 2004, p. 18-19 (discussing the U.S.-led trend towards deregulation and the enhancement of the role of private enterprise in governing international relations).

organizations, the greater the need to introduce and respect such principles. On the other hand, the spread of these principles highlights their meagerness compared to the richer panoply of rights recognized by national legal systems, a difference accentuated by asymmetries in the different national 1egal and administrative traditions.[124]

The third important aspect of the penetration of law into the global arena concerns judicial review. Global administrative decision making raises the following problems: who ensures legal protection for those affected by such decisions? National courts or judicial bodies belonging to the global legal system? If it is the latter, does the complainant have the same rights as it would in a national court? What relationship ought to be established between national courts and global tribunals, when global administrative decisions are not the exclusive product of global institutions, but originate in joint, global-national, decisions? It is in this area that we face the biggest issues of global administrative justice.

Until now, the global legal order has given diverse answers to these questions. There are, first of all, global institutions, like the ICDO and the WMO, in which there is no need for dispute resolution mechanisms. In other cases, national courts review the decisions of global institutions.[125]

The most interesting phenomenon, however, is the increase of global administrative courts. We do not need to dwell on names here (they are often called "panels"), but rather observe that they decide disputes through adversarial procedures and are required to be independent. There are many adjudicating bodies, and some have already been mentioned above: the Dispute Settlement Body of the WTO, the International Tribunal for the Law of the Sea, NAFTA's Dispute Set-

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[124] This is a general phenomenon but it is particularly felt in the United States, where the domestic rules governing participation in administrative proceedings (in the context of both rule-making and adjudication) are more developed. See G. Silverstein, "Globalization and the Rule of Law: 'A Machine that runs of itself?'", in *Journal of Constitutional Law*, 2003, vol. 1, p. 427.

[125] B. Kingsbury et al., *The Emergence of Global Administrative*, cit., p. 20-21; see also A. Reinisch, *International Organizations Before National Courts*, Cambridge, Cambridge University Press, 2000, p. 323 (discussing the appropriateness of national courts' rulings on disputes involving decisions made by international organizations); cf. C. McCrudden and S. G. Gross, "WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study", in *European Journal of International Law*, 2006, vol. 17, p. 151 ff.

tlement Panels, the International Centre for the Settlement of Investment Disputes (ICSID), the WIPO's Arbitration and Mediation Center, the World Bank Inspection Panel, and the Subsidiary Body on Dispute Settlement of the Commission on Phytosanitary Measures. Many other international bodies have mechanisms or procedures in place, such as arbitration, for dispute resolution. The UPU is one such organization.[126] Sometimes States have access to these courts; sometimes private actors do. Some of these courts have jurisdiction over decisions adopted by national administrations – such as the Dispute Settlement Body of the WTO – others over administrative decisions adopted by global authorities. These adjudicating bodies are characterized by the fact that they resolve disputes between States (and thus resemble international law), which are, at the same time, transnational conflicts[127] (which thus resem-

[126] The phenomenon of the multiplication of tribunals at the global level is examined here with an eye to only those tribunals operating in the field of administrative law, even if it is hard to distinguish those having an administrative jurisdiction from those having jurisdiction over trade or other areas.

There is a rich body of recent literature on the spread of tribunals. A. Fischer-Lescano argues in *Die Emergenz der Globalverfassung* that at the core of the global legal system there are "global remedies", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2003, vol. 63, p. 717 ff. See A. Del Vecchio, *Giurisdizione internazionale e globalizzazione: i tribunali internazionali tra globalizzazione e frammentazione*, Milan, Giuffrè, 2003 (analyzing the tribunals and their jurisdiction). For a study of judicial globalization, see generally Sir D. Williams, *Courts and Globalization*, in *Indiana Journal of Global Legal Studies*, 2004, vol. 11, p. 57; R. O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, in *International Organization*, 2000, vol. 54, p. 457; A.-M. Slaughter, *Judicial Globalization*, in *Vanderbilt Journal of International Law*, 2000, vol. 40, p. 1103; A.-M. Slaughter, *A New World Order* 65-103 (2004); A. Stone Sweet, *Judicialization and the Construction of Governance*, in *Comparative Political Studies*, 1999, vol. 32, p. 147; A. Stone Sweet, *Islands of Transnational Governance* (Ctr. for European and German Studies, Univ. of Cal. Berkeley, Political Relations and Inst. Research Group, Working Paper No. 2.89, 2001). Regarding the WTO dispute resolution mechanism, see generally G. della Cananea, "Il diritto amministrativo globale e le sue corti", in F. Manganaro and A. Romano Tassone (eds), *Dalla cittadinanza amministrativa alla cittadinanza globale*, Milan, Giuffrè, 2005, 125, 125-41; C.-D. Ehlermann, *Some Personal Experiences as Member of the Appellate Body of the WTO*, p. 3-4 (The Robert Schuman Ctr. For Advanced Studies, European Univ. Inst., Policy Paper 02/9, 2002); M. Melloni, "L'intesa sulla soluzione delle controversie dell'organizzazione mondiale del commercio: problemi emersi nei primi otto anni di attività e prospettive di soluzione", in *Il diritto dell'economia*, 2003, nn. 2/3, p. 427.

On the ICSID, see generally S. Flogaitis, "Administrative Law of International Organizations": the World Bank, in *Essays In Honour of G. I. Kassimatis*, Bruxelles, Bruylant, 2004, p. 604.

[127] Meaning that they involve relationships that cross national borders, in which at least one party is not a State or public entity.

ble administrative law). Moreover, they make decisions backed up by a system of sanctions, like the retaliation and cross-retaliation authorized by WTO panels.[128]

In conclusion, the large number of norms, the development of rules and principles, and the rise of courts all confirm the high degree of institutionalization (or legalization, as American scholars like to say) of the global administrative system. This stands in direct relation to the greater efficacy of global decisions in targeting national citizens, organizations, and corporations.

The more that global organizations widen their scope of action beyond States and domestic public organizations, the more that it becomes important to ensure respect for the rule of law, the principle of participation, and the duty to give a reasoned decision. These procedures are important in order to ensure the protection of citizens, organizations, and corporations, not only in their relations with States and other national public powers, but also in their relations with the new global public powers.

II. IS THERE A GLOBAL ADMINISTRATIVE LAW?*

1. AN IMPORTANT INTELLECTUAL EXERCISE

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

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[128] *The Future of the WTO: Addressing institutional challenges in the new millennium*, cit., p. 53.

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