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**GLOBAL ADMINISTRATIVE LAW:
AN INTRODUCTION**

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“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.”

I. Calvino, *La corsa delle giraffe* (1975), in I. Calvino, *Palomar*, Torino, Einaudi, 1983, p. 81-82, now reprinted in *Romanzi e racconti*, Milano, Mondadori, 1992, vol. 2, p. 940 – 941.

1. Tuna fishing: how a global administrative law is born

In the early 1960s, the fishing of Southern Bluefin Tuna (“*Thunnus maccoyii*”) rose to 60,000 tons per year, leading to a marked decrease in mature tuna. As a result, the catch began to suffer.

In 1973, the third United Nations Conference on the Law of the Sea met in New York. It concluded its work in 1982 with a new treaty, the United Nations Convention on the Law of the Sea (UNCLOS). This treaty went into force in 1994, with the signature of the seventieth state, Guyana. 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”. Articles 116 to 119 contain other provisions on the conservation of marine resources. The Southern Bluefin Tuna is included in the list in Annex I.

In 1985, Australia, Japan and New Zealand (the countries that did the most fishing of this type of tuna) stipulated voluntary agreements on tuna fishing. Since these agreements proved to be inadequate, in 1993, the three countries signed the Convention for the Conservation of Southern Bluefin Tuna (CCSBT), which went into force in 1994. Other countries later acceded to this treaty.

The 1994 Convention establishes a Commission for the Conservation of Southern Bluefin Tuna. The Commission has legal personality, a budget and rules governing accounting and employment relations, a Secretariat with its own staff, and headquarters in Canberra. Within it, separate bodies carry out oversight and consultation tasks. 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 tuna.

On the basis of the CCSBT treaty and of the acts subsequently adopted by the Commission, the Commission is in charge of the following: 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 instance, it has established that the importation of tuna by party States must be accompanied by statistical information on its provenance)¹; adopting, “if necessary, additional measures”; controlling illegal fishing on the basis of the Food and Agriculture Organization’s (FAO - 1945) International Plan of Action for Illegal, Unregulated and Unreported Fishing (IUU - 2001); inviting non-party States to respect the treaty’s objectives.

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” (Article 15. 4).

The Commission fixed the national quotas in 1994. 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. Thereupon, Australia and New Zealand initiated an arbitration procedure

¹ Quotas are assigned to the party States, but addressed to fishers. States in turn distribute the national quota among fishers.

before an arbitral tribunal, as provided by Article 287 and Annex VII of the UNCLOS. 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. In addition, in response to the unilateral action by Japan, New Zealand banned Japanese tuna fishing ships from its harbors.

On 27 August 1999 the international tribunal 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, and ordering the parties to resume negotiations².

The tribunal's order was complied with and negotiations were resumed.

In the meanwhile, the arbitral tribunal was set up. This arbitral tribunal decided to avail itself of the secretariat and chancellery of the International Centre for the Settlement of Investment Disputes (ICSID)³.

The arbitral tribunal issued its decision on 4 August 2000. It held that without Japan's consent to refer the controversy to the arbitral tribunal, "this Tribunal lacks jurisdiction to entertain the merits of the

² For an overview of international fishing and related issues, see J.S. Barkin, *Unilateralism and Multilateralism in International Fisheries Management*, in "Global Governance", 2000, 6: pp. 339-360.

³ Note that this was the first arbitral tribunal established on the basis of Annex VII of the UNCLOS.

dispute brought by Australia and New Zealand against Japan.” 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”. 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”. The arbitral tribunal stressed the “possibility of renewed negotiations”, in accordance with 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”⁴.

In response to this decision, in December 2000, New Zealand revoked the prohibition on Japanese tuna fishing ships in its harbors. Negotiations continued, and led to a decision in 2001 to undertake a scientific program to measure the volume of the tuna stock. This program was carried out by independent experts and included placing observers on board fishing ships to control the quantity of tuna fished.⁵

⁴ “Negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice”.

⁵ On this case, see C. Romano, *The Southern Bluefin Tuna Dispute: Hints of a World to Come ... Like It or Not*, in “Ocean Development & International Law”, 2001, pp. 313-348; V. Röben, *The Southern*

This case captures all of the distinctive features of administrative law. 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, 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 nationals as may be necessary for the conservation of the living resources of the high seas”. Yet, even in the top-down phase of implementation, the Commission interacts with members of State systems.

Comment: Non sono certa che il verbo “to interact” renda il concetto espresso nella frase “la Commissione agisce nei confronti dei componenti degli ordinamenti statali” a p. 8.

Compared to the more familiar State-level administrative law, global administrative law bears some differences. A first difference has to do with 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 the general regime of the law of the sea⁶. The

Bluefin Tuna Cases: Re-Regionalization of the Settlement of Law of the Sea Disputes?, in “Zeitschrift für ausländisches öffentliches Recht und Völkerrecht”, 2002, 62/1-2, pp. 61-72; M.D. Evans (ed.), *Decisions of International Tribunals*, in “The International and Comparative Law Quarterly”, 2001, 50/2, pp. 447-452; D.J. Devine, *Compulsory dispute settlement in UNCLOS undermined?*, in “South Africa Yearbook of International Law”, 2000, 25, pp. 97-112; C.E. Foster, *The “real dispute” in the Southern Bluefin Tuna Case*, in “International Journal of Marine and Coastal Law”, 2001, 16/4, pp. 571-601; 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, 13/2, pp. 361-385; J. Peel, *A paper umbrella which dissolves in the rain*, in “Melbourne Journal of International Law, 2002, 3/1, pp. 53-78; L. Sturtz, *Southern Bluefin Tuna Case*, in “Ecology Law Quarterly”, 2001, 28/2, p. 455-486.

⁶ This principle was established by the arbitral tribunal's Award on Jurisdiction and Admissibility (4 August 2000) in the Southern Bluefin Tuna Case (Australia and New Zealand

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. In other words, three different international orders are intertwined.

A second difference between global and State administrative law has to do with the global law's high degree of self-regulation; regulators and the regulated are 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: 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. In State administrative law, by contrast, decisions made by representative bodies (political decisions) and the unilateral decisions typical of "command and control" prevail.

A fourth difference: the line between public and private is hardly clear at the global level: members of the Extended Commission include Member States as well as fishing entities (which may be sub-State bodies or even private actors)⁷.

The administrative law presented thus far may be defined as

v. Japan), which decided 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".

⁷ 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.

global⁸, even though this qualification may seem unacceptable to those holding that administrative law cannot be global by definition, as it is State law *par excellence*; if it is global, then it cannot be administrative law, since global law regards the relations between States.

In this paper I shall begin to respond to some of the questions regarding this global administrative law. First of all, how is it structured and how does it operate? According to international law (by means of negotiation) or according to administrative law (by “command and control”)?

Secondly, on which grounds does global administrative law rest? National administrative laws are sustained by a constitutional framework, which is lacking 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 national or domestic administrative law? Is there a mismatch, an overlap or integration between the two levels? Does the emergence of a global administrative law alter the structure of national public powers?

⁸ This term calls for an immediate specification. It is the most commonly used. There are, however, two alternative terms: the more traditional “universal law” (Domenico Romagnosi is the author of *Diritto pubblico universale*, “Universal Public Law”) and “world-wide law” preferred by the French (*droit mondial*). Here the term “international”, coined by Jeremy Bentham to indicate the relations between sovereign States as unitary actors is to be avoided. 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 systems⁹ 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 subjects of global regulation. But global regulation involves many other sectors as well, like 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.

Goods and functions that escape State control are regulated at the global level¹⁰. 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.

⁹ 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 paper 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.

¹⁰ P.G. Cerny, *Globalization and the Changing Logic of Collective Action*, in “International Organization”, 1995, 49 (Autumn): pp. 595–625 (esp. p. 609 and p. 618).

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 245 such organizations in 2004; according to surveys based on more open-ended criteria, there were 1988; and according to a count based on even more liberal criteria, 7306¹¹. To appreciate the meaning of these numbers, consider that there are more of such organizations than there are States (191 States belong to the United Nations (UN - 1945)).

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 tripled¹².

Furthermore, in several sectors, there is more than one regulatory authority, with each one having different competences. The International Maritime Organization (IMO - 1958) and the International Seabed Authority (ISA - 1994), regulate the use of the seas, as well as the International Tribunal for the Law of the Sea (ITLOS - 1994). The environment is regulated by the World Meteorological Organization (WMO - 1950), the United Nations Convention on Climate Change –

¹¹ These data are taken from the *Yearbook of International Organizations 2004-2005*, Munich, Saur, 2004, vol. 5, App. 3, Table 1. See also N. M. Blokker and H. G. Schermers (eds.), *Proliferation of International Organizations*, The Hague, Kluwer, 2001.

¹² See *Yearbook*, cit., Figure 1.2.1 and Figure 1.2.2.

Clean Development Mechanism (UNFCCC-CDM - 1992) and the Global Environmental Facility (GEF - 1991), and their respective implementation bodies (the United Nations Environment Programme, the United Nations Development Programme and the World Bank). Many bodies are active in the economic and financial area: the International Monetary Fund (IMF - 1945), the World Bank (1944), the Basel Committee on Banking Supervision (1974), the Financial Stability Forum (FSF - 1999), the Financial Stability Institute (FSI - 1999), the Committee on Payment and Settlement Systems (1990), the Egmont Group (1995), the Financial Action Task Force on Money Laundering (FATF - 1989), the International Organization of Securities Commissioners (IOSCO - 1983), the International Association of Insurance Supervisors (IAIS - 1994) and the International Accounting Standard Board (IASB - 1973, reorganized in 2001). 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.

To sum up, global regulatory systems are quantitatively very developed. 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 is also through global regulatory systems that domestic

public powers are able to make their voices heard.

A second conclusion: 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 is that States associate in order to establish an ultra-State body, like the UN. International organizations arise from agreements between States, but also promote other agreements: for instance, the International Maritime Organization has promoted agreements in the areas of security, protection of the marine environment and the maritime transport of nuclear materials.

In addition to the States, sub-State organs may also join to establish international bodies. National bodies for the regulation of financial markets are associated in the above-mentioned IOSCO; national insurance regulating bodies come together in the IAIS; the International Competition Network (ICN - 2001) 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 made up neither by States, nor by lower level, sub-state entities, but by other global organizations, acting alone or together. For instance, the Commission on Phytosanitary Measures (1992) was established by the FAO; the International Centre for Settlement of Investment Disputes (1966) was established by the World Bank.

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 (1963) was established by the FAO and the World Health Organization (WHO - 1948). The World Trade Organization (WTO - 1994) and the United Nations Conference on Trade and Development (UNCTAD - 1964) together established the International Trade Committee.

The horizontal interpenetration of global structures is reinforced by organizational and procedural 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 UNFCCC – CDM by the Secretary General of the UN.

Examples of procedural relationships are the network of agreements between the World Intellectual Property Organization (WIPO - 1967) and the WTO, and the close relations between the Universal Postal Union (UPU - 1874), the International Civil Aviation Organization (ICAO - 1944) and the International Telecommunication Union (ITU - 1865); between the Office International des Epizooties (OIE - 1924) and the FAO, WTO, Codex Alimentarius Commission, and the World Health Organization (WHO); between the Financial Stability Forum (FSF), the IOSCO and IAIS; between the International Olive Oil Council (1986) and the Codex Alimentarius Commission¹³.

Even closer are the functional relations between the WTO and the Commission on Phytosanitary Measures and between the WTO and the OIE. The standards set forth by the Commission are not binding in themselves, but 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. Thus, standards established by one organization become binding

¹³ On inter-agency cooperation as a “central element of global economic governance”, see C. Tietje, *Global Governance and Inter-Agency Co-operation in International Economic Law*, in “Journal of World Trade”, 2002, 36/3: pp. 501–515.

rules by virtue of the force given to them by another organization¹⁴.

Finally, the connection between different global regimes is strengthened by the fact that some regimes “lend” their institutions to others for the resolutions 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 Treaty, the Cartagena Free Trade Agreement, and the Colonia Investment Protocol of Mercosur.

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, it does not embody a unitary structure.

It has the following characteristics: it is progressive, cooperative and non-hierarchical; it has no center; it does not develop according to a plan, but spontaneously; it creates a thick regulatory mass.

Finally, though originating in the States (which continue to keep it

¹⁴ K. Raustiala and D.G. Victor, *The Regime Complex for Plant Genetic Resources*, in “International Organization”, 2004, 58 (Spring): pp. 277–309, discuss in this vein 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.

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 ss.

under control), this system becomes increasingly less dependent on them as it develops autonomously through voluntary, spontaneous processes¹⁵. As we shall see ahead, national public powers compensate their relative loss of power by participating in the decision-making processes of the 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 the development of 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 within them, and the distinctions between participants and non-participants, and

¹⁵ C. Moellers, *Transnational Governance without a Public Law?*, in C. Joerges, I.J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism*, cit., p. 327 observes that there is a "generation of norms as a spontaneous co-ordination process, normally between formally equal actors".

between public and private participants, are uncertain¹⁶.

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 - 1865); assistance and the provision of services [for instance, the work of the International Organization for Migration (IOM – 1989)¹⁷, the WHO and the OIE]; protection [for instance, the United Nations High Commissioners for Refugees (UNHCR - 1950)].

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, 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: that of the Basel

¹⁶ On the “flexibility of arrangements” of global institutions, see B. Koremonos, C. Lipson and D. Snidal, *The Rational Design of International Institutions*, in “International Organization”, 2001, 55/4 (Autumn): : pp. 761–799.

¹⁷ First established in 1951 as the “Intergovernmental Committee for European Migrations”.

Committee on Banking Supervision is provided for by the Bank for International Settlements; the Paris Club committee (1956) is supported by the French Finance Ministry. 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, made up of five different institutions: the International Bank for Reconstruction and Development (IBRD - 1945), the International Development Association (IDA - 1960), the International Finance Corporation (IFC - 1956), the Multilateral Investment Guarantee Agency (MIGA - 1988) and the International Centre for Settlement of Investment Disputes (ICSID - 1966).

While there is a stable division of powers between the different organs of the States, 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 thus 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 - 1972), both affiliated members and associated members (without the right to vote) participate.

In the IAIS, observers such as insurance companies, associations thereof, practitioners and consultants participate. 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 instance, the International Air Transport Association, the Airports Council, the International Federation of Airline Pilot's Associations, and the International Council of Aircraft Owner and Pilot Associations all participate. Finally, many global organizations accept unions of States (mainly the European Union) as a member: the WTO, ICDO and the International Olive Oil Council.

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 "adhocracy," 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. The

study of decision-making processes confirms this diagnosis: they are inspired by the techniques of joint action, mutual conditioning, composition and balancing, and progressiveness¹⁸.

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 power¹⁹. 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: the States in making their voices heard in the global system and the global system in penetrating the States to reach civil society and local actors - a reach 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.

Comment: Anche se non corrisponde alla traduzione letterale, la frase qui utilizzata sembra adatta a rendere il concetto di cui a p. 22 "penetrare negli Stati e raggiungere la società civile e il territorio, gli elementi che sono assenti nei poteri pubblici globali".

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

¹⁸ Note that according to Bentham, international and national law are independent of each other, and the question of whether an international law norm applies to national law depends on the latter.

¹⁹ On the different roles of international organizations, A. Caffarena, *Le organizzazioni internazionali*, Bologna, Il Mulino, 2001, p. 36 ss.

of “polysynody”²⁰. 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 appreciate this, it is sufficient to examine the examples of the organization 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.

The technique of joint decision-making recurs in the sharing of functions between national offices and the offices of global regulatory

²⁰ 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 council 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.

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 countries (Article 2 of the Statute). Article IV of the International Plant Protection Convention (1951), in addition to establishing a global organization - the Commission on Phytosanitary Measures - provides that each contracting party shall establish a national plant protection organization, corresponding to the global institution²¹, sets forth the tasks to be assigned to it, and requires that such organization cooperate at the international level. Further, article VIII.1 of the above convention provides that the Member States undertake to cooperate with one another in establishing regional (meaning pluri-State) plant protection organizations in appropriate areas.

The two 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 conclude at the national level,

²¹ The norm provides that “ Each contracting party shall make provision, as soon as possible and to the best of its ability, for [establishing] .. an official plant protection organization”.

either with a decision or with the implementation of the global decision. In the first case, the national 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 takes a decision²².

Much more frequent is the second type of decision-making process, because, with a few exceptions, global regulatory systems lack executive apparatuses. Enforcement thus depends upon the Member States.

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 compliance is voluntary²³, and when they are binding but depend on national offices for their implementation, global regulatory systems

²² Patent Cooperation Treaty, 19 June 1970, Articles 31 and on.

²³ This is the case with many standards: see S.A. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, in *Global Administrative Law Symposium*, in "Administrative Law Review", 2002, 409: p. 438.

compensate for their weakness by keeping execution under their control. For instance, the WIPO provides for an Advisory Committee on Enforcement of Industrial Property Rights, which elaborates best practices and implementation procedures. 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 binding²⁴.

The mixture of global and national is, in these cases, particularly strong and complex. National administrations that have collaborated to reach a decision must collaborate again, this time individually, to ensure implementation. The mediation of the national level is fundamental. The decision-making process is mixed, and cannot be labeled as exclusively global or national. There is no clear separation between global law and domestic law.

The joint decision-making technique makes 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 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

²⁴ F. Morgenstern, *Legal Problems of International Organizations*, Cambridge, Grotius, 1986, pp. 125 ss.

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 State and global is blurred²⁵.

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 national systems like a sponge. This absorption creates an additional order of 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,

²⁵ S. Sassen, *The Participation of States and Citizens in Global Governance*, in "Indiana Journal of Global Legal Studies", 2003, 10/1 (Winter). 2003: p. 8.

can also capture the States²⁶.

6. The global and the national are not two separate levels

We have seen that between the global and the national 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 (*but only in these cases?*), the distinction between international and domestic law does not hold. Likewise is the weakness of the recurring metaphor of levels 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 global²⁷ - is clear if we consider the relationships between citizens (or better, nationals, in the sense of persons belonging to a nation) and global administrations. Global administrative law ascribes two fundamental rights to citizens, which derive from domestic administrative law: the right to participation and the right to defense. The former consists in 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)

²⁶ On “integrated decision-making”, J. C. Dernbach, *Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decision-making*, in “Indiana Journal of Global Legal Studies”, 2003, 10: pp. 247–285 (especially p. 279).

²⁷ An analogous examination of the relations between the regional and global level ought to be undertaken.

decisions.

An example of participation in an individual administrative proceeding (and thus of adjudication) is in the above-mentioned Patent Cooperation Treaty (Article 34). 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 (“rights to participation and consultation”)²⁸.

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

²⁸ This is seen in the case of the *Report and Recommendation India: Mumbai Urban Transport Project*, Report n. 29361, 3 September 2004, on which only a preliminary assessment is available..

organization with the task of conciliation and arbitration²⁹.

Chapter 19, Article 1904 of the NAFTA treaty empowers a Binational Review Panel to review the decision of a national administrative body, on the basis of the national law of that State, upon the application of a private business from another State³⁰.

The WIPO Arbitration and Mediation Center 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 (ccTLD) 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 names an Administrative Panel to rule upon the application (the procedure is governed by the Rules for Uniform Domain Name Resolution Policy, approved by the ICANN on 24 October 1999). The decision must then be implemented by the national registration administrator, which in many countries has a public character³¹.

The WTO Dispute Settlement Body also has the job of reviewing the decisions of national administrations: for instance, it reviews whether

²⁹ As provided by the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1966. See, for example, *Tokios Tokelès v. Ukraine, Decision on Jurisdiction*, 29 April 2004, n. ARB/02/18.

³⁰ See, for example, *Certain Iodinated Contrast Media*, n. CDA-USA-2000-1904-02. On Chapter 19, 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, 32/1 (Feb.): pp. 65 – 82.

³¹ See, for example, the decision of 22 July 2003 *Casio Keisanki Kabushki Kaisha, dba Casio Computer Co., Ltd v. Fulviu Mihai Fodoreanu*, Case No. DRO2003-0002. WIPO decisions are available at <http://arbiter.wipo.int/domains/decisions/index-ccTld.html>.

or not a national body has fulfilled its duty to give a “reasoned and adequate explanation”³².

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 – and not a cleavage – between them.

7. The legalization of global administrative networks: towards a universal rule of law?

Economic globalization, while often opposed in the name of

³² This is the case examined by the WTO Appellate Body, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products AB - 2003 – 3 Report of the Appellate Body*, 10 November 2003.

(national) 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 then be argued that the universalization of rights - rather than that 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 organizations³³. But as we have seen above, in the last quarter of a 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 and unilateral norms; externally imposed norms and norms created by the institutions themselves³⁴; global norms and national norms that apply to global institutions (for instance, those of the country hosting the organization's headquarters), 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

³³ F. Morgenstern, *cit.*, p. 136.

³⁴ 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.

instance the Government Procurement Agreement of WTO provides for access to sub-central government organs on the condition that others make an equal offer. Thus, obligations do not apply in a uniform fashion.

Comment: Non sono sicura di aver capito a cosa si riferisca qui la frase “il Government Procurement Agreement del WTO prevede l’accesso per organi sub-centrali a condizione che altri faccia eguale offerta”.

As we have seen, a body of general principles is consolidating in the global arena: the principle of legality, the right to participate in the formation of norms (“notice and comment,” 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), the right to be heard (“procedural participation” recognized by the FATF and the WTO Appellate Body), 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), the right to decisions based upon scientific and testable data, the principle of proportionality³⁵.

The global development of principles rooted in traditional administrative law rights (participation, transparency, reasoned decision, proportionality, reasonableness) creates a paradox. On the one hand, the greater the weight of civil society and the direct relations between private actors and global organizations, the greater is the need to introduce and respect such principles. On the other hand, the spread of these principles

³⁵ 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 the 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).

highlights their meagerness compared to the richer panoply of rights recognized by national legal systems, a difference accentuated by asymmetries in the different national legal and administrative traditions³⁶.

The third important aspect of the penetration of law into the global arena regards 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 here that we face the big 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 in which there is no need for dispute resolution mechanisms, like the ICDO and the WMO.

In other cases, national courts review the decisions of global institutions³⁷.

³⁶ This is a general phenomenon (see G. Silverstein, *Globalization and the Rule of Law: "A Machine that runs of itself?"*, in "International Journal of Constitutional Law", 2003, I-3 (July):pp. 429– 445), 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.

³⁷ B. Kingsbury, N. Krisch, R. Stewart, *The Emergence of Global Administrative Law*, unpublished, p. 20–21; C. McCrudden and S. G. Gross, *WTO Rules on Government Procurement and National Administrative Law*, unpublished, pp. 8 and 31. On this subject in general, A. Reinisch, *International Organizations Before National Courts*, Cambridge,

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 perform the function of deciding disputes through adversarial procedures and are required to be independent. Many adjudicating bodies can be listed, 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 Settlement Panels, the International Centre for the Settlement of Investment Disputes (ICSID), the WIPO’s Arbitration and Mediation Center, the World Bank Inspection Panel, the Subsidiary Body on Dispute Settlement of the Commission on Phytosanitary Measures. Many other international bodies have mechanisms or procedures in place, including arbitration, for dispute resolution (for instance, the UPU)³⁸.

Cambridge Univ. Press, 2000.

³⁸ The phenomenon of the multiplication of tribunals at the global level is examined here with an eye to just 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, *Die Emergenz der Globalverfassung*, in “Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht”, 2003, 63:pp. 717–760 argues that at the core of the global legal system there are “global remedies.” An analysis of the tribunals and their jurisdiction can be found in A. Del Vecchio, *Giurisdizione internazionale e globalizzazione. I tribunali internazionali tra globalizzazione e frammentazione*, Milano, Giuffrè, 2003. For a study of judicial globalization, see *Symposium: Globalization, Courts, and Judicial Power*, in “Indiana Journal of Global Legal Studies”, 2004, 11: (Winter):pp. 57 ss.; R. O. Keohane, A. Moravcsik and A.M. Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, in “International Organization”, 2000, 54/3 (Summer): pp. 457–488; A.M. Slaughter, *Judicial Globalization*, in “Virginia Journal of International Law”, 2000, 40/4 (Summer): pp. 1103–1124 and *A New World Order*, Princeton, Princeton Univ. Press, 2004; A. Stone-Sweet, *Judicialization and the Construction of Governance*, in “Comparative Political Studies”, 1999, 32/2 (Apr.): pp. 147–184 (esp. p. 164 ss), and *Islands of Transnational Governance*, unpublished. On the WTO dispute resolution mechanism, G. della Cananea, *Il diritto amministrativo e le sue corti*, unpublished; C.D. Ehlermann, *Some Personal Experiences as Member of the Appellate Body of the WTO*, EUI,

Sometimes the States have access to these courts, sometimes private actors do. Some of these courts have jurisdiction over decisions adopted by national administrations (for instance, the Dispute Settlement Body of the WTO), others over administrative decisions adopted by global authorities.

What is characteristic of these adjudicating bodies is that they resolve disputes between States (relevant to international law), which are, at the same time, transnational conflicts³⁹ (and thus relevant to administrative law); moreover, they make decisions backed up by a system of sanctions, like the retaliation and cross-retaliation authorized by WTO panels⁴⁰.

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 (just consider the tradable emission credits in the context of the Kyoto Protocol). The more that global organizations

Schuman Centre Policy Papers, n. 02/9; 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, 2-3: pp. 427-458. On the ICSID, S. Flogaitis, *Administrative Law of International Organizations: the World Bank*, in "Essays in Honour of G. I. Kassimatis", Bruylant, undated, p. 604.

³⁹ Meaning that they involve relationships that cross national borders, in which at least one party is not a state or public entity.

⁴⁰ On this compensatory system, consisting in the power to suspend international obligations, see WTO, *The Future of the WTO – Addressing institutional challenges in the new millennium*, WTO, Lausanne, 2004, p. 53 ss.

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. This is 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.

8. An administration with no constitutional foundation

Administrative law has thus moved beyond its natural domain, 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 going through a process of constitutionalization⁴¹: the recognition of human rights, rules governing

⁴¹ On this see D. Z. Cass, *The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, in *EJIL*, 2001, 12/1: pp. 39–75 and B.O. Bryde, *Konstitutionalisierung des Voelkerrechts und Internationalisierung des Verfassungsrechts*, in *"Der Staat"*, 2003,42/1: pp. 61–75.

the sources of law, the rise of a penal system. But these are still rudimentary and in any case less developed than the rules and principles of national administrative law. For this reason, one writes of a “private law framework of public institutions”⁴².

The absence of a constitutional foundation to global administration and administrative law raises the much-discussed issue of their accountability⁴³. 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 bureaucracies⁴⁴.

Yet, the absence of an executive vertex, accountable before a representative body, actually increases the pressure on global administrative law towards greater openness, participation and transparency. These features may make up for the democratic deficit

⁴² C. Moellers, *Transnational Governance* cit., p. 327. See also P. G. Cerny, *Globalization* cit., p. 618. Moellers adds that “the self-emergent private law constitutionalisation creates its own public law supplement” (p. 334).

⁴³ 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?).

⁴⁴ On these features, see M. Shapiro, “*Deliberative*”, “*Independent*” *Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?* and R. W. Grant and R. O. Keohane, *Accountability and Abuses of Power in World Politics*, both papers presented at the 2004 seminar organized by the Research Project on Global Governance and Administrative Law at New York University Law School.

caused by the absence of a constitutional foundation to global administrative law. Insofar as top-down legitimation is lacking, it could be – at least partially – compensated by means of reinforced guarantees for civil society.

The need for such guarantees magnifies the problem mentioned above of the asymmetric degree of participation by private actors in the adoption of global administrative (general or individual) decisions as opposed to participation in processes of decision-making at the national level. The issue is particularly sensitive in those countries in which public administrations accord wide space to private interests (for instance 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 the call to participate in the formation of the national position ahead of global administrative negotiations, or to actually participate in these negotiations, directly or through (similarly global) non-governmental organizations⁴⁵.

⁴⁵ The various alternatives are discussed by S.A. Shapiro in *International Trade Agreements*, cit., p. 449.

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 (for example, in the Codex Alimentarius Commission). 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 FATF informs Non-Cooperative Countries and Territories of evaluations regarding them and permits them to present comments).

The question of the dialogue with the civil society is increasingly important: see the WTO report, *The Future of the WTO*, cit., p. 41 ss and the analysis by F. Bignami, *Civil Society and Global Governance: The Case for Corporatist Democracy*, unpublished.

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