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SHRIMP, TURTLES AND PROCEDURE. GLOBAL STANDARDS FOR NATIONAL ADMINISTRATIONS [*]

Summary.

[*] First draft of a paper prepared for the Administrative Law and Global Governance project, an initiative of the New York University Law School Institute for International Law and Justice, directed by Benedict Kingsbury, Richard Stewart and Nico Krisch. This paper will be presented on April 12, 2004 at NYU Law School (Global Law School). I thank Professors Stefano Battini, Francesca Bignami, Armin von Bogdandy and Paolo Picone for their comments. This is a draft version, and is not to be cited.

1. Shrimp, Turtles and Procedure

In 1989, the U.S. imposed an embargo on the importation of shrimp from countries that used fishing methods harmful to marine turtles. The shrimp were not a protected endangered species, but the marine turtles were. The embargo was thus motivated by the rightful concern to protect an animal species from extinction.

Holding this embargo to be a violation of Article XI of the 1994 GATT (providing for the general elimination of quantitative restrictions on trade), India, Pakistan, Malaysia and Thailand commenced proceedings on the basis of the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO).

In deciding *United States – Import prohibition of certain shrimp products*,[1] the WTO Appellate Body concluded that Section 609 of Public Law 101-162[2] "[…] has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX […].[3] According to the Appellate Body, "[…] with respect to neither type of certification under Section 609(b)(2) is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the

[1] 12 October 1998 WT/DS58/AB/R.

[2] Enacted on 21 November 1989, and codified at 16 U.S.C. §1537.

[3] n. 186.

course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C). Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application is provided."[4]

This decision was made on the basis of the chapeau of Article XX of the 1994 GATT, according to which "[…] such measures are not [to be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade […]."

It follows that for States to respect the prohibition on arbitrary discrimination between countries where the same conditions prevail, as required by the GATT norm, they must respect the principle of due process. Though usually established by national laws, the principle of due process can also enter national administrative law through another door: it is established at the international level and then is applied at the national one.

This is not the only case in which an international treaty or international organization imposes procedural principles upon State administrations.[5] I propose to examine some of these principles and to evaluate the way they operate in the global context..

[4] n. 180.

[5] G. della Cananea, Beyond the State: the Europeanization and Globalization of Procedural Administrative Law, in "European Public Law", vol. 9, n. 4, December 2003, p. 563 ss.

After an introduction discussing administrative law as State law, I shall identify the global regulatory regime upon which I focus in this paper and briefly describe the characteristics common to different instruments in this system. I will then turn to the peculiarities of this global regime, organizing them into four categories: the regulators, the regulated, the regulatory process and the legal status of the rules. With respect to the regulators, I shall analyze three aspects: (1) regulation set forth by international treaties and regulation set forth by secondary regulators, like the committees of international organizations; (2) the schism between the authors of the regulation and the authorities overseeing national compliance with it; (3) the disintegration of the States produced by singling out national authorities which act as partners with the international authorities. With respect to the regulated, I consider two effects, the vertical effect (between international organizations and States) and the horizontal effect (between the States themselves), as well as other relationships between States and interested parties established by the international legal order. For the regulatory process, I examine the peculiarity of voluntary, self-imposed, mutual recognition, and the characteristics of notice and comment procedure as applied to inter-State relations, rather than to the relations between States and private parties. In considering the legal status of these international administrative measures, I look at their non-binding character and the source of their effectiveness.

This paper does not consider the ways in which domestic legal systems react in their contact with international administrative law: whether the institutions governed by this law are altered and adapted to the national context; whether international institutions spread as contagious infections; whether national legal systems instead resist and reject international norms (and at what cost).

2. Administrative Law as State Law

Administrative law has historically sprung from national States. Public administrations belong to a national community and they structurally depend upon national governments. On the basis of the principle of legality, they are subjected to laws and regulated by them. Administrative law is thus fundamentally State law.

This suggests the impossibility of international administrative law; at the same time, it suggests the impossibility of a global governance of national administrative laws. It would seem that an international administrative law could not exist, because public administrations are exclusively national phenomena. According to this traditional perspective, it is only within the State that there can exist an administration which enjoys a monopoly of executive power; it is only within the State that there can be the authority – liberty dialectic that characterizes administrative law.[6] A global system governing national administrative law cannot exist, because administrative governance finds its source exclusively in national law. As Otto Mayer, one of the founders of German administrative law observed, the national public power is the lord in its own domain, to the exclusion of all others; the action of a foreign power on the territory of a foreign State can be considered valid only in exceptional situations.[7] If international obligations exist, they must pass through the filters of national law, which transform them into national rules.

Two developments have called this traditional perspective into question. The first is the rise of an international administrative law, tied to global administrations rather than to the State. The second is the rise of global rules, declared by treaties or international organizations but addressed to States (and private actors). These international norms penetrate domestic legal systems, thus having an effect upon national administrative laws.

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[6] This formulation comes from D. Donati, cited and discussed by S. Battini, Amministrazioni senza Stato. Profili di diritto amministrativo, Milano, Giuffrè, 2003, p.31.

[7] Otto Mayer, Le droit administratif allemand, Paris, Giard-Briére, 1906, p. 354.

These two developments are distinct, but related. The global limits on national administrations are created by international bodies, which operate according to a non-State law.

The first development will not be analyzed in this paper. Of interest is the second development, which represents an intrusion of global rules upon national administrations. It is important to understand how the interference of the global with the national occurs, whether it corresponds to the practices of other international legal systems, and whether international regulatory forms resemble national ones.

3. International Regulation

There are many different kinds of international administrative norms. These norms may have an ad hoc character or a permanent one. An example of a set of ad hoc norms can be seen in the World Bank Operational Policies, which require a public consultation on the environmental assessment of projects proposed for Bank financing. In this case, national law is obliged to respect the principle of private participation in administrative proceedings. A national administration which disregards this norm cannot obtain financing.[8]

Even more interesting are the permanent rules. I have chosen to examine four, all of which follow the same model. They are set forth in the following legal instruments: the Agreement on the Application of Sanitary and Phytosanitary Measures (hereafter SPS); the Agreement on Technical Barriers to Trade (hereafter TBT); the General Agreement on Trade in Services (hereafter GATS); and the Principles for Food Import and Export Inspection and Certification System (hereafter FIEIC). The first three of these instruments belong to the legal system of the World Trade Organization; the fourth was adopted by the Codex Alimentarius Commission.

These four instruments present common characteristics, with some variations in their details. First of all, the norms contained in these instruments

[8] On this example, see S. Battini, Amministrazioni op.cit., p.262.

are aimed at ensuring the balancing of conflicting interests. They seek to guarantee free trade, butalso to protect health and consumer interests. The SPS agreement seeks to reconcile free trade with the sanitary and phytosanitary measures necessary to protect human, animal and plant health. The TBT agreement seeks to balance the needs of international commerce with the safety of products and processes: excessively and unjustifiably complex national rules governing products, processes and methods of production may discriminate against foreign products.[9] The GATS agreement seeks to limit the professional requirements and procedures for practicing a profession, to prevent such rules from operating as barriers to the free circulation of services. The FIEIC seeks to facilitate international trade in foodstuffs, while ensuring adequate protection of consumer health. All of these instruments aim at preventing restrictions ontrade in goods and services through disguised barriers, like health or technical requirements, which would favor national products and impede the importation of foreign ones.

These instruments establish a link, and require a balance, among collective public interests, one of which is international trade. The four instruments considered here are just some of the many existing "linkages" or "trade ands," because the pervasiveness of trade connects it with other concerns, like the environment, employment, competition, corporate law, foreign investments, development, immigration policy and poverty.[10]

These instruments contain five types of common provisions, relating to transparency, harmonization, equivalence, consultation and control procedures. To ensure transparency, these instruments require national administrations to promptly publish their requirements, so that they may be made known to other

[9] On the balancing relative to the TBT agreement, see WTO Appellate Body, *European Communities – Measures affecting asbestos and asbestos-containing products*, 12 March 2001, WT/DS 135/AB/R.

[10] On these problems, see S. Battini, Amministrazioni op. cit., p. 236 – 237 and M. Nettesheim, Legitimizing the WTO: the dispute settlement process as formalized arbitration, in "Rivista trimestrale di diritto pubblico", 2003, n.3, p.716, 719, 722.

national administrations and interested parties. A reasonable period should be allowed before a new requirement takes effect, in order to allow producers in exporting countries to adapt their products or methods of production. To the same end, Members must establish enquiry points to provide information to other States or private actors. These norms do present some variations. For example, some instruments require Members to supply requested documents to nationals of other Members at the same price, while others require Members to provide information and assistance.[11]

To ensure harmonization, these instruments stipulate that national administrations shall base their measures on international standards, guidelines or recommendations. Such measures are then presumed to be consistent with the relevant international provisions of the treaties.

Standards, guidelines and recommendations are not set forth by the agreements themselves. They are instead issued by other international organizations, in which the Member States are required to participate. Some examples are the Codex Alimentarius Commission, the International Office of Epizootics, the International Plant Protection Convention, the International Standard Organization (ISO), and the International Electrotechnical Commission (IEC).[12]

To ensure equivalency, the agreements provide that Members should accept the measures of other States as equivalent, if the exporting State objectively demonstrates that its measures achieve the importing State's level of protection. The obligation to demonstrate equivalence rests with the exporting country. The Member States may also sign bilateral and multilateral agreements on the recognition of the equivalence of specified measures.[13]

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[11] SPS, Annex B, Articles 1, 2, 3; TBT, Articles 2.11 and 12 and Article 10; GATS, Article III; FIEIC, Articles 14 – 17.

[12] SPS, Articles 1.2, 4; TBT, Articles 2.4 and 5; GATS, Article VI.5.b); FIEIC, Article 12.

[13] SPS, Article 4; TBT, Article 2.7; GATS, Article VII; FIEIC, Article 13, but also see Articles 9 – 16 of the TBT and all of the GATS.

If no international standards, guidelines or recommendations exist, or if a national measure does not respect the international standard, guideline or recommendation, the Member shall follow a procedure of notification and consultation : publish a notice of the measure, so as to enable interested Members to become acquainted with it; notify other Members of the products to be covered by the regulation; provide other Members with copies of the proposed regulation; allow other Members reasonable time to make comments and discuss these comments on request, and take the comments and the results of the discussion into account.[14] In the case of sanitary and phytosanitary measures, a State may choose a higher level of protection, but it must demonstrate that this is justified and does not result in arbitrary discrimination.

Finally, international agreements set forth restrictions on national procedures of certification and control. National procedures must respect the following principles: equivalence of assessment and control procedures for imported and domestic products alike; the expedient execution of the procedures (without undue delays) and the avoidance of undue delay in considering an application; the ban on overly burdensome requirements; confidentiality; reasonableness and proportionality; the obligation to provide a procedure for reviewing decisions.[15]

4. The Regulators

The international standards which constrain national administrations share many common features. I shall look first at the regulating authority.

The body of legal rules summarized here derives from both international agreements and the decisions of the collegial bodies established by the agreements themselves: the Committee on Sanitary and Phytosanitary

[14] SPS, Annex B, Article 5; TBT, Article 2.9; GATS – "Disciplines on domestic regulation in the accountancy sector", 14. 12. 1998, chapter on "Transparency"; FIEIC, Article 15.

[15] SPS, All. C; TBT, art. 5. 1, 2 e 3; GATS, art. VI; FIEIC, art. 19.

Measures, regulated by the SPS, Articles 12 and 5.5; the Committee on Technical Barriers to Trade, regulated by the TBT, Article 13; the Council for Trade in Services, regulated by the GATS, Articles XXIV and VI §4; and the Codex Alimentarius Commission and the Committee on Import/Export Inspection and Certification Systems.

The distinction between international agreements and collegial bodies is important because standards disciplining State administration that derive from inter-State agreements can be considered acts of self-restraint undertaken by the States themselves. By contrast, standards established by the collegial bodies of international organizations represent an external limitation, even if State representatives belong to these bodies.

For example, on June 21 – 22, 2000 the Committee on Sanitary and Phytosanitary Measures adopted the guidelines envisaged by Article 5.5 of the SPS Agreement for the application of the concept of the appropriate level of protection. It declared that new measures must be based on a comparison with previous measures, with national measures addressing analogous risks, with measures adopted by international bodies and with measures adopted in other countries and based on technical opinions.

The Committee on Technical Barriers to Trade has established norms for the implementation of Articles 2.9-10, 3.2, 5.6-7 and 7.2 of the TBT Agreement . These provisions concern transparency and notification obligations. The Committee has recommended that Members designate the government authority that will examine comments, acknowledge receipt of the comments, specify the ways in which the comments will be taken into account, and provide further information where necessary.[16]

In application of Article VI.4 of the GATS Agreement and thus in order to facilitate the liberalization of trade in accounting services by ensuring that domestic laws do not constitute unnecessary barriers to such trade, the Council

[16] WTO, Transparency Provisions of the TBT Agreement, WTO Secretariat, April 2002.

on Trade in Services adopted "Disciplines on Domestic Regulation in the Accountancy Sector" on December 14, 1998. This requires that every Member designate the national administrative authority, notify other Members of new measures and establish professional licensing criteria and predetermined qualification requirements, which are made publicly available, and are objective, proportional and reasonable.

Here in the realm of international law we see the phenomenon, familiar in European law, of the sectoral committee, made up of national bureaucrats rather than government representatives. These committees function as clearing houses for national interests, as connecting bodies and centers of secondary rulemaking.

Also interesting here is the schism between the regulators on the one hand, and the authors of the regulation on the other. As we have seen, intemational agreements do not themselves fix the standards, guidelines and recommendations to which the Members are invited to conform, nor do they entrust this job to the bodies constituted by the agreements themselves; instead, they reroute this job to other international bodies, using a connection technique known as "borrowing regimes." It has been observed that, "on the one hand, the WTO avails itself of the Codex Commission's work for the harmonization of national regulations likely to prejudice free international trade, that is the interest protected by that organization. On the other hand, the Codex Commission, in order to guarantee the safety of foodstuffs, borrows from the greater institutional effectiveness of the WTO system: its standards are not in themselves binding upon States, but the degree of their observance has markedly increased owing to the application of these standards by the dispute resolution bodies of the WTO."[17]

[17] S. Battini, Il sistema istituzionale internazionale. Dalla frammentazione alla connessione, in "Rivista italiana di diritto pubblico comunitario", 2002, n. 5, p. 986 and A. von Bogdandy, Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization, in S.

At the heart of the system stands the WTO. Through the medium of trade, the WTO ultimately regulates – or better yet, lends its regulatory force to – different authorities, in order to implement rules regarding very diverse sectors, from the environment to agriculture, plants, health and food safety. There is, in this sense, a certain resemblance between the WTO and the European Union: both revolve around the circulation of goods and services (though the European Union also protects the free circulation of persons and businesses).Both ultimately penetrate other sectors in order to balance competing and conflicting interests. The process of EU transformation from a sectoral authority into a general public authority is, however, substantially more advanced.[18]

A third interesting feature consists in the agreements' prescription that the Members designate a government authority as responsible for performing the activity subject to international obligations (an example can be seen in the SPS, Annex B, Article 10) or designate an enquiry point (examples can be seen in the SPS, Annex B, Article 3 and the TBT, Article 10.1). In this way, the State is substantially disaggregated: the designated national office becomes the body of reference for the international organization. The paradigm of the State as a unit is thus cast aside and the internal administrative organization of the State takes on an increased international importance.[19]

Griller (ed.), International Economic Governance and Non-Economic Concerns – New Challenges for the International Legal Order, Wien-New York, Springer, 2003, p. 109. This too is a widespread phenomenon: the Monetary Fund and the World Bank lend their own power to the rules and criteria established by the Basel Committee, asking that national administrations apply them and verify their observance.

[18] On the difference between the WTO and the European Union, see A. von Bogdandy, Legitimacy, op. cit., pp. 123-126.

[19] On this, see S. Battini, Amministrazioni op. cit., p. 211. More generally, on the international role of domestic bureaucracies, S. Cassese, Relations between International Organizations and National Administrations, in XIXth International Congress of Administrative Sciences (Berlin 1983), Proceedings, Antwerp, Kluwer, 1985, p. 177.

5. The Regulated

The second noteworthy aspect of this international regulation lies in the way in which it operates. It has a vertical effect, in the sense that it penetrates within the State, circumventing national legislation in order to address national public administrations directly. This is the product of harmonization.

International regulation is not directed solely to States. It is also addressed to sub-State and even to private entities. An example can be seen in the TBT agreement, which concerns not only central governments but also the local governments and non-governmental bodies that establish technical rules.

International regulation also produces a horizontal effect, in the sense that it requires a kind of dialogue between States. This dialogue unfolds in two different ways. First of all, national public administrations are required to compare continuously their own and other countries' measures. Secondly, national public administrations are encouraged to enter into equivalence or mutual recognition agreements.

Global regulation thus does not only impose itself vertically upon States, but it also produces a horizontal effect: it requires States to open themselves up reciprocally, laterally, as it were, respecting procedural rules in their relations.

This twofold effect, vertical and horizontal, and the relation between international organizations and States, can also be seen in the European Union. Here too harmonization is required from on high, and is accompanied by mutual recognition. But, as we shall see, differences between international and European administrative law abound.

6. The Regulatory Process

The third noteworthy aspect of international regulation has to do with the regulatory process.

It is worth noting that the State obligations deriving from international regulation are addressed to procedures. These are obligations such as

consultation and discussion, respect for the principles of reasonableness and proportionality and the duty to give a response within a fixed period. This is a domain that States usually consider to be their exclusive province: governing administrative procedures.

By requiring national legal systems to respect the procedural obligations of consultation, transparency, reasonableness and proportionality, the global system thus imports legal principles into national systems.[20]

Another interesting consideration here regards the regulatory technique of mutual recognition. This is a widespread institution, which overcomes the dualism between international and domestic law, by enabling a national authority to make decisions which have direct effects in other national legal systems. In the European Union, where the principle of mutual recognition originated before spreading to international law,[21] it was imposed from on high.It was usually accompanied by a minimum of harmonization, which is the premise making mutual recognition possible. The situation at the global level is different. Here, mutual recognition is an alternative to harmonization (viable when there are no international standards or there is no will to follow them). It is the outcome of interstate accords and is thus a matter of voluntary consent.

The notice and comment procedure has also been borrowed from other legal systems, this time from national ones. Still, even this is very different from the analogous procedures practiced by domestic legal systems. In fact, at

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[20] It affirms that […] "the Appellate Body proceduralizes the substantive WTO obligations […] and that it has extended "[…] basic elements of the democratic principles and the rule of law to aliens", A. von Bogdandy, Legitimacy, op. cit., pp. 128, 132. The phenomenon is also evident in other cases, like in the Poverty Reduction Strategy of the World Bank and International Monetary Fund. These two organizations grant loans to low income countries on condition that national programs are prepared with the participation of government and administrative bodies, interested parties (civil society organizations, minorities, unions, research institutes, etc) and that the results of such participation be taken into account in preparation of the programs. See http://web.worldbank.org/poverty/strategies/overview.htm.

[21] A. Alemanno, Gli accordi di reciproco riconoscimento di conformità dei prodotti tra regole OMC ed esperienza europea, in "Diritto del commercio internazionale, April – Setember 2003, p.379.

the national level, the actor who notifies, receives comments and decides is a State authority, and is superior to the party which is heard. Transposed into international law, the procedure is structurally similar, but functionally different. At the international level,it is a State which listens to another State; there is no higher authority which decides. International law is inspired by domestic administrative law, but the function of the institution, transplanted into a different context, changes. The notice and comment procedure becomes an instrument of consultation and debate among equals subject tono higher authority.

Finally, it is worth mentioning that the public arena phenomenon manifests itself in the global legal space as well as in the national one. By this I mean that there are multiple levels of government, in potential conflict between each other (international organizations and national administrations) and also interested parties, which can exploit the differences between the regulators by playing off one against the other.[22]

7. The Legal Status of the Rules

As I have noted above, the rules created by international organs in furtheranceof the treaties are defined in different ways:guidelines, disciplines and standards.[23]

These rules do not create direct, legally binding obligations upon the States.[24] In the case of some rules, the relevant international organization

[22] S. Cassese, L'arena pubblica. Nuovi paradigmi per lo Stato, now in S. Cassese, La crisi dello Stato, Bari-Roma, Laterza, 2002, p. 74.

[23] SPS, Article 5.5; TBT, Article 2; GATS, Article VI.4.

[24] The question of the direct application and the higher status of directly applied norms has been discussed in reference to the norms contained in the WTO treaty, not with reference to secondary norms. See J. H. Jackson, The Jurisprudence of GATT and the WTO, Cambridge-New York, Cambridge University Press, 2000, p. 297 and p. 328; J. H. J. Bourgeois, The European Court of Justice and the WTO: Problems and Challenges, in J. H. H. Weiler (ed.), The EU, the WTO and the NAFTA, Oxford-New York, Oxford University Press, 2000, p. 71 and A. von Bogdandy, Legal Equality, Legal Certainty, and Subsidiarity in Transnational Economic Law -

debated the question of their legal status, and decided not to make them binding. This holds true for the international rules governing accountants, set forth on the basis of Article XVIII of the GATS, relative to the Additional Commitments, which are binding only when they are voluntarily inscribed in a Member's Schedule. Currently, the Working Party on Domestic Regulation is working to extend this regime to other professions. At the end of this process, the "disciplines on domestic regulations" should become an annex to the GATS and thus assume a binding character.

Still, these rules' lack of a directly binding character is compensated for in two ways. First of all, by implementing monitoring procedures, which encourage States to adhere to the standards. Second, by dispute resolution mechanisms, which can be set into motion by the States interested in other States' compliance.[25]

International law techniques for enforcing decisions are different from domestic ones. International law provides for a retaliation mechanism (in the WTO, the offended State may, following the dispute resolution procedure set forth in Articles 21 - 23 of the DSU, – take countermeasures in the form of tariffs so as to penalize the exports of the condemned country and obtaincompensation for the losses incurred by the violation), that functions as an ultimate rule of the global legal system. The WTO system thus borrows rules from other international systems (FAO, WHO, Codex Alimentarius, etc.), but also lends those rulesmuscle, so that they are effectively respected.

8. Conclusion

Decentralized application of Art. 81.3 EC and WTO law: why and why not, in A. von Bogdandy, P. C. Mavraidis, Y. Meny (eds.), European Integration and International Coordination, Studies in Transnational Economic Law in Honour of C.D. Ehlermann, The Hague-London-New York, Kluwer, 2003, pp. 13-137.

[25] As well as by private actors benefiting from States : G. C. Shaffer, Defending Interests; Public – Private Partnership in WTO Litigation, Washington, Brookings Institution Press, 2003.

The parts of the global legal system that we have examined appear as a network of sectoral governments. These governments, however, are not separate, but rather reinforce each other mutually. They do not make up a structural unit, but they do become a functional one, thanks to mutual ties and the division of labor between standardization bodies and bodies charged with imposing standards.

In the global legal system we have seen the return of many forms otherwise specific to States and supranational bodies, like the European Union: regulators, committees, harmonization, consultation procedures. These forms rarely appear in the global legal order in the same way as in national or mature supranational systems. Here the regulator is not unitary, as in the States, but split in two: one body sets the rule and another imposes it. Harmonization is encouraged, but not imposed from on high, as in the European Union; it is therefore voluntary. The consultation procedures are carried out by actors in a position of equality, while in domestic law, the State authority which hears the views of the "administered" before making its decision is superior to them.

To returnto the initial question, one can offer the hypothesis that these different institutions do not correspond to their national or European models, because they are transformed by the different context.. It is worth repeating the warning of C. W. Jenks: "[w]e will have occasion to stress the importance, when transposing concepts of administrative law to the international sphere, of evaluating with prudence and circumspection the extent to which they are fully applicable at a particular stage of development, with due regard to the contrast between the infancy of international organisation and the maturity of the modern State."[26]

The only common element is that known as the "public arena." And it is natural that this should be so. In fact, the following things recur because the public arena exists: a plurality of public authorities, articulated at different

[26] C. W. Jenks, The Proper Law of International Organisations, London, Oceana, 1962, p.XI.

levels, but not in a hierarchical relationship; differences in regulation, that authorities want to reduce and private parties want to exploit; interested parties' access to the different authorities, to further their own interests, but also the implementation mechanisms of the regulatory systems; multipolar (rather than bipolar, as in the States) relations; exchange relationships.[27]

The above analysis brings me to two conclusions. The first has to do with the distinction between domestic and international law. The second concerns the functions of these two kinds of law in relation to private parties.

International law has long been dominated by a dualistic conception of its separation from domestic law. The States, the only subjects of international law, functioned as a screen dividing the one kind of law from the other.[28] The cases that we have considered belie this conception. The power of State intermediation is in fact attenuated. The State itself, in acting, must respect the standards established at the international level.

Domestic administrative law has an imperative authority. It imposes itself on the public, issues orders, grants permission and establishes obligations. From this comes the characterization of domestic administrative law as the point of equilibrium between State authority and individual liberty. The authority of international administrative law functions differently. It does not set limits upon individuals, but rather upon States. It is a higher law which imposes obligations upon national authorities. Its function is the inverse of that of domestic administration. International administrative law serves to widen, rather than to narrow, the sphere of private liberty. And it does this by limiting the action of the State.[29]

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[27] S. Cassese, L'arena pubblica, op. cit.

[28] On this distinction, S. Battini, Amministrazioni cit., p.4-5 e 10.

[29] "The basic purpose of GATS is to constrain governments from imposing or continuing a variety of measures that restrain or distort international trade": J. H. Jackson, The Jurisprudence, cit., p. 22-23.

This reversal in the function of international administrative law, as compared to its domestic counterpart, requires a reconsideration of the principles that ground the two systems. Values and rules that have one meaning domestically, assume another one internationally. It is enough to give two examples, concerning accountability and participation.

Accountability serves to protect individual liberties. The national administration is asked to respect the law (the principle of legality) because the law comes from the Parliament. Citizens elect the Parliament, and in so doing, consent to the limits imposed upon them by the public administration. The Parliament and its laws thus protect citizens against the executive power, which limits their sphere of activity. At the international level, this conceptual order does not hold. Here, in fact, there is no executive power; the public authority does not function in order to limit, but rather to enrich the sphere of private liberty; the actions of international bodies are carried out against States, in order to keep them at bay.

An analogous observation can be made for participation. This assumes a different significance in the international arena, as compared with domestic administrative law. In domestic law, it is private actors who participate. And this participation has two connected purposes: to ensure the cooperation of citizens in the decision-making process and give voice to them, to protect them in their relations with the public power. In international administrative law, the situation is different. Here, it is the State which is generally called to participate. And it participates not as a defendant but as a vindicator of rights: the international community had better listen to the point of view of each State, if it wants to maintain general collective control over States' actions. Finally, as has already been observed, in international administrative law there is no higher authority which, after the consultation, decides, because the decision is remanded to bilateral or multilateral collective decision-making.

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