CHAPTER I

THE GLOBAL POLITY

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I. WHO RUNS THE WORLD?

WHO runs the world? The customary answer to this question is that the world is run by national governments (States), by common agreement, in different territories. States have different degrees of influence, and therefore power is not balanced[1]; they establish links among themselves, giving rise to international law.

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

If we examine the trends in the numbers of polities in Europe over the course of the last thousand years or so, we see that there has been a process of aggregation. In two centuries they halved (from 1000 in the 14th century to 500 in the 16th), and then diminished by a further 30% in the two hundred years that followed, leaving some 350 by the end of the 18th century[2]. By the early 20th century there were only 25 such polities in existence. The British historian Mark Greengrass has summarized this process in his claim that "'*swal-*

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

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

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

If, however, we ask the same question of the 20th and 21st centuries, we are immediately struck by the extent to which the opposite process of disaggregation has occurred. In half a century, the number of polities in existence has increased fourfold. In 1945, there were 50 (the 50 States that attended the San Francisco Conference, at which the United Nations Charter was drafted); by 2010, there were approximately 200[4].

Moreover, from the middle of the 20th century onwards, national governments have increasingly been accompanied by other actors, such as multinational corporations, international governmental organizations (IGOs) and non-governmental organizations (NGOs), that challenge the capacity of the States to lead. In this neo-medieval system[5], an important role is played by the approximately 2000 existing global regulatory regimes[6]. Among them, "[f]*ive main types of globalized administrative regulation are distinguishable: administration by formal international organizations; administrations based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administra-*

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

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

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

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

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

International governmental organizations[8] are – as a rule – established by national governments: States integrate in larger bodies that incorporate diversified "local" legal orders. But IGOs sometimes reproduce themselves (many IGOs, such as the Codex Alimentarius Commission, are established by other IGOs). Moreover, they are not mere agents of the States, from which they have become increasingly autonomous. On the contrary, they have a role in guiding and constraining State behaviour: they conclude treaties and make rules; they create standards[9]; they help transform the

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

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

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

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

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

A remarkable model of hybrid public-private global organization is provided by the International Organization for Standardization (ISO), whose members are the national bodies "*most representative of standardization in their countries*". Therefore, the ISO is a "*non-governmental organization that forms a bridge between the public and private sectors*"[10], within which some bodies are entirely private, while others are part of the governmental structure of their countries or have some form of governmental mandate[11].

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

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

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

law[12]. Its structure conforms to a "multi-stakeholder" or "multi-organizational" model, characterized by the existence of multifarious entities and institutions[13]. Nevertheless, it differs from the ISO in that it displays a particular form of hybridization: it is composed of private entities, but it performs a public function; in other words, it has a private "façade", but the substance of its activities is public in nature[14].

The International Chamber of Commerce (ICC) is, on the other hand, a perfect example of an entirely private global regulator. It brings together only private bodies and its main tasks involve the promotion of "international trade, services and investment"[15]. Furthermore, the enforcement of its standards is completely entrusted to the Chamber itself, without any interference from public or national authorities. The ICC, however, collaborates with several States and governmental organizations, by concluding agreements and providing recommendations[16].

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

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

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

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

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

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

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

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

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

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

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

Global regulatory regimes are established because a growing number of issues and problems cannot be addressed or resolved by national governments alone. These issues themselves are global in nature, and as such are beyond the power of individual governments to regulate: internet governance, environmental control, the Olympic Games, and the recent economic crisis provide example[19].

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

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

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

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

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

II. THE BASIC FEATURES OF THE GLOBAL POLITY

In the global space there are – as already noted – many regulators. It is impossible, therefore, to deny that there is a global political organization, even a global polity; and it is important to identify its particular characteristics[23].

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

a. There is no single global and comprehensive legal order and no global government, but rather several global regulatory regimes[24], without one hierarchically superior regulatory system (the United Nations Organization is more comprehensive then others, but it is

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

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

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

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

less developed, as – for example – it lacks an efficient dispute settlement mechanism open to private parties[25]). The global polity is the empire of "ad-hoc-cracy": global regulatory regimes do not follow a common pattern; they are not uniform because they have to balance, area by area, national diversity and global standards.

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

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

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

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

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

b. Vertically, there is continuity and no clear dividing line between the global and the national levels[28]. National governments are at once principals (because they establish and control global institutions) and agents of IGOs (insofar as they implement international regimes). Global organizations are subject to the control of national governments even as they supervise them. Global institutions have also in many cases established direct links with national civil societies. The global legal space, therefore, is neither hierarchical, nor layered, but rather "marbled": global, transnational, supranational and national are intermixed.

c. Horizontally, the diverse global regulatory regimes are self-contained (leading to the fragmentation of the global legal space)[29], but they establish mutual interconnections and linkages[30]; together, they constitute an enormous conglomeration of interdependent legal orders. This interconnection has been called a "regime complex": "[….] *a collective of partially overlapping and non hierarchical regimes*"[31].

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

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

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

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

d. The public-private divide is blurred and does not follow the domestic paradigm of government regulating business[32].

e. Compliance, while compelled in national legal orders through enforcement and the legal exercise of power ("*covenants*, *without the sword*, *are but words*" (Hobbes[33])), in the global space is "induced".

"[….][*T*]*he Codex Alimentarius Commission (CAC) has changed after the World Trade Organization (WTO) referred to it as the reference point for the elaboration of international food standards*". Before 1995, "*it was entirely voluntary for member states to base their national regulations on Codex standards*". After 1995, a State wishing to go beyond the global food standards must demonstrate the scientific basis of its measure and how it complies with the level of protection established by the Codex Alimentarius Commission (F. Veggeland and S. Ole Borgen, *Negotiating International Food Standards: The World Trade Organization's Impact on the Codex Alimentarius Commission*, in *Governance*, 2005, vol. 18, October, n. 4, pp. 683 and 701; R.A. Pereira, *Why Would International Administrative Activity Be any Less Legitimate? A Study of the Codex Alimentarius Commission*, in *The Exercise of Public Authority by International Institutions*, eds. A. von Bogdandy et al., Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 210, Berlin, Springer-Verlag, 2010, pp. 541-571). The two global regulatory regimes thus reinforce each other. The decoupling of standard setting and standard enforcement produces new problems of accountability: "*If third parties enforce standards*, *it will be especially difficult for the standard users to hold the standard setters accountable for the consequences of those standards*"; "*decoupling rule making and enforcement is the key to the accountability deficit of standards*" (D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, in *Governance*, 2005, vol. 18, October, n. 4, pp. 623 and 624).
The principle that WTO rules are not to be interpreted in isolation from other rules of general public international law was established by the first WTO Appellate Body decision (WTO Appellate Body, US Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 20 May 1996, p. 17).
It follows from this that the different regulatory regimes are not entirely self-contained, because they do not exist in isolation from other rules of global law.

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

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

Global bodies use surrogates to implement their standards. One such surrogate, noted above, is that of the "regime complex", linking one regime to another: trade and labour, trade and human rights, environment and human rights (for example, allowing the imposition of trade penalties for non-implementation of labour or environmental standards). Another possibility is retaliation, authorizing controlled self-enforcement: it induces one party (one State) to obey to the law because of the threat that another party (another State) will be authorized by a third party (the WTO Dispute Settlement Body) to react. Still another option is to introduce incentives for compliance: for example, to provide additional rights as a "prize" for fulfilling obligations[34]. Implementation and enforcement may also be left to national governments acting as instruments of global institutions[35].

f. Global regulatory regimes impose the rule of law and democratic principles on national governments. A body of administrative law principles has developed in the global space: due process, the right to be informed and consulted, the right to a hearing, the duty to give reasons, the right to a judge; both procedural fairness and judicial review are influenced by the new context and thus open to change[36]. Some democratic principles (free elections, freedom of

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

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

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

association, free speech) are imposed by global actors (such as the European Union) on national governments[37].

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

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

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

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

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

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

III. A TWO-LAYER SYSTEM?

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

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

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

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

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

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

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

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

Members of international organizations include not only States, but also non-national institutions (such as the European Union, which is a party to the International Olive Oil Council and the World Trade Organization), as well as private non-governmental bodies (as in the case of the ICANN[42]). Many international organizations also allow a range of bodies to participate as "observers" in their activities. It is, therefore, often better to avoid the common denomination of such organizations as "intergovernmental".

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

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

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

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

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

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

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

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law.duke.edu/faculty_scholarship/1126).

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

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

International and regional organizations, States and non-State actors are mutually implicated within global governance structures and follow the logic of collective action[45]. This "[….] *is becoming a heterogeneous, multilayered logic, derived not from one particular core structure, such as the State, but from the structural complexity embedded in the global arena. Globalization does not mean that the international system is any less structurally anarchic; it merely changes the structural composition of that anarchy from one made up of relations between functionally differentiated spheres of economic activity, on the one hand, and the institutional structures proliferating in an ad hoc fashion to fill the power void, on the other*"[46]. "*Global regulation typically does not operate on two distinct, vertically separated levels, international and domestic. Rather, it functions through a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes and actors, resembling nothing so much as a Jackson Pollock painting*"[47].

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

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

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

IV. GOVERNANCE BY AGREEMENT

There is no higher authority in the global polity. Therefore, the kind of hierarchy that characterizes domestic governments is simply non-existent. Nor there is uniformity, as some global regimes are more developed than others, while others are less so. Given these conditions, the global polity relies heavily on governance by agreement (transactionalism[48]): contracts, consensus, transnational cooperation, mutual recognition agreements, and shared powers. An example is in Article 16.1 of the Convention for the conservation of Southern Bluefin Tuna (20 May 1994): "[i]*f any dispute arises between one or more of the Parties concerning the interpretation or the implementation of this Convention*, *those Parties shall consult among themselves with a view to having the dispute resolved by negotiation*, *inquiry*, *mediation*, *conciliation*, *arbitration*, *judicial settlement or other peaceful means of their own choice*". Notice the importance of governance by agreement: a convention provides for subsequent contractual means of conflict resolution[49].

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

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

The global polity also operates on a mixture of consensus, unanimity and different kinds of majoritarian principles[50]. For instance, all intergovernmental bodies of the United Nations Conference on Trade and Development (UNCTAD) take decisions by consensus. Article 11 of the International Agreement on Olive Oil and Table Olives (1986) prescribes consensus as the means of decision-making of the International Olive Oil Council. Article 15 of the Rules of Procedure of the Committee for Environmental Protection (part of the Antarctic Treaty System) provides that "*where decisions are necessary, decisions on matters of substance shall be taken by consensus of the members of the Committee participating in the meeting*". Where decisions relate to procedural matters, a simple majority is enough. If the Committee has to decide whether a question is substantive or procedural, such decision must be taken by consensus.

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

Consensus is a rigid rule that can produce inertia or rigidity. But the rules that govern the functioning of global institutions also often provide means for softening or escaping such rigidity. For example, what is usually required is a consensus of those members participating in the meeting in question, not of all the members[51].

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

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

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

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

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

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

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

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

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

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

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

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

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

The reliance of the global legal space on horizontal links and networks produces three effects. It reduces the "verticality" of the global machine, because the *superioritas* of the higher authorities rests on an intricate web of horizontal and contractual relations[56]; it facilitates the political transfer or transplant of institutions from one national legal order to another[57]; and it stimulates research into functional analogies hidden behind formal differences in national systems[58].

Fourthly, the global polity relies on shared powers. For example, the 1970 Patent Cooperation Treaty establishes a regime of cooperation between national and global authorities[59]. Article 3.1

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

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

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

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

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

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

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

V. THE IMPACT ON DOMESTIC REGULATION AND ON PRIVATE PARTIES

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

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

The global polity has a powerful impact on domestic regulation. Global law removes functions from the domestic setting and asserts control over national agencies. For example, many WTO agreements impose obligations on national authorities to ensure transparency, to move towards harmonization, to guarantee equivalence, and to introduce consultation and control procedures[61].

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

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

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

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

management and optimum utilization of SBT: a) the Commission shall decide upon a total allowable catch and its allocation among the Parties [….]"; and Article 8(7) continues by providing that "[*a*]*ll measures decided upon under para.3 above shall be binding on the Parties*" (namely Australia, Japan, New Zealand, Korea, Taiwan). Article 1(1) and 1(4) of the SBT Statistical Document Program (approved by the Commission in October 2003) states that "[*f*]*or the importation into the territory of a Member, all southern bluefin tuna shall be accompanied by a CCSBT SBT Statistical Document* […]". "*The Commission requests the appropriate authorities of exporting/fishing entities to make the requirements under this Program known to their exporters*". As a consequence, domestic "fishing entities" are directly affected by the Commission's decisions[62].

There are hundreds of global standard setting bodies, of which the global financial standard setting agencies are among the most powerful. These bodies adopt standards that are implemented directly by national firms (such as banks). Those standards penetrate into the national regulatory context and, while not legally binding, are obeyed in practice at the national level[63].

Global regulatory decisions are binding. Even when they are not formally so, compliance is often monitored in any event[64]. And even when they are not binding and compliance is not monitored, such

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

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

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

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

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

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

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

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

Neither the anti-dumping and the retaliatory measures can be established without judicial authorisation or control. Private parties and States act as enforcers of judicial decisions. As global courts cannot enforce their decisions "from above", implementation is ensured through the reaction of the injured party, which can either obtain compensation or retaliate[66].

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

VI. THE PUBLIC-PRIVATE DIVIDE

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

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

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

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

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

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

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

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

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

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

Global regulatory regimes are, however, replete with quite another kind of rules. A body of public law is developing at the global level[69]: global rules require that public authorities provide information to private parties, impose on them the obligation to hear and the duty to provide reasons, and make access to justice a general obligation.

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

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

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

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

As one moves away from the State, up into the global space, the dividing line between public and private becomes progressively less clear. For example, ICANN is a private corporation, but, this notwithstanding, its own by-laws subject it to very strict procedural obligations, similar to those established by the US Administrative Procedure Act for public bodies; one explanation for this is that ICANN performs a public function [70].

Another interesting case concerns the implementation of the standards set by the Forest Stewardship Council (FSC)[71], to which notice and comment procedures and obligations to consult with stakeholders are applied on the basis of the "Code of Good Practice for Setting Social and Environmental Standards", elaborated by ISEAL[72].

Due process guarantees and procedural obligations are also applied in relation to the implementation of the International Air Transport Association (IATA) standards. Article 6 of the IATA Bylaws establishes the right to be heard and the right to initiate arbitration proceedings[73].

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

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

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

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

Another example is provided by the public procurement regulations for IGOs, which are not less rigid than those binding national governmental bodies. One explanation for this is that national and global regulation have the same purpose: to make the best goods or services available at the lowest price (hence, they impose competitive tendering). The general blurring of the lines between public and private law[74] are indications of the emergence of a new "mixed" or "compound" legal system.

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

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

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

VII. A GLOBAL DUE PROCESS OF LAW

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

According to another sceptical view, the flaws of global legalism stem from the fact that in the global space there is legislation without legislators, enforcement without enforcers, adjudication without courts[76].

The global polity is not in such a primitive stage of development: on the contrary, we can find there binding rules addressed to private parties[77]; an institutional setting with specialized bodies, and well-established links among them; a set and many sub-sets of legal and physical persons, subject to the rules and to orders stemming from global organizations; and, of course, a wide range of rights and obligations.

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

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

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

If there is a global polity, what is the role of law in the global arena? And what is the role of the rule of law[78]?

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

In this case, the rule of law (transparency, the right to a hearing and judicial review) was recognized by a global court, but applied to "internal governmental procedures". What about the global procedures themselves? Are global institutions required to abide by the rule of law, and thus to provide transparency, the right to a hearing and judicial review of their own decisions[80]?

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

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

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

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

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

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

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

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

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

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

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

The development of these procedural principles in the global arena has a twofold impact: they apply to global decision-making processes, and they may also affect domestic proceedings[83].

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[83] Basic principles for the global procedures have been established by treaties, statutory instruments, secondary legislation and global courts.
The International Tribunal of the Law of the Sea, in the *Juno Trader* case (n. 13, 18 December 2004) established, at para. 77, that "[t]*he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision*". Notice that respect for fairness and the due process of law is established by the court as an obligation of the domestic authorities of Guinea-Bissau. These authorities had not only detained the crew, but also failed to inform the ship owner that the bond paid was unreasonable.
Article 34 of the Patent Cooperation Treaty establishes the rights of the applicant to communicate orally and in writing with the International Preliminary Examining Authority, amend the claims, receive a written opinion from the Authority and respond to the written opinion. In this case, procedural rules are imposed on global agencies.
Article 6.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) provides that "[t]*hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered*". Article 6.4 of the same Agreement provides that "[t]*he authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases* [….]". In this case, the duty to provide interested parties an opportunity to obtain the relevant information and to be heard is imposed on domestic agencies in order to favour comments from foreign enterprises which have dumped their products.
Article 3.1 of the GATT Safeguard Measures and Article XIX of the GATT establish the duty to provide a reasoned and adequate decision, with explanations, to importers, exporters and other interested parties (including foreign governments). In this case, global law imposes procedural rules on domestic agencies, and grants not only private parties but also foreign governments the right to an explanation.
Article 7 of the Sanitary and Phytosanitary Agreement provides that "[m]*embers shall notify changes in their sanitary and phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B*". Para. 1 of this Annex provide that "[m]*embers shall ensure that all sanitary and phytosanitary regulations which*

Global rules grant participation rights to private parties vis-à-vis domestic authorities (thus strengthening the participatory rights already granted in many national legal orders), to national governments vis-à-vis global agencies or other national governments, to global institutions vis-à-vis other global institutions, and to private parties appearing before global institutions. Participation is therefore ensured both vertically (for private parties before national governments and global agencies; and for national governments before global organizations) and horizontally (that is, guaranteed to national governments before other national governments; and to global institutions before other global institutions). Thus participatory rights created at the global level establish links among the different levels of government, and between the different governmental bodies involved and civil society[84].

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

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

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

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

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

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

VIII. JUDICIAL GLOBALIZATION

Another aspect of the juridification of the global polity is the development of dispute settlement[87]. Joseph H. H. Weiler has sum-

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

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

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

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

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

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

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

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

Since the 1990s, the number of international courts and tribunals has grown rapidly[91]. Not long prior to this, there were only six operative international courts. In the last fifteen years of the last

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

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

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

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

century, fifteen new permanent adjudicative mechanisms and eight quasi-judicial procedures were introduced[92].

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

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

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

[94] R. A. Kagan, *Adversarial Legalism: The American Way of Law*, Harvard Univ. Press, 2003, p. IX and 164.
One of the most important global dispute settlement bodies is that of the WTO. Its development has been summarised by Alec Stone Sweet in the following manner: "[*w*]*hen GATT (1948) entered into force and was institutionalized as an organization, "anti-legalism" reigned* […]. *Diplomats excluded lawyers from GATT organs and opposed litigating violations of the Treaty. In the 1950s, triadic dispute resolution emerged in the form of the Panel System. Panels, composed of 3-5 members, usually GATT diplomats, acquired authority through the consent of two disputing States. In the 1970s and 1980s, the system underwent a process of judicialization. States began aggressively litigating disputes; panels began treating the treaty as enforceable law, and their interpretation of that law as authoritative; and jurists and trade specialists replaced diplomats on panels. The process generated the conditions necessary for the emergence of the compulsory system of*

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

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

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

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

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

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

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

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

The decisions of global courts can have direct effect, penetrating into domestic law and lifting the veil of national law[95].

The process of judicialization should not be over-emphasized, because there is a strong continuity between traditional diplomatic negotiation and the new forms of judicial dispute settlement[96].

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

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

[96] Consider, in this regard, Arbitral Tribunal – Annex VII of the United Nations Convention on the Law of the Sea-UNCLOS, Award on Jurisdiction and Admissibility, 4 August 2000 and the "effort to cooperate" (para. 78). This decision emphasizes the role of negotiation, mediation and consensual procedures. Article XIII of the International Plant Protection Convention provides for the settlement of disputes, consultation and the establishment of committees of experts. It then states: "*the contracting parties agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the contracting parties concerned of the matter out of which the disagreement arose*". There is, therefore, no sharp distinction between dispute resolution and negotiation.
See also the European Court of Justice (ECJ) decision in the *Van Parys* case (ECJ, C-377/02), which privileged reciprocity and negotiation; the Court held that adjudication may play a role only upon condition of reciprocity.

establish secondary circuits, by which they extend the rule of law in the global arena[97].

Judicial globalisation raises three important questions. Firstly, global courts exercise public authority through judicial law-making[98], but their power can neither be justified on the traditional basis of State consent, nor by functionalist narrative. In democratic contexts, judicial law-making is embedded in a political system in which a democratic legislature has the central place in creating the norms: there is no equivalent in the global space. Therefore, global courts are not *indirectly* legitimated in this manner because there is very little parliamentary participation in the selection of global judges. This argument, however, underestimates the existence of a large amount of global legislation (treaties, "constitutions", regulations, by-laws, "policies"). On every topic, there are rules; some "soft", others "hard"[99]. This legislation establishes the framework in which global courts operate. Therefore, courts do not act in a vacuum. We might also add to this the fact that legislation at the national level can have an important impact on the global level, setting limits and establishing barriers.

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

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

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

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

Thirdly, how do global courts interact with domestic judiciaries? Is the relation between global and domestic courts complementary, competitive, or hierarchical? (National courts apply avoidance techniques or follow strategies of judicial deference when international organizations appear before them[101]).

IX. DEMOCRACY AND GLOBALIZATION

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

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

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

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

In cases like the *Southern Bluefin Tuna*[102], *Tokios Tokelès v. Ukraine*[103] and *Kadi*[104] or in the example of the Patent Cooperation Treaty[105], direct links were established between global bodies and civil society. The SBT Commission, for example, issued orders to national fishing vessels. And, under the Patent Cooperation Treaty, a national can directly petition an international body for an international preliminary examination on the patentability of an invention. These links are, however, limited; therefore, global regulatory regimes are not, as a whole, democratic.

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

To study this first set of questions, we must take three features of "cosmopolitan democracy" into consideration[107]. Unlike States,

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

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

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

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

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

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

the global polity is not rooted in an authoritarian legacy, which influences the quality of the democratic process[108], and it has only a limited police power. In the global space, the characteristic feature of the nation State – a strong executive – is missing.

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

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

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

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

Moreover, the fragmentation of global regulatory regimes avoids the concentration of power at the global level. Dispersed powers are easier to check and keep under control. Overlapping public authorities can check each other. In many respects, this design (or at least this result of concurring and opposing forces) fulfils the same function as democracy: keeping public power under control. As the division of powers inside the State functions to check and balance powers, so the fragmentation of global regulatory regimes – though inefficient – can act as a mechanism of control[109].

Finally, the global polity has made use of a vast array of accountability mechanisms that were introduced and tested only relatively recently within the national context[110]. As there are no periodical elections at the global level, and there is no room for representative democracy, deliberative democracy and procedural accountabi-

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

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

lity play a dominant role in making global bodies responsible with respect to global society[111].

In terms of the second issue, globalization can favour the spread of democracy by facilitating the transplant or development of democratic institutions in countries where such institutions are weak or non-existent. This raises further, related questions: "[i]*s military occupation likely to be the midwife of democracy? Can democracy be imposed by force from the outside? This is the assumption driving America's intervention in Iraq and posited a potential new pillar of ambition for U.S. foreign policy elsewhere*"[112]. Multilateral institutions can actually enhance democracy[113], contrary to the traditional view that democracy is dependent upon political sovereignty, and that sovereignty is undermined by participation in multilateral institutions[114].

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

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

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

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

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

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

X. GLOBAL GOVERNANCE OR A GLOBAL COMPOUND CONSTITUTION?

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

A process of constitutionalization is already underway at the global level through the strengthening of an international civil society, the creation of a global public sphere, the growing number of transnational networks and the proliferation of global courts[117].

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

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

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

ment, *is normally present in the conduct of global life*"[118]. Global law is mostly administrative law, not constitutional law.

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

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

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

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

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

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

At the global level there are also executive agencies, such as the United Nations Compensation Commission for Iraq, the Iraq-Kuwait Boundary Demarcation Commission, the Global Environmental Facility, and the Prototype Carbon Fund[120]. These bodies carry out managerial tasks.

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

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

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

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

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

it provide an additional shelter for developed States at the expense of the "pariah States"[122]? Does it increase the impact of American legal imperialism in the World, by facilitating the export of American law[123]?

Legal globalization, like globalization itself (for example, the French denounce globalization, but their companies embrace it[124]), is full of ambiguities. For example, ICANN has global control of the Domain Name System, but it is an American corporation, incorporated in California, under the control of the Department of Commerce.

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

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

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

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

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

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

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

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

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

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

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[127] *The insidious wiles of foreign influence*, in *The Economist*, June 11, 2005, p. 41. On the role of American legal culture and tradition in the process of globalization, U. Mattei, *Miraggi transatlantici, fonti e modelli nel diritto privato dell'Europa colonizzata*, in *Quaderni fiorentini*, 2002, vol. 31, t. I, p. 407.
"[O]*n the one hand, dominant actors engage with international law, use it for their purposes and reshape it so as to better reflect their factual superiority. Yet insofar as international law doesn't bow to their demands – as it defends equality against hierarchy and stability against flexible change – powerful states withdraw: they try to limit the reach and impact of international legal rules on them and turn to the sphere of politics in order to achieve their goals. However, the simplicity of this picture, and in particular the dichotomy between international law and politics that it suggests, is misleading. Withdrawal from international law doesn't necessarily result in a rejection of law in favour of politics; instead it frequently leads to a substitution of domestic law for international law*" (N. Krisch, *Imperial International Law*, cit., p. 53).

and by local authorities, in relation to an urban transport project being co-funded in Mumbai[128]; and the successful attempt made by environmental associations to trigger UNECE intervention in order to compel national government bodies to provide access to relevant information[129]. The global polity is not only run in a top-down manner, but allows for voluntary cooperation from the bottom. This cooperation is strengthened by associations with parallel regulatory regimes: for instance, environment and human rights in the *Kazatomprom* case.[130]

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

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

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

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

[130] See footnote n. 103.

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

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