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Global Administrative Law and EU Administrative Law

Relationships, Legal Issues and Comparison

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Contents

List of Abbreviations

AD	US Department of Justice – Antitrust Division
ADB	Asian Development Bank
AGP	TT Agreement on Government Procurement
APA	American Administrative Procedure Act of 1946
ARC	Accounting Regulatory Committee
BCBS	Basel Committee on Banking Supervision
BIS	Bank of International Settlements
CAP	Compliance Advisory Panel
Cardozo Law Rev	Cardozo Law Review
CDM	Clean Development Mechanism
CEA	European Insurance Organisation
CEBS	Committee of European Banking Supervisors
CEN	Comité Europeén de Normalisation
CENELEC	Comité Europeén de Normalisation Electrotechnique
CERs	Certified Emission Reductions
CESR	Committee of European Securities Regulators
CGP	WTO Committee on Government Procurement
CHMP	Committee for Medicinal Products for Human Use
CINGO	Conference of International Non-Governmental Organizations
CMC	Common Market Council
CMDh	Coordination group for mutual recognition and decentralized procedure
CMG	Common Market Group
COE	Council of Europe
COP	Conference of the Parties
CPMP	Committee for Proprietary Medicinal Products
DCP	Decentralised Procedure
DG	Competition Directorate – General for Competition
DGIMS	Directorate General for Internal Market and Services

DIAC	Draft International Antitrust Code
DOE	Designated Operational Entity
DSB	WTO Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
EAS	European Administrative Space
EB	Executive Board
EBA	European Banking Authority
EBF	European Banking Federation
EC	European Community
ECHA	European Chemicals Agency
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
ECSC	European Coal and Steel CommunityTreaty
EEC	European Economic Community
EFAA	European Federation of Accountants and Auditor
EFAC	European Federation of Associations of Certification Bodies
EFRAG	European Financial Reporting Advisory Group
EFSA	European Food Safety Authority
EGAOB	European Group of Auditors' Oversight Bodies
EMA	European Medicines Agency
ESMA	European Securities and Markets Authority
ETSI	European Telecommunications Standards Institute
EU	European Union
Eur Competition Law Rev	European Competition Law Review
EWG	Expert Working Group
FAO	Food and Agriculture Organization
FASB	Financial Accounting Standards Board
FCAG	Financial Crisis Advisory Group
FEE	European Federation of Accountants
FSAP	Financial Sector Assessment Program
FSB	Financial Stability Board
FSC	Forest Stewardship Council
FSF	Financial Stability Forum
FTC	US Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
George Mason Law Rev	George Mason Law Review
GHG	Greenhouse gas emissions
GPA	Government Procurement Agreement

GPP	Green Public Procurement
GRID	Global Reflexive Interactive Democracy
GRR	Global Regulatory Regime
Harv Int Law J	Harvard International Law Journal
IAASB	International Auditing and Assurance Standards Board
IAIS	International Association of Insurance Supervisors
IAS	International Accounting Standards
IASB	International Accounting Standard Board
IASC	International Accounting Standards Committee
IASCF	International Accounting Standards Committee Foundation
ICANN	Internet Corporation for Assigned Names and Numbers
ICH	International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use
ICN	International Competition Network
ICOMOS	International Council on Monuments and Sites
ICSC	International Civil Service Commission
IET	International Emissions Trading
IETA	International Emissions Trading Association
IFAC	International Federation of Accountants
IFRIC	International Financial Reporting Interpretation Committee
IFROs	International Financial Regulatory Organizations
IFRS	International Financial Reporting Standards
IIOC	Independent International Organization for Certification
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
IPC	International Personnel Certification Association
IQNet	International Certification Network
ISA	International Seabed Authority
ISA	International Standards for Auditing
ISBN	International Standard Book Number
ISO	International Organization for Standardization
IT	Information Technology
ITU	International Telecommunications Union
IUCN	International Union for Conservation of Nature
J Eur Public Policy	Journal of European Public Policy
JFSA	Financial Services Agency of Japan
JI	Joint Implementation
KP	Kyoto Protocol
LOLR	Lender of last resort
MAHT	Mercosur Ad Hoc Tribunal
MB	Monitoring Body
MB	Management Board

Mich J Int Law	Michigan Journal of International Law
MOP	Meeting of the Parties
MOP	Meeting of the Parties to the Kyoto Protocol
MRLs	Maximum residue levels
MRP	Mutual Recognition Procedure
N Engl Law Rev	New England Law Review
NAP	National Allocation Plans
NCAs	National Competition Authorities
NGO	Non-governmental Organization
NY Univ Law Rev	New York University Law Review
OECD	Organization for Economic Cooperation and Development
PDD	Project Design Document
PEFC	Programme for the Endorsement of Forest Certification schemes
PIOB	Public Interest Oversight Board
PPPP	Public Procurement Pilot Project
PTR	Permanent Tribunal of Review
QELRC	Quantified Emission Limitation and Reduction Commitments
REACH	Registration Evaluation, Authorization and Restriction of Chemicals
ROSCs	Reports on the Observance of Standards and Codes
SAC	Standards Advisory Council
SAI	Social Accountability International
SARG	Standards Advice Review Group
SEC	Securities and Exchange Commission
SIMAP	European Public Procurement (Système d'Information sur les Marchés Publics)
SMEs	Small and medium-sized enterprises
SPS	Agreement on Sanitary and Phytosanitary Agreement
SSP	Sustainable Public Procurement
STC	Decision of the Spanish Constitutional Court
TBR	Trade Barriers Regulation
TBT	Agreement on Technical Barriers to Trade
TEC	Treaty of the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Treaty Related Aspects of Intellectual Property Rights
UEAPME	European Association of Craft, Small and Medium-sized Enterprises
UN	United Nations
UNCECE	United Nations Economic Commission for Europe
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade And Development
UNECE	United Nations Economic Commission for Europe

UNESCO	United Nations Educational Scientific Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
Univ Chic Leg Forum	University of Chicago Legal Forum
US	United States of America
Va J Int Law	Virginia Journal of International Law
WB	World Bank
WGTCP	Group on the Interaction Between Trade and Competition Policy
WHC	World Heritage Convention
WHL	World heritage list
WHO	World Health Organization
WTO	World Trade Organization

Chapter 1
Introduction: The Relationships Between Global Administrative Law and EU Administrative Law

Edoardo Chiti and Bernardo Giorgio Mattarella

In the last two decades, European Union (EU) administrative law has gone through a process of extraordinary development and consolidation. It first developed as a body of principles and rules aimed at governing, on the one hand, the action of the EU public powers (such as the action of the Commission in the fields of State aids and competition), on the other hand, the action of the national administrations operating as decentralized EU agencies (e.g. the action of national public administrations in the field of public procurement). Subsequently, it has gradually developed in such a way to apply to the several phenomena of organizational and procedural interconnections among national and EU authorities. As a matter of fact, the EU legal order has elaborated a great variety of mechanisms of integration and composition of organizations and activities, establishing in different policy areas "European common systems", made up of national, European and mixed authorities jointly responsible for the administrative implementation of an increasing number of EU rules and policies.

The emergence of a global administrative law represents a more recent phenomenon. It stems from the proliferation, as a functional response to the changing needs of the world community, of global regulatory systems by sector, sometimes provided with rulemaking powers and called to adopt individual measures, as well as of bodies responsible for the resolution of the controversies that may arise between the global regulators and the addressees of their action, or between the latter. Such development implies the establishment of a number of regulations by sector, centred around administrative law provisions (e.g. those concerning administrative proceedings and participation of private subjects) and established by a variety of legal sources, often differing from the traditional sources of international public law. In this context, the notion of "global administrative law" does not refer

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generically to a body of administrative law beyond the State. Rather, it refers to the administrative regulation of a global legal space differing from the traditional representation of the world community in several regards: (a) as for the subjects, because the classical construction of States as the only subjects of international law is substituted by a more complex understanding, based on the recognition that the subjects of global administrative regimes are, on the side of regulators, a rich variety of global public powers as well as private bodies, on the side of regulatees, not only States but also individuals, firms, market actors and NGOs; (b) as for legal principles, rules and practices, because the regulation of the action of the various global regulatory systems and the other subjects of the global legal space, contrary to the traditional assumptions of international law science, frequently makes recourse to instruments of administrative decision and management; (c) as for the sources, because global administrative law cannot be conflated in the classical sources of public international law, but it extensively relies on measures of different types, such as institutional practices, intra-institutional rules and private regulation. The notion of global administrative law thus describes a new legal reality of rules, institutions and practices that the classical understanding of international relations and international legal regimes fails to recognize or under-estimates.

The two mentioned components of administrative law beyond the State – EU administrative law and global administrative law – have been studied so far as two parallel bodies of law. Little attention has been paid to their "horizontal" relationships, while the analysis of "vertical" relationships between national administrative law and, respectively, EU and global administrative law has been privileged.

Yet, the relationships between EU administrative law and global administrative law that are established in an ever increasing number of policy areas raise several stimulating questions. First, which game of forces characterizes, in the sectors where such relationships take place, the interactions between EU administrative law and global administrative law? To which extent are EU administrations subject to EU law and to global law? And to which extent is global administrative law subject to the influence of EU administrative law? Is there opposition or communication among the two legal systems? And what principles govern the co-existence among EU and global administrative law? Second, what is the result of such game of forces? Does the interaction among EU administrative law and global administrative law give place to an architecture reproducing the traditional paradigm of statal administrative law, centred on the fundamental opposition between authority and freedom and on coercion and authoritative powers? Or does it respond to a different design, which cannot be fully traced back to the administrative experience of the States? In this case, in what ways do the usual forms of statal administrative law combine with the forms belonging to the tradition of international public law, where the rationale of negotiation prevails over command and control? And what are the consequences of the absence, in the global legal space, of a genuine constitutional architecture?

This book seeks to open the discussion on such uneasy issues. Its purpose is to contribute to the overall understanding of EU administrative law and global

administrative law through the analysis of their multiple legal relationships. Its authors are not interested in applying to a number of sectors a predefined set of EU and global administrative law categories. Rather, they seek to enrich and refine EU and global administrative analytical tools through the exam of the manifold relations between the two bodies of administrative law beyond the State. In this sense, the effort carried out in this book is essentially analytical: the aim is to begin to explore the complex reality of the interactions between EU administrative law and global administrative law, to provide a preliminary map of such legal and institutional reality, and to review it.

The book is the outcome of a two-year research, funded by the Italian Ministry of Education, by the Istituto di ricerche sulla pubblica amministrazione – Irpa, and by the Universities of Siena, Rome "Tor Vergata", Naples, Viterbo, and Campobasso. The five working groups, each operating in one university, have been coordinated, respectively, by Professors Bernardo Giorgio Mattarella, Claudio Franchini, Giacinto della Cananea, Stefano Battini, and Hilde Caroli Casavola. Gianluca Sgueo has greatly helped to finalize the interactions among the various groups, as well as to manage the final stages of the project.

The researchers, selected with an international call for papers, have been asked to examine specific issues, while considering the general framework of global and European administrative legal principles and some cross-cutting issues, such as the competences of European institutions and global organizations and their possible overlap, the public–private dualism at the two levels, the issues of democracy and representation, the instruments of protection of private subjects towards public authorities.

The contributions to this book have been organized in six parts. The first part explores the potentialities of a comparison between EU administrative law and global administrative law. The second and the third part look at the linkages and interconnections between global administrative law and EU law. The last three parts then focus on specific sectors, by analyzing, respectively, cases of parallel regimes, converging harmonizations, and cross implementations.

The first part of the book discusses the relationships between EU and global administrative law by comparing some of their features. It does not provide an analysis of principles, rules and practices of EU and global administrative law. Rather, it focuses on certain structural elements of their legal systems, taken by themselves and in their interaction with national law. Somehow unsurprisingly, it highlights a combination of limited similarities and marked differences.

The comparative inquiry opens with Edoardo Chiti's analysis of the EU and global administrative organizations. Three main aspects of such organizations are compared: the position of the EU and global administrative bodies in the institutional system; the organizational models prevalent in the EU and global administrations; and the recourse to private actors by the EU and global administrative law for performing specific activities. The analysis reveals a complex and peculiar pattern of similarities and differences in the administrative organizations of the EU and the global legal space. EU and global administrations are different in terms of the "constitutional" anchorage of their public administrations, which is

present in one case but not in the other. They tend to converge as far as their organizational models and the role assigned to private actors in the exercise of administrative functions are concerned. But this convergence takes place at a general level only, while the specific arrangements maintain important, distinguishing specificities. Such pattern of limited similarities and marked differences has several explanations: similarities reflect the common functional needs to which EU and global administrative systems are called to respond, while differences stem from the particular historical formation of the various systems beyond the State as well as from the particular place occupied by the European Commission in the EU legal order.

Barbara Marchetti's contribution compares the EU judicial system with the judicial mechanisms of four global regimes: the World Trade Organization, the UN Convention on the Law of the Sea, the Mercosur and the World Bank. It opens with a discussion of the multiple jurisdictions – international, constitutional and administrative – of EU courts. Then, the fundamental structure and functions of the dispute settlement system of the World Trade Organization, the International Tribunal for the Law of the Sea, the Mercosur system and the Inspection Panel of the World Bank are examined. In a global legal space characterized by both juridification and judicialization, several differences can be identified between judicial systems founded on voluntary jurisdiction, such as the UN Convention on the Law of the Sea and judicial systems based on exclusive and obligatory jurisdiction, such as the EU and the WTO. Furthermore, important divergences can also be found in comparing *prima facie* similar mechanisms for international compliance.

Bernardo Giorgio Mattarella's chapter deals with the influence of EU and global administrative law on national administrative decisions. Proceeding from the theory of administrative acts, typical of the legal scholarship of many European countries, the author examines first the way in which the law beyond the state affects the several steps of administrative decisions: the legal basis for administrative acts, their making, their contents, their legal effects, their execution and their review. This analysis displays more similarities than differences between EU and global law. The different techniques of influence are then investigated, distinguishing between the secure devices, which ensure the supremacy of European law over domestic one and the more diverse techniques used by global law. From this point of view, the differences are bigger, although an accurate exam reveals patterns of resemblance and convergence. Finally, the outcome of the described phenomena on crucial legal issues is considered, showing that the theory of administrative act seems able to adjust to the influence of the law beyond the state, and that even the impact of the latter on the rule of law and democracy is quite less stressful than one could expect.

The second and the third part of this book turn to the linkages and interconnections between global administrative law and EU law. Their purpose is to complement the comparative inquiry carried out in the first part by giving an impression of the multiple forms in which global administrative law and EU law come to contact and interact and by exploring the legal challenges inherent to such variety of interconnections.

The second part, in particular, is devoted to the dynamic of legal principles, which are easily traded between the European and the global legal regimes.

This part opens with Giacinto della Cananea's analysis of the genesis and features of principles of global public law. It is argued that a body of general legal principles common to national legal orders and regulatory systems beyond the State is in the process of emerging. Such principles regulate the ways in which powers are exercised by subordinating decisions to the execution of an established procedure. Their purpose is to remedy the marked sectionalism of the various legal regimes. These principles, which form a procedural (rather than substantive) due process of law, present common, recurring features, different from those characterizing other categories of legal principles. They are structurally and functionally different from both the principles of conventional international law and the principles traditionally recognized in national legal orders. The author investigates these features and the sources of such principles, both in EU law and in the global regulatory systems, and discusses whether the traditional dichotomy between municipal public law and international law has lost its significance, and whether the new principles have a universal or only relative value.

Joana Mendes's chapter then illuminates a specific aspect of the interplay between EU and global regulation, namely the problems arising from the reception of global rules on procedural participation by EU law in sectors, such as food-safety and environmental protection. The chapter investigates whether implementation of international law by EU law is capable of bypassing participation that would otherwise be granted by the EU institutions and bodies. Crucially, this may hinder the procedural protection of the persons affected or the standards of political or social legitimacy that have become accepted in EU governance. Several case–studies are considered to illustrate three different types of interaction between international regulatory regimes and the EU legal order: direct reception, reception filtered by EU procedures specifically created for this purpose, reception following existing EU procedures. These case–studies show how the incorporation of international law in EU law may actually jeopardize the effectiveness of the consolidated EU procedural standards.

Juli Ponce's contribution focuses on the procedural principles relating to the right to good administration, such as the duty of giving reasons and the citizens' participation, showing that such principles are increasingly recognized in different legal systems. Their spread is mainly an achievement of courts: global ones, such as the TWO Appellate Body, EU ones and national ones. The analysis, which takes into account also the case law of the European Court of Human Rights and of certain national courts, such as the US Supreme Court, shows that, in spite of the many differences between the mentioned legal systems, there is a certain degree of convergence in relation to problems and solutions. After accounting for this convergence, the author discusses in general terms the virtues and limits of judicial review of administrative decisions and the relations between judicial globalization and good administration.

Further models of connection and mutual influence are considered in the third part of the book.

Gianluca Sgueo's contribution opens this part by examining the involvement of civil society's actors in the EU and global administrative space, in order to understand whether, and to what extent their action brings the EU and global administrative law closer. The chapter focuses on the organized networks of civil society organizations, which significantly affect the development and implementation of policies by EU and global organizations. These networks, which the author calls "interlocutory coalitions", may be considered a significant factor in spreading interaction and convergence between the EU and the global legal spaces. Several factors stimulate the proliferation of such coalitions, although they face problems of legitimacy, organization and effectiveness. After some general remarks on civil society participation in the ultranational decision-making, Sgueo assesses the contribution of interlocutory coalitions to bolstering principles of administrative governance at the European and the global level. Building on such analysis, the final part of this chapter develops a theoretical framework for reflections on administrative convergence as well as on civil society networks' potential to develop and enlarge in the future.

A different dynamic is presented in Stefano Battini's chapter, which deals with the impact of both Europeanization and globalization on consular assistance and diplomatic protection. The international conventions on consular assistance and diplomatic protection are briefly summarized, in order to clarify the commonalities as well as the differences between them. Then, the impact of Europeanization is evaluated, taking into account both the horizontal (the right to consular and diplomatic protection from authorities of member states other than those of citizenship) and the vertical dimension (the right to consular and diplomatic protection from European authorities). Finally, the impact of globalization is considered. The transformations occurring in these specific sectors seem to exemplify some more general phenomena. On the one hand, globalization increases the international dimension of domestic administrative law, by widening the part of domestic administrative law that regulates situations having a link with foreign legal systems. On the other hand, globalization decreases the degree of specificity of that part of domestic law, submitting the exercise of "foreign affairs" administrative functions to the general requirements of the rule of law.

The discussion leads to the analysis of specific sectoral areas, which is carried out in the last three parts of the book. Several sectors are considered: public procurement, antitrust, cultural heritage, pharmaceutical products, accounting and auditing, banking supervision, environmental protection and climate change. While examining the concerning regulations and authorities, many viewpoints are considered: EU's participation in global regulatory regimes, the impact of global regulations on European administrative decisions, the role of private parties, judicial and procedural guarantees of individuals.

The fourth part, in particular, examines the dynamics and tensions that can be observed in areas where coordination between EU and global administrative law is absent or inadequate and the two bodies of administrative law beyond the State operate in parallel.

Simona Morettini's chapter reviews the complex way in which the EU and global regulatory regimes limit the use of public procurement by national governments as an instrument of domestic policy. Although the primary objective of procurement is the acquisition of goods or services on the best possible terms, national governments have frequently used their extensive powers of procurement to promote further national concerns, industrial, social and environmental in nature. These secondary policies, legitimately pursued by national governments, could be in contrast with other global and European legitimate purposes, such as the free trade. The chapter analyzes how EU and global administrative law affect the use of procurement as an instrument of national policy. It compares the rationales underlying, respectively, EU regulation and global regulation. And it highlights their tensions and potential conflicts.

Other areas in which coordination between EU and global administrative law is absent or inadequate are those of protection of cultural heritage and competition policy. The former is the subject of Carmen Vitale's contribution, which examines how the EU and the relevant global regulatory systems deal with the protection, circulation, and enjoyment of cultural heritage in order to understand whether there are conflicts between different legal regimes. After describing the various ways in which globalization affects the definition of cultural heritage and the new needs and interests that it originates, the chapter draws a parallel between the EU law and the global law, mainly resulting from the World Heritage Convention System. While describing the EU and global regulations, the author also investigates the interdependence between these regulations and the national law.

Competition policy is the subject of Elisabetta Lanza's contribution. Globalization of markets forces competition authorities, including the European Commission, to develop coordinated competition policies. The chapter investigates the role played by the EU for the antitrust policies coordination in the global market, also in the light of the meaningful interactions of EU and US antitrust regulatory systems, as well as the struggling experience of the relevant global regulatory systems. Two possible ways forward are then identified: on the one hand, a WTO multilateral agreement on competition policy, and on the other hand a horizontal control through a global regulatory agencies federalism in the frame of the International Competition Network, inspired to the European Competition Network model.

In other sectors, EU and global administrative law seem to coexist more easily, as their harmonization efforts are directed towards common or connected purposes and the instruments used are sometimes the same. These sectors are examined in the fifth part of the book.

Alessandro Spina examines the EU and the global pharmaceutical regulations. At both levels, in this sector the network model is the outcome of the tension between the strong role traditionally pertaining to the national administrations and the transnational dimension of markets and research. The author considers separately the EU and the global level, and finally compares the two regulations and evaluates the relations between them. The EU experience has achieved an almost complete harmonization of pharmaceutical regulation, an advanced coordination of national administrations and the sharing of data and regulatory expertise among

them. At the global level, a public–private body promotes the harmonization of the pharmaceutical regulation through the adoption of shared guidelines and standards applicable in the development of new products. The concluding remarks are devoted to the similarities and differences between the EU and the global regulatory networks and to their mutual reinforcement and convergence.

Maurizia De Bellis explores the accounting and auditing sectors. In these areas, EU regulations refer to global standards, but in a selective way: there is not a simple incorporation of internationally recognized accounting standards, but extremely complex endorsement procedures, which involve public and private bodies and require both political and technical assessments. EU strategy aims at avoiding a delegation of its regulatory power in two main ways: first, controlling the access of international standards within the EU legal order through an endorsement procedure; second, attempting to influence the international standard setting process. After providing a general overview of global financial standards, the chapter describes the EU and the global approach to the two sectors and then concludes with some reflections on European enforcement of global private standards.

Hilde Caroli Casavola's contribution inquires into the EU and global regulations of public procurement, which are significantly different in terms of harmonizing techniques and in terms of enforcement devices, but interact very well. For global regulation, EU law is mainly an "internal" factor of domestic discipline, which ensures compliance and effective controls over procurement rules. As reversal, in the EU perspective, global regulation is both a crucial "external" factor, which favours the predictability necessary for European traders to rely on those rules *vis-à-vis* GPA member States, and a reforming factor. This positive interaction mutually reinforces both the systems. After providing some background information on WTO and EU scope of public procurement regulations, the author describes the specificities of the Government Procurement Agreement (GPA) and the EU implementation mechanisms and their effect, highlights the peculiarities of their institutional frameworks, focuses on the enforcement proceedings and on the remedies and finally puts forward some remarks concerning the similarities, differences and interactions between the EU and the global regime.

This volume closes with a discussion of sectors in which EU and global administrative law not only coexist peacefully, but also pursue common goals and tend to reinforce each other through cross implementations and integrated organizations. This happens in sectors such as financial stability and environmental protection, to which the last three contributions are devoted.

Enrico Leonardo Camilli analyzes the connections between the EU and global financial regulation, exploring the ongoing processes of legal reform in the EU and in the global legal space and how they could mutually reinforce. The chapter, in particular, analyzes the relationships between the activity of the Basel Committee and the EU harmonization process on banking services. Of course, the two regimes are very different in nature, but they share the aim to achieve a mutual and credible coordination of national regulatory systems and they interact along two different "routes": one goes from Basel to Brussels and deals with the implementation of global decisions by EU institutions; the other goes from Brussels to Basel and

involves the role of EU institutions in the Basel standard setting. After describing the main features of the Basel Committee, the chapter focuses on these interactions, considering the development of the two regulations and the debate prompted by the recent financial turmoil.

In Rui Lanceiro's chapter, a quite complex network of administrative regulations and bodies is described: the one set forth by the Aarhus Convention, which grants rights to the public and imposes obligations on public authorities in terms of decision-making procedures, in order to protect the environment and ensure sustainable development. The chapter begins with a brief presentation of the Aarhus Convention and then presents the EU as a party to it. It goes on to explore the consequences of such membership, including the duty of implementation by the EU's institutions and by the Member States and the consequences of non-compliance. Finally, it focuses on the application of the compliance mechanism of the Aarhus Convention to the EU's Member States and to the EU itself, and it explores the foreseeable impact of the procedure to review compliance of the EU to the Aarhus Convention.

Georgios Dimitropoulos's chapter is devoted to a case of involvement of private parties in the implementation of administrative law beyond the State. The sector considered is climate change, where the instrument of the certification system has been used extensively both on the global and on the EU administrative level. After describing the procedures and focusing on the implementation role of private subjects, the chapter describes the regulatory tools used by UE and global bodies for the regulation of private administration. EU and global climate change law share the purpose to strike a balance between global climate protection and cost-efficiency, and use the same implementation technique, based on private certification. Even private certifiers implementing climate change law are common: very often a single body verifies the compliance with the two kinds of obligations. As a result, private administration grows as a common administrative structure for both EU and global administration.

The contributions collected in this book do not provide a complete picture, nor do they describe a coherent set of objects. They do, however, offer useful accounts and thoughtful analyses of both general tendencies and sectoral areas.

In comparative terms, the differences between the EU and the global legal systems can be easily depicted for administrative organization, ways of action and instruments of review. EU law is well settled in its principles, bodies and procedures, while the global one is so diverse, as to make it often impossible to draw general conclusions. The former has very efficient and secure ways to affect national law, while the latter is unsteady and adaptable. More generally, the former relies strongly on national public authorities, while the latter looks more freely for partners, even in the private sector, and often is itself the product of private bodies. Moreover, the EU has a large scope of action and performs several different functions, while the global legal systems tend to focus on specific yet important policies and to act mainly as regulatory regimes.

However, there are similarities and exceptions to these tendencies. EU and global regulations are often similar, at times converge and reinforce each other.

Global law uses organizational models and manners of action typical of the EU law, which in turn adjusts to many global regulations, making its own law similar to the global one. Convergence is particularly strong for some aspects, such as the principles regulating administrative procedures, and in some sectors, such as the environmental protection. Also global law often relies on national governments, while EU law does not neglect private enforcement. They both are largely western systems of law.

As for the relationships between the EU and global law, the picture is a very fragmented one. In some areas, EU law and global law get together very well, coordinate and implement each other, in others they ignore each other or even compete. In some areas, globalization pushes forward the law produced by global bodies, in others the game of forces is more favourable to the EU. The reciprocal attitudes are discontinuous as well: obviously there is not one "European policy" of global bodies, but it is just as difficult to identify a consistent "global policy" of the European institutions, common to different sectors.

Admittedly, the contributions collected in this book are only a first attempt to explore a dense area of new legal issues, which further research should develop and systematize. Yet, they bring our attention to an area, which is crucial to understand the present and future patterns of both EU and global administrative law. And they pioneer a new route to investigate the complex life of administrative law beyond the State.

Part I
Comparative Inquiries

Chapter 2
EU and Global Administrative Organizations

Edoardo Chiti

2.1 Introduction

In both the European Union (EU) and the global legal space, a genuine administrative organization is rapidly emerging. In the EU legal order, the implementation of European laws and policies is carried out not only by the member States' administrations, but also by the European Commission and by an increasing number of EU administrative bodies, such as European agencies, executive agencies and European independent authorities. In the global legal space, an "extraordinarily varied landscape of global administration"[1] is developing and consolidating.

Legal scholars and political scientists have dedicated increasing attention to these organizational phenomena, proposing several taxonomies and investigating some specific bodies. So far, however, the EU and global administrative organizations have only been studied in parallel, as distinct from each other. A comparison of the two has not yet been undertaken.

The absence of a comparison may have several explanations. One is the still uncertain degree of development and consolidation of global administrations. A second possible explanation is the difficulty of carrying out a balanced comparison of the EU legal order and the global legal space: the former tends to be more unitary, while the latter is highly differentiated and pluralistic. Moreover, both international and administrative law scholars may have found uneasy to analyze a legal reality that is particularly complex, fragmented and far from their usual objects of research.

[1]Kingsbury et al. (2005), p. 19. On the proliferation of global regulatory systems, see Cassese (2006a), p. 44 ff.

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At the same time, one should not neglect the potential of a comparative inquiry of EU and global administrative organizations. Such inquiry could shed light on the peculiar features and processes of development of both EU and global administrations. On a more general level, a comparative inquiry could usefully contribute to the reflection on the overall features of administrative law: in so far as administrative law is experiencing a radical expansion and it comes to regulate the functioning not only of national administrations but also of the EU administrations and of the administrations of global regulatory systems, a comprehensive reflection on the overall features of the "new" administrative law needs to be based also on the conclusions that can be reached through a comparison between the different kinds of administrative law beyond the State.

The purpose of this chapter is to make some preliminary observations about the similarities and differences between the administrative organization of the EU and that of the global legal space. What are the principal convergences and divergences between the two orders of administrations beyond the State? Do these two experiences give rise to opposing organizational models? Or do common characteristics prevail? And what can explain these similarities and differences?

To begin to answer these questions, three main aspects will be discussed in the sections that follow: first, the position of the EU and global administrative bodies in the institutional system (Sect. 2); second, the organizational models prevalent in the EU and global administrations (Sect. 3); third, the recourse to private actors by the EU and global administrative for performing specific activities (Sect. 4). The final paragraph will summarize the main results of the inquiry and will attempt to provide some preliminary answers to the questions raised above (Sect. 5).

2.2 The Position of the EU and Global Administrations in the Institutional System

The comparison between the EU and global administrative organizations may begin by considering their position in the context of the institutional system.

With respect to the EU, two aspects have to be highlighted.

To begin with, EU administrations are subject to the rule of law. This was implicitly recognized by the EC Treaty and is now openly envisaged by the Lisbon Treaty. But it has also been developed by the case-law of the Court of Justice, which has held that EU administrations are subjects to the treaties, to supranational "legislation," to the principles affirmed by the Court, to the general principles of law, to the common constitutional traditions of the Member States and international law.[2] Thus,

[2]On the principle of the rule of law in the EU legal system, see Lenaerts (2007); Azoulay (2007); and von Bogdandy (2006).

a principle rooted in Western national traditions[3] has been affirmed in the EU legal order. Both the foundation and the scope of the rule of law principle, however, are peculiar at the European level.[4] While in national legal orders the rule of law is based on respect for the separation of powers, democracy and property and civil liberties, at the European level it is essentially rooted in the protection of the institutional balance set forth in the treaties. As for its scope, the European Court of Justice has shaped the rule of law as a principle going beyond the mere respect of legislative provisions, as it is commonly held in the tradition of many national legal systems.

Moreover, EU administrations respond to a "composite" executive power, made up of the Commission, the Council and the Member States. In contrast to national systems, in which administrations respond to a unitary executive power represented by the government,[5] EU administrations respond to an executive power which is based on a plurality of non homogeneous components: an intergovernmental institution (the Council), a supranational institution (the Commission, which is independent of the Member States and responsible for protecting the "general interest of the European Union"), the Member States (normally in charge of the executive implementation of European rules and policies) and an inter-bureaucratic component (the comitology committees, made up of "representatives" of national administrations and the European Commission).[6]

As for the administrations of the global legal space, their limited maturity and consolidation, as well as their differentiation and fragmentation, makes it hard to isolate their distinctive features. Generalization difficulties notwithstanding, an examination of the various existing global administrations does reveal two elements which partly distinguish the functioning of global administrations from that of the EU administrations.

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[3]In France, for example, the *règle de droit* was traditionally understood in a double sense: as a prohibition on adopting measures contrary to legislative provisions; and as a duty to take the measures necessary to give execution to the legislation. Yet, the *règle de droit* has been progressively expanded to include the general principles of law and constitutional law provisions as standards for administrative action; at the same time, the scope of judicial review has expanded to include the *actes du gouvernement*, leaving an exception only for acts addressing the relationship between the government and other political institutions, and for acts relating to international relations. U.K. administrative law is also rooted in the principle of the rule of law, although the definition of the rule of law by courts and legal scholars has been influenced by Dicey's position, who derived from the rule of law the negation of discretionary power, the personal liability of public servants and their subjection to ordinary judicial review. For a wide reflection on the similarities and differences between these two experiences, see Cassese (2003), in particular p. 49 ff. and p. 70 ff.

[4]See, in particular, Cassese and Savino (2008), p. 189 ff.

[5]For example, the French constitution expressly anchors the administration in the executive: Article 20 of the 1958 Constitution declares that the government *dispose de l'administration*.

[6]The characteristics of the European executive power are discussed in a vast literature. See in particular, Cassese (1991); Lenaerts (1991) and Dann (2006). The composite character of the EU executive power is specially stressed by Curtin (2009).

The first one is the tendency to the gradual development of the rule of law as a principle common to the different global sectoral administrations, through the widespread expansion of the right to be heard, the duty to give reasons and the right to judicial review.[7] Consider, for example, the intervention of interested parties in proceedings that might lead to anti-dumping tariffs on the basis of GATT (1994) and the Anti-Dumping Agreement; the States' duties to give reasons for tariffs aimed at balancing the effect of other States' subsidies within the WTO; the activity of the dispute resolution bodies in various sectors, such as the Arbitral Tribunal of the International Centre for Settlement of Investment Disputes. As in the EU experience, the principle of legality in the global legal space is assuming a wider meaning than it traditionally had in national systems. It is coming to imply the subordination of administrative activity not only to legislative provisions, but also to principles developed by courts. Different from the EU experience, however, its purpose is the protection not only of the institutional balance, but also of the private and public actors in the global social and economic space.

The second element relates to the anchorage of global administrations to the executive power. While EU administrations respond to a set of institutions composing the EU executive power, global administrations do not respond to any global government or set of higher institutions, but to a plurality of sectoral sub-governments. Arguably, the multiplication of linkages and interconnections among the various sectoral global regimes has given rise to wider "families" of interconnected organizations, jointly responsible for the exercise of increasingly unitary functions.[8] And yet, this does not imply that global administrations depend upon a unitary global government or set of higher institutions.[9] It should be noticed, moreover, that this lack of a global government or set of higher institutions is one of the factor contributing to the development of the rule of law in the global legal space, as the establishment of principles and rules of global administrative law is able to compensate in part for the administration's own lack of constitutional grounding.

The EU and global administrations thus present a few similarities and some marked differences. The similarities consist in the recognition and scope of the principle of the rule of law. The differences regard the foundation for the rule of law

[7]On the progressive development of a rule of law in the global legal space, Cassese (2006a), p. 58 ff.; Cassese (2006b), *passim*; on the nexus between the rule of law and national sovereignty, see Denninger (2004).

[8]A significant example of this tendency is provided by the "United Nations system"; see Battini (2003), p. 216 ff.; for a comprehensive overview of this subject, see Cassese (2002) and Cassese (2006a), p. 46.

[9]Cassese discusses "public powers without a government" in Cassese (2006c), p. 10 ff. It is almost superfluous to note that the concepts of "global legal order" and "global administrative space", proposed by Sabino Cassese and Benedict Kingsbury, Nico Krisch and Richard Stewart, respectively, imply the existence of a comprehensive administrative system, but do not assume the dependence of global administrations on a unitary government; we see this in Cassese (2002) and Kingsbury et al. (2005), pp. 20–27.

and the circumstance that global administrations are not led by a global government or set of higher institutions at the global level.

2.3 Organizational Models

Having sketched the similarities and differences between the position of the EU and global administrative bodies in the wider context of public powers, we can now move to discuss the organizational models prevalent in the two kinds of administrations beyond the State.

2.3.1 Supranational or A-National?

Both the EU administrative system and the administrations of the global legal space are characterized by the existence of administrative bodies that are autonomous if not fully independent from the member States' governments. Yet, the bodies of this type established in the EU and those established in the global legal space differ in several regards.

In the EU, the main body provided with independence from the member States' governments is the Commission.

This institution has two distinctive organizational features. Firstly, it is supranational. While the Council is an intergovernmental institution, made up of national ministries representing the particular interests of Member States, the Commission is made up of Commissioners who are fully independent of the national governments and responsible for the general interest of the Union.

Secondly, it is a complex organization. Originally, the Commission's administrative functions were minimal, and its collegiate, horizontal character prevailed. The Commission was given a "light", though rigidly structured, bureaucratic apparatus, essentially aimed at supporting the various Commissioners in preparing and executing the Commission's decisions: this apparatus was conceived as a purely internal administration, to make the Commission's work more efficient. This reflected the early conception of the Commission as the policy-maker of the European Community, and complemented the principle of indirect execution as the general rule for the administrative implementation of EU laws and policies.[10] In the sectors in which the Commission had responsibility for direct implementation,

[10]On the decisions of Walter Hallstein, the first president of the Commission, see Preda (2000) and the interview with Noël (1992). On the precedent of the High Authority of the European Coal and Steel Community, a source of inspiration for the Commission, see Conrad (1989); Morgan (1992) and Gerbet (1992).

however, the original framework soon revealed its limits.[11] Already in the early Sixties, it was clear that several substantial decisions were being assumed not by the college of Commissioners, but by the relevant administrative services, which had gradually turned from simple apparatuses at the service of the institution into genuine administrations with an external relevance. The organizational architecture of the Commission thus got more complicated. The initial idea of a light structure to service the college of Commissioners was replaced by a more complex organization, based upon: the central role of the college of Commissioners; individually responsible Commissioners; and a rather sophisticated vertical administration. A similar process of "bureaucratization" of the Commission increased in the following decades through the modification of internal decision-making procedures[12] and, even more importantly, in connection with the increasing competences of the Commission as the European Community took on general competences, creating a complex administration centered not only upon the college of the Commissioners, but also upon a bureaucracy divided into Directorates, Services and Divisions.[13]

The experience of the global administrations is partly different. These administrations are at times characterized by a certain degree of autonomy *vis-à-vis* the member States' governments. But they cannot be qualified as supranational, since they are not called upon to pursue the general interest of the regulatory system to which they belong, distinct from the interests of the States, and their members are not always called to act independently from member States, but may instead be State representatives.

The most obvious example of this is the Secretariat of the United Nations (UN). In connection with the growing importance of the UN, the Secretariat has gradually evolved from being an intergovernmental office to an office exercising a certain degree of impartiality with respect to the Member States.[14] Yet, this impartiality pertains not to a supranational power as much as to an "a-national" one, characterized by the neutrality and non-representativeness of the subjects participating in the UN. This impartiality is moreover laden with ambiguities and

[11]Among the studies discussing the work of the Commission in its first years of activity, see in particular Cassese and della Cananea (1992) and Berlin (1987).

[12]Consider the introduction of the written procedure and the practice of *habilitation*, upon which the Court of Justice has repeatedly pronounced: see the judgements in Case 48/69, *Imperial Chemical Industries Ltd. v. Commission* [1972] ECR 619, and Case 8/72, *Vereeniging van Cemethandelaren* [1972] ECR 977, as well as the judgement in *Vereniging-ter Bevordering van het Vlaamse Boekwezen, VBVB* and Joined Cases 43/82 and 63/82, *Vereniging-ter Bevordering van de Belangen des Boekhandels, VBBB*, [1972] ECR 19, as well as Case 5/85, *Akzo Chemie BV and Akzo Chemie UK* [1986] ECR 2585.

[13]For a historical reconstruction of the evolution of the internal structure of the Commission, see, Cassese and della Cananea (1992).

[14]For a reconstruction of this process, see Battini (2003), p. 99 ff.; among earlier studies see, in particular, Szasz (1991); Pérez de Cuellar (1993); Rivlin and Gordenker (1993) and Murthy (1995); of the much earlier studies, see Schwebel (1952) and Balladore Pallieri (1967).

subject to numerous tensions, exemplified by the Secretariat's tendency towards multinationalization.[15]

Another example is that of the International Civil Service Commission (ICSC). It is made up of fifteen members, who "shall perform their functions in full independence and with impartiality" and "shall not seek or receive instructions from any government, or from any secretariat or staff association of an organization in the United Nations common system".[16] But the powers of the ICSC, having to do with the regulation and coordination of conditions of service in the common system of the UN, characterize this independence as a criterion for the relations between the ICSC and all of the international organizations that incorporate its statute.

In addition to this, some global systems are lacking altogether in a secretariat and thus appear to be directly connected to their member States: this is the case, for example, of the Paris Club, operating since 1956 in the sector of international finance, whose secretariat function is performed by the French finance ministry.

Another difference with respect to the EU experience regards the prevalence of simple organizational structures in the global system. While the European Commission came quickly to be characterized as a complex administration, centered upon the college and an articulated internal apparatus, more rudimentary models prevail in the global legal space. Global secretariats, for example, generally have a monocratic nature, with an individually responsible Secretary-General, who appoints the secretariat's functionaries. This is what happens in the UN Secretariat. The Secretary-General is appointed by the General Assembly upon the proposal of the Security Council and then nominates his own functionaries, in respect of the general principles fixed by the Assembly.[17]

2.3.2 Composite Bodies

In the previous paragraph, it has been argued that the establishment of administrative bodies provided with a certain degree of autonomy with respect to the member States' governments represents a tendency common to both the European administrative system and global regimes. Such process of general convergence, however, coexists with several specific divergences, as the EU and global administrative bodies provided with a certain degree of autonomy *vis-à-vis* to the national governments differ in several regards.

[15]See in particular Battini (2007), p. 118 ff.

[16]Articles 5 and 6/1 of the ICSC Statute.

[17]A different kind of example is provided by the International Telecommunications Union (ITU), which has a general secretariat, three secretaries specific to the three sectors in which the ITU operates (Radio, Telecommunications Standardization, Telecommunications Development) and a Coordination Committee. But this is a rather peculiar model, which could disappear in the near future, given administrations' growing tendency to conform to the UN model.

The same dynamic of general convergence and specific divergence reappears with respect to the tendency to establish composite organizations, in which a variety of distinct and separate administrations are called to jointly exercise a specific function.

The proliferation of mixed bodies is a characteristic phenomenon of both the European and global regulatory systems. Beginning in the 1960s and accelerating in the 1990s, the EU has developed a wide variety of mechanisms for the joint exercise of its functions by national and EU administrations, giving rise in a growing number of sectors to alternatives to direct and indirect administration, through the coexistence and interdependence of the EU and national levels.[18] Analogously, global regulatory systems abound with forms of composition that on the one hand enable States to participate in the functioning of the global organization, and on the other enable the global organization to penetrate national legal systems. These forms of composition also enable the regulatory systems beyond the State to cooperate horizontally with each other.[19]

The organizational models consolidated in the EU and in the global legal space do, however, present various differences.

In the EU legal order, the form of composition that has consolidated over the years is that of the sectoral collegiate body, made up of members appointed by national and European administrations, and responsible for performing a specialized activity in the decision-making process leading to the adoption of administrative measures in particular technical or scientifically complex sectors.[20] In the last 15 years, however, the EU has developed several new and well more complex forms of composition. This is the case, in particular, of the many network-based "common systems"[21] set up since the early 1990s. In all of these cases, the administrative powers necessary for performing a determinate function are distributed between a plurality of national and EU bodies, "interconnected" with each other through organizational and procedural techniques of administrative integration. And their joined functioning is "governed" or "coordinated" by a body established by EU sectoral regulation and internally constructed so as to give a voice to both national administrations and the Commission. This general

[18]This phenomenon was noted in the early Eighties by Sabino Cassese; it is discussed in Cassese (1983, 1985, 1987); for a more recent discussion, see Chiti and Franchini (2003) and Saltari (2007).

[19]Cassese (2006a), p. 49 ff. See also, Falcon (2006), p. 224 ff.

[20]There are three main types: the comitology committees established by the Council pursuant to a delegation by the Commission of a series of discretionary powers, and made up of functionaries of the relevant authorities, subject to a partial rationalization in Council Decision 87/373 of 13 July 1987 and the following Council Decision 468/99; Council committees, charged with preparing the decisions of the ministers; expert committees, established by the Council or the Commission, normally made up of one of their own functionaries and national experts, and governed by sectoral norms. The most comprehensive recent examination of the different types of committees is that of Savino (2006).

[21]On the notion of the European "common system", see Cassese (2004).

architecture can give rise to different models, essentially distinguished by their different combinations of the supranational and transnational components.

In the case of the common systems coordinated by "European agencies", for example, the EU legislator has established a common European system in which the transnational component is tempered or corrected by the supranational component, as the Commission participates in a meaningful way in the common system and in the internal functioning of the European agency responsible for the comprehensive coordination of the system. As a matter of fact, the European agency has two main features: it is instrumental or auxiliary with respect to the Commission; its top structure is organized into different collegiate bodies made up in such a way as to stabilize and manage a plurality of relationships involving the Commission and national administrations. In functional terms, this design responds to the twofold need of administrative decentralization and integration: it aims to ensure the performance of activities that, for technical or political reasons, cannot be directly regulated by the Commission; moreover, it serves to structure the interactions between the different components of the common system.[22] One example of this architecture is provided by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), which coordinates the organizational cooperation between national administrations in the process of implementing European laws for the control of external borders, in order to guarantee a uniformly high level of control and surveillance.[23]

A second example of EU common administrative system is provided by the transnational systems. The main examples of this are the administrative systems by sector coordinated by Europol,[24] Eurojust[25] and Cepol.[26] Analogous to the administrative systems coordinated by European agencies, in all of these cases EU law has conferred the administrative powers necessary to perform the European function upon a plurality of national, mixed and EU administrations. Different from the administrative systems coordinated by European agencies, however, the

[22]For a reconstruction of this model, Chiti (2004); more recently, Chiti (2009).

[23]Council Regulation n. 2007/2004, of 26 October 2004, which establishes a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, in OJ 2004 L 349. For a brief account of the institutional developments that led to the establishment of the Agency, Costello (2006), p. 306 ff.

[24]Convention between the Member States on the basis of Article K.3 of the Treaty of European Union establishing the European Police Office (Europol Convention), in OJ 1995 C 316; Council Decision 2009/371/JHA establishing the European Police Office (Europol), in OJ 2009 L 121.

[25]Council Decision 2002/187/GAI, 28 February 2002, which establishes Eurojust to strengthen the struggle against serious crimes, in OJ 2002 L 63, as amended by decision 2003/659/GAI, in OJ 2003 L 245.

[26]Council Decision 2000/820/GAI, 22 December 2000, which establishes the European Police College, in OJ 2000 L 336, amended by decision 2004/567/GAI, in OJ 2004 L 251 and amended by Council Decision 2005/681/GAI 20 September 2005 which establishes the European Police College (CEPOL), in OJ 2005 L 256.

administrative cooperation involves essentially the national administrations, while the Commission is assigned a marginal role. The coordinator of the sectoral system, moreover, operates as an instrument of association of national bodies, whose cooperation, though encouraged and structured, retains an essentially voluntary basis.

EU composite organizations are the result of the peculiar "game of forces" that is played in the European legal order, which has characterized and conditioned the developments of the European administration since the emergence of the comitology practice. They attempt to tackle the issue of the effectiveness of EU law implementation posed by the traditional strategy of EU action, based upon the adoption of rules, with instruments that do not implicate a direct reinforcement of the Commission. The common systems coordinated by the European agencies mentioned above provide a clear example of this power game: the EU legislator has provided a certain rationalization of the mechanisms of exercise of specific EU functions; at the same time, the powers relating to these functions are not granted to the supranational administrative body only, but divided among a multiplicity of national, supranational and common offices; moreover, new bodies, partially autonomous from the Commission, are set up to oversee the coordination of these different offices composing the sectoral networks.

The experience of global regulatory systems reveals some similarities as well as some differences when compared to the European system.

Like the European administrative system, global regulatory regimes do not operate independently from national authorities. They communicate through a thick network of mixed collegiate bodies, established in the global system but made up of national representatives, or through more complex common systems in which global, national and mixed offices all participate.

One example of mixed collegiate bodies is provided by the committees of the World Trade Organization, which are trans-governmental plenary colleges charged with internal administration (such as the Committee on Budget, Finance and Administration), research, coordination with other international bodies (such as the Trade and Environment Committee), or the implementation of WTO rules (such as the committees working in the area of the Multilateral Agreement on Trade in Goods).

An example of global common administrative systems is provided by the global organization for food safety, which consists of the Codex Alimentarius Commission, a second-level international agency established by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO), as well as of national sectoral administrations such as the National Codex Contact Points.[27] We could also consider the International Plant Protection Convention, which allocates the powers necessary for the protection of plants between a Commission on Phytosanitary Measures, national offices corresponding to the international

[27]On this organization, see Poli (2004); Herwig (2004); Bevilacqua (2006) and Pereira (2008).

authority and multinational bodies established by the Member States themselves. Other common administrative systems, instead, present a limited institutionalization. An example is the Global Forum of Food Safety Regulators, which consists of a series of conferences coordinated by the FAO and WHO, aimed at sharpening the common regulation in the area of food safety. Participating in these conferences are national regulatory authorities and various international non-governmental organizations. Some international organizations, such as the WTO and World Bank, enjoy observer status.

To these mechanisms of co-operation and inter-dependence one might add the mixed, "horizontal" administrations made up of representatives of two or more global systems. One example is that of the NATO-EU Ad Hoc Working Groups, which discuss issues relating to military security, EU access to NATO structures and operational capacity.

As a whole, the composite administrative bodies established within the context of global regulatory systems present certain similarities with those of the EU. First, analogous to the EU experience, the construction of composite administrations is not the result of a coherent institutional project, but it is rather the effect of a multiplicity of cooperative efforts among a plurality of actors. Second, like EU composite bodies, mixed organizations in the global legal space represent a highly differentiated institutional phenomenon. Thus, to consider only the simplest example, the transnational committees of global regulatory systems, though always acting instrumentally to a body provided with decision-making powers, may be variously composed: sometimes they are made up of national administrative functionaries, and in this case they express a trans-governmental voice; at other times they can also include experts or representatives of national interest groups, whose position diverges from that of the national government in so far as it reflects scientific opinion or specific organized interests; and further distinctions are possible within this very general grid.[28]

These similarities are accompanied by various specificities. The first is the prevalence of simple composite organizations, represented by collegiate bodies and exemplified by the numerous transnational committees established within the context of global regulatory systems: this distinguishes the global experience from the EU order, in which composite organizations have been developed well beyond the basic structure of committees (which do represent the prototypical form of European administrative integration) and very differentiated architectures characterized by a remarkable institutional complexity have been established. Another specificity can be found in the essentially multinational character of the global composite administrations, whereas the EU experience presupposes a specifically supranational component, even if its combination with the multinational component can assume different legal forms. A third specificity is the progressive and spontaneous construction of composite bodies, which is particularly

[28]A classification of global committees is provided by Schermers and Blokker (2004); see also Savino (2005, 2006).

accentuated in the global administrative space, as it develops through the unplanned initiatives of equally ranking actors, establishing mutual links and cooperative mechanisms.

Also, the reasons for the wide use of composite administrations in the global legal space correspond only in part to the reasons behind the analogous tendency at the EU level.

Like in Europe, the establishment of composite administrations in the global legal space has essentially functional reasons: it enables the reinforcement of global public powers while preserving national prerogatives. It reinforces public powers by enabling a dialogue between the different global regulatory systems and national administrations, as well as with national civil society. It preserves national prerogatives by guaranteeing Member States' chance to participate in global decision-making processes.

But there are still some important differences distinguishing the global development from the European one. One difference has to do with the fact that, in the European system, recourse to composite administrations reflects a preference for a technique of joint implementation of EU primary rules that are elaborated through procedures governed only in part by the Member States, provided that also the Commission and the European Parliament participates to such procedures, and that are granted direct effect and supremacy over conflicting national norms. The production of global rules, by contrast, remains under the firm control of the Member States. Only in the European context do composite administrations respond to the need to recover at the implementation phase of EU policies and laws at the implementation phase the intergovernmental dimension that was attenuated in the legislative phase. A second closely related difference has to do with the fact that, in the European order, the establishment of composite administrations represents an alternative to the construction of a federal administration, which could happen through a strengthening of the Commission or through the establishment of other genuinely supranational administrative bodies. The top structure of global regulatory systems, by contrast, does not have any truly supranational component and the choice of "polysinody"[29] is therefore the most linear institutional solution.

2.3.3 Independence from Political Institutions

A third tendency common to both the European administrative system and the administrations of the global legal space is that to establish administrations that are independent from national and supranational political powers.

[29]See Cassese (2006a), who observes that the polysinody responds to "a need for specialization, but mainly serves the purpose of communication with national governments and civil society" (p. 52).

The EU experience in this regard is peculiar. The setting up of numerous European agencies starting in the early 1990s was accompanied by great expectations on the part of legal scholars and political scientists. In an essentially normative perspective, centred upon the representation of the EU as a "regulatory State", it was argued that the EU should establish independent authorities and that European agencies represented at least a first step in this direction. The reality, however, turned out quite differently. In the last 20 years, European agencies have been designed as bodies placed in an institutional position that is substantially different from that of independent authorities. For such authorities, independence is granted with respect both to private parties and to the political majority: to private parties, in order to avoid the risk of capture of the regulator by the regulatees; to the political majority, in order to guarantee specific regulatory policies the stability and credibility that a policy cycle connected to the electoral timing does not necessarily ensure. European agencies, instead, are not provided with independence, since, even if they are designed as bodies external to the Commission, they are at least partly subject to its influence. This does not mean that the EU has not made use of the organizational formula of independence. Despite the intense academic discussion on the failure of the European regulatory project, the EU legislator has developed several arrangements based on independence.

The most notable example of this is the European system of central banks coordinated by the European Central Bank. In this case, the European legislation distributes the administrative tasks necessary to carry out the EU function, essentially identified in price stability, among different national and European bodies, which are independent of the national and European economic and political powers. This implies that the Commission, which is independent of national governments but tied to the political majority in the European Parliament, does not have any power in the exercise of this function. The independence of the competent bodies is protected through the recognition of peculiar organizational characteristics. For example, the Treaty on the Functioning of the European Union prohibits the European Central Bank, national central banks and members of their decision-making bodies from seeking or taking instructions from EU institutions, Member State governments or any other national or EU body. It provides that EU institutions and bodies and the governments of the Member States shall respect this principle and not seek to influence the members of the decision-making bodies of the European Central Bank or the national central banks in the performance of their tasks.[30]

This is not the only organizational scheme that uses the formula of independence. In most cases, actually, independence is provided by a different design, characterized by the establishment of common European systems made up of independent national authorities, an independent European authority and the Commission. This is the case, for example, of the administrative governance of the

[30]On the independence of the European Central Bank see, *ex multis*, Smits (1997); Zilioli and Selmayr (2001); Malatesta (2003); see also Padoa Schioppa (2004).

energy sector.[31] Like the model exemplified by the European system of central banks, national independent regulators enjoy significant powers in the implementation of the sectoral European legislation, and the European authority gives voice, at the EU level, to national independent regulators and it is granted independence *vis-à-vis* the Commission and the other political institutions. Yet, the governance of the energy sector differs from the model exemplified by the European system of central banks because the Commission is fully involved in the exercise of the regulatory function. More precisely, while the European authority is conferred tasks that require a highly specialized competence and the collaboration of experts from the national regulatory authorities, the Commission is granted the tasks that are considered necessary in order to pursue the general interest of the EU. The model is therefore centred on a clear "regulatory dualism" at the EU level, where two regulators operate: on the one side, a strictly supranational regulator, the Commission, which does not represent national administrations but expresses the EU point of view; on the other side, a European but composite or mixed regulator, which gives voice to the various Member States' regulators. It should be noted, moreover, that the common system is made up of offices that have different degrees of independence: a strong independence in the case of national regulators and the European authority, and a more limited independence in the case of the Commission.

A third scheme based on the organizational formula of independence is that in which the implementation of the EU regulation is entrusted to a European common administrative system made up of national independent authorities and of the Commission, acting as the coordinator of the network. In this case, the national independent authorities are coordinated by a truly supranational body, which does not represent national administrations but is independent of national governments, though still dependent on the political majority in the European Parliament. In the current state of EU law, this model has been applied in the area of competition law.[32]

The paths towards independence in the emerging European administrative system are thus multiple and differentiated. They follow the *ad hoc* logic that is typical of EU legislation. At the same time, however, they give rise to some basic

[31]Regulation No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

[32]This is a peculiar sector, due to the specific "constitutional" guarantee of the Treaty on the Functioning of the European Union (Article 105, former Article 85 EC Treaty), which gives the Commission the administrative prerogative in implementing European antitrust law. The Commission's position of functional preeminence, in other words, is provided by the Treaty rather than being left to the European legislator. In this framework, Council Regulation n. 1 of 2003, on the modernization of the implementation of the rules of competition provided by the EC Treaty replaces the Commission's traditional administrative monopoly, provided by Regulation n. 17/62, with a mechanism of joint implementation, run by a common system created by the interconnection of the national antitrust authorities and the Commission, and given a place of functional preeminence with respect to the other components. On the modernization of the European antitrust law see, *ex multis*, Ehlermann and Atanasiu (2003); Pera and Falce (2003); Fattori and Todino (2004) and Türk (2006).

institutional models, which the institutional discussion on the full development of independent authorities in the EU is called to confront.

The European situation is somewhat different from that of the global legal space.

Like the European administrative system, the global administrative space also has made increasingly recourse to the organizational formula of independence. Among the examples of global organizations independent of national and international political institutions one may think of the International Organization of Securities Commissions (IOSCO), currently made up of the real estate market regulators of 108 countries; the International Competition Network (ICN), which operates in the antitrust sector; and the International Association of Insurance Supervisors.[33]

Different from the EU experience, however, the formula of independence has not been used in the context of a variety of organizational arrangements. Independence is used mainly in the context of a single organizational model, centered on the establishment of common systems made up of national independent authorities and a transnational coordinator designed as an association of national authorities.

The global administrations' powers, moreover, are less penetrating that those of the European bodies, being essentially tied to coordination and cooperation management, through the elaboration of standards, codes of good practices and non-binding guidelines, and the comparison of different national implementation processes.[34] This difference, however, should not be over-emphasized, since global standards do produce many direct and indirect legal effects.[35]

In addition to this, the distinction between public powers and private bodies, clear enough in the EU order, is not always clear in the global administrative space. For example, not only do national and international public powers participate in the International Association of Insurance Supervisors, but also private bodies, which are granted the right to vote.

The use of the formula of independence in global regulatory systems differs from that of the EU legal order also because of the absence of a supranational body like the European Commission. As it has been previously noticed, the Commission has a major role in some of the European common systems of independent public powers. In such common administrative systems, independence presents a variable force and intensity: while national regulators enjoy full independence, the Commission does not, being at the same time independent of national governments and called to respond to the political majority of the European Parliament. In the global legal space, by contrast, common independent systems are independent with respect to both national governments and international political institutions, being

[33]On the International Organization of Securities Commissions, see Guy (1992); Somer (1995) and Cassatella (2007). Among the many studies of the International Competition Network, see Zanettin (2002); Lampert (1999); as well as Taylor (2006). On the International Association of Insurance Supervisors, see Pellizzari (2007).

[34]This point is argued in many of the studies on international administrations; in general terms, Raustiala (2002); among the examinations of specific sectors, Fratianni and Pattison (2002).

[35]Cassese (2006d).

composed just of national independent authorities and an international coordinator reflecting the nature of the latter, and sometimes even expressly recognized as independent. This does not mean that international political institutions disregard the activity of independent global systems: an example of the inevitable interaction between independent global systems and international political powers, and the tendency towards their institutionalization, is provided by the Financial Stability Forum. This was established in 1999 as a G7 initiative and it has been transformed 10 years later in a Financial Stability Board.[36] Here, the views of global independent systems, such as the Basel Committee, the International Organization of Securities Commissions and the International Association of Insurance Supervisors, are called to confront each other as well as national finance ministers and the relevant international institutions, such as the IMF and World Bank.[37]

The reasons for this difference between the global and the EU experiences are clear. The European order is traditionally centered on a "Community method" based on the participation of political institutions which express, respectively, the general interest of the EU, the interests of national governments and the interests of the peoples of the Member States. This leads to the development of organizational schemes in which the formula of independence is not exploited at the expense of the Commission's prerogatives. Such schemes are often born out of political compromise, which can seem tentative and provisional. In the global legal space, by contrast, the absence of a system of higher institutions facilitates the initiative of national independent authorities to aggregate in a common system coordinated by an associative body, itself protected from the interference of the international political power.

2.4 The Role of Private Actors in EU and Global Administrative Organizations

Not different from national authorities,[38] both the EU and global administrations make recourse to private actors and techniques for the exercise of certain administrative functions. The recourse to these actors and techniques does, however, vary between the EU's organizations and global regulatory systems.

[36]See G20 2009.

[37]For a sketch of the Financial Stability Forum, see Liberi (2003) and Morettini (2007).

[38]In national legal systems, public powers tend to increasingly make recourse to private actors and techniques in order to carry out certain administrative functions. This phenomenon characterizes the main national administrative systems in Europe and the United States and has given rise both to public administrations taking private form (for example, associations, foundations and corporations) and to the use of private actors to serve administrative functions. For a survey of these events, see Cassese (2000), pp. 233–234; Casini and Chiti (2007), p. 98 ff.; Fiorentino (2009).

As for the EU legal order, it should be first of all observed that the recourse to private actors and techniques is quantitatively marginal. The development and growth of EU administrative functions in the last 20 years have led to the establishment of new EU offices. But recourse to private bodies and techniques has been envisaged only when considered particularly appropriate for the effective exercise of a public function.[39]

Secondly, the recourse to private actors and techniques in the EU gives rise to relatively simple organizational arrangements.

The main technique is the organization of EU administrations in such a way to allow participation of private actors in their internal collegiate bodies. This is what happens, for example, in the European Network and Information Security Agency, whose internal organization includes a Permanent Stakeholder Group made up of experts representing interested parties such as the information and communications technology industry, consumer organizations and academic experts in the area of network and information security.

A different technique consists in establishing auxiliary relationships of private actors *vis-à-vis* the public powers in the exercise of specific aspects of a public function. One of the most important examples of the role of private actors in carrying out public functions is the production of technical standards, setting forth the features of products, production processes and measurement methods. The EU's technique for this "new approach", established by the Council Resolution of 7 May 1985, is grounded in a distinction between essential safety requirements and technical production specifications.[40] In order to circulate freely in the European market, products must conform to essential safety requirements, which are adopted through harmonization directives. European standardization bodies, which have a private character, set out the technical specifications that industries need to use in producing and marketing products in conformity with these essential requirements. Technical specifications are not mandatory. Yet, products manufactured in conformity with harmonised standards are presumed to conform

[39]For a slightly different perspective, which isolates a process of expansion of the private regulation in the European system and recognizes in this, and in its combinations with public regulation, a "new modality" of European regulation, Cafaggi (2006).

[40]The EU intervention in the area of standardization aims to remove technical obstacles to the free circulation of goods. The establishment of a European common market requires EU action in order to remove the barriers created by the technical standards, that are elaborated by producers' associations and sometimes incorporated into the national law. These standards have in most cases a private nature and therefore escape to fall within the scope of Article 34 of the Treaty on the functioning of the European Union (former Article 28 of the EC Treaty). The Community aimed, initially, at eliminating the obstacles originated by the existence of different standards in the various member States through the adoption of directives of full harmonization. This strategy, however, revealed many inconveniences, tied to the length of the decision-making process, which required unanimity, and the quick obsolescence of the norms. In the early Eighties, the Community thus opted for a "new approach" in the Council Resolution mention in the text, above. For a comprehensive summary of the characteristics of the European system of standardization, Chiti (2003).

to the essential requirements established by the directive. In the context of such European standardization system, the participation of private actors in carrying out administrative activities responds to a simple framework. The bodies charged with drawing up technical standards – the *Comité européen de normalisation* (CEN), the *Comité européen de normalisation electrotechnique* (CENELEC) and *European Telecommunications Standards Institute* (ETSI) – are international non-profit associations established in the early 1970s. Their members are national standardization bodies (in the case of CEN and CENELEC) or the competent administrations and companies active in the sector (in the case of ETSI). Their involvement in the standardization process is regulated by the Commission, which entrusts the relevant standardization body with the task of drawing up the technical specifications that industries need to use to produce and market products conforming to the essential requirements fixed by the directives. The European standardization bodies, moreover, are not subject to any form of competition with other private actors exercising the same activity. Instead, they act as international representatives of entities operating in the respective sector of competence at the national level.

In spite of the relative simplicity of these organizational arrangements, the recourse to private actors in the EU presents several inconveniences. Actually, the stable institutional dialogue with the private sector pursued in some European bodies, such as the European Network and Information Security Agency, can give life to neo-corporative practices whose effects are not necessarily positive. And establishing auxiliary relationships of private actors *vis-à-vis* the public powers in the exercise of specific aspects of a public function does not always prove an effective option. Standardization bodies, for example, have operated much below the expectations of the Commission, which has issued various proposals to better the overall efficiency of the European standardization system. These proposals have been rejected by industry and coldly received by the standardization bodies.

Turning to global regulatory systems, the use of private actors and techniques for the carrying out of public activities is partly different than in the European experience.

One difference has to do with the greater diffusion of this approach in the global legal space: the use of private actors is much more consistent and consolidated in the global legal space than in the EU.[41]

The use of private actors and techniques, moreover, gives rise to a variety of organizational arrangements, ranging from simple to highly complex. A first arrangement, which corresponds to the EU experience, is that of organizing global administrations in such a way to allow participation of private actors in their internal collegiate bodies. In this case, a global body established by States, sub-state entities or other global organizations, allows private actors to be "represented" in one or more collegiate bodies, usually as simple observers. For example, the

[41]So much so as to be considered a characteristic trait of the global legal space by Kingsbury et al. (2005).

International Civil Defence Organization, whose members are States, gives "affiliate member" status (with the right to participate in General Assembly meetings but not vote) to interested private actors and non-governmental organizations. A second arrangement, which represents a specific achievement of the global system *vis-à-vis* the European one, is illustrated by the World Anti-Doping Agency (WADA): in this case, the organization itself is private, but public bodies may participate; moreover, the private organization respects such rules and principles of public organizations as due process.[42] A third arrangement is represented by the complex architectures based on the auxiliarity of private actors *vis-à-vis* the public powers. One example is provided by the relationships between global financial regulators (including the Basel Committee on Banking Supervision (BCBS), the IOSCO, the International Association of Insurance Supervisors (IAIS)) and the International Federation of Accountants (IFAC), a private international body exercising standard setting powers: the relations between the two sets of actors, respectively, public and private, revolves around the Public Interest Oversight Board (PIOB), a Spanish non-profit organization whose eight members are nominated by the BCBS, the IOSCO, the IAIS, the Financial Stability Forum and the World Bank, and charged with overseeing the so called "public interest activity committees" of IFAC which are responsible for the adoption of standards.[43]

The variety and the "fluidity"[44] of these organizational forms give rise to several functional problems, often highlighted by the actors of the international community and at the basis of complex reform attempts and negotiation processes. An example is the Internet Corporation for Assigned Names and Numbers (ICANN), originally established as a non-governmental organization, reformed in 2002 to reinforce the position of the national governments making it up, but still the target of various, contested reform proposals.[45]

Finally, we must consider that the EU and global experiences have a different kind of impact upon national administrative systems as far as the use of private actors and techniques is concerned. The influence of global systems continues to be quite limited, even though the gradual integration of national and regional markets in a global economic space suggests that global administrative law is destined to affect the use of private actors and techniques made by national public powers. As for the EU, though making little use of private actors in the carrying out of its own administrative functions, it does already orient the use of private bodies by its Member States' administrations. In particular, it has progressively required national administrations, irrespectively of their legal form and organizational architecture, to comply with administrative law rules and principles. Examples are provided by

[42]See, for example, Van Varenbergh (2005); for an overview of the area, see the articles in Allison (2005).

[43]For a description of this, see Loft et al. (2006) and Rotolo (2007), p. 258 ff.

[44]To use an expression of Cassese (2006a), p. 49.

[45]See Carotti and Casini (2008), pp. 32–33; for a comprehensive analysis, Carotti (2007).

the ECJ case-law in the area of public procurements and the Commission's Green Paper on public-private partnerships.[46]

2.5 Conclusions

In the previous pages, three main aspects of the EU and global administrative organizations have been compared: the position of the EU and global administrative bodies in the wider context of public powers; the organizational models prevalent in the EU and global administrations; the involvement of private actors in the exercise of administrative functions. It is now time to bring together the various threads of the analysis in order to draw some general conclusions.

(a) A first conclusion regards the particular combination of similarities and differences in the administrative organizations of the EU and the global legal space.

These two groups of administrations distinguish one from the other quite clearly as far as their position in the wider context of public powers is concerned. Both the EU and global administrations are subject to the rule of law. But the rule of law has a different foundation from one system to another: in the EU, it operates mainly in function of institutional balance, while in the global legal space it seeks to protect the positions of private actors and public powers. Moreover, the administrations of the global legal space are not anchored in an executive power equivalent to that of the European Union, as are not called to respond to a global government or set of higher institutions, but rather to a plurality of sectoral sub-governments.

With respect to the main organizational models employed, we can register a more nuanced dynamic, characterized by a combination of a general convergence between the EU and global experiences and a number of specific divergences.

Both in the EU and in the global legal space, we may register the tendency to establish administrations that are autonomous from member States' governments and public powers. The organizational arrangements, however, do not perfectly correspond from one system to another, due to the different levels of complexity (greater in the EU than in the global legal space) and because global organizations lack a supranational component equivalent to the European Commission.

Analogously, both in the EU and in the global legal space there is a tendency towards the establishment of composite organizations, in which many distinct and separate national, non-national and mixed sectoral administrations participate. But the organizational models congealing in the EU and global legal space have some relevant differences too: European composite administrations give rise to very complex common sectoral systems, while the global legal space is marked by rudimentary organizational arrangements like the transnational collegiate bodies internal to many global regulatory systems; the composite administrations of the

[46]On the first see the accurate account by Massera (2007); on the Commission's Green Paper (COM (2004) 327 def), see the articles collected in Chiti (2005).

global legal space, moreover, have an essentially multinational character, while European composite administrations combine the multinational element with a genuinely supranational component.

A third example of general convergence and specific divergences concerns the development of administrations that are independent of national and non-national political institutions. This tendency is common to the EU and global administrations. However, in the EU legal order, the organizational model of independence is employed in organizational arrangements characterized, among the other things, by the participation of the Commission, which is independent of national governments but dependent on the political trust of the European Parliament. In the global legal space, instead, independence is used mainly in the context of a model centred on the establishment of common systems made up of national independent authorities and a transnational coordinator designed as an association of national independent authorities, and therefore independent of both national governments and non-national political institutions.

The same dynamic applies to the role of private actors and techniques in the exercise of certain administrative functions. Both the EU and global administrations use private bodies to carry out specific activities. The recourse to these actors and techniques does, however, vary between the EU and global regulatory systems. This practice is quantitatively limited in Europe and gives rise to simple, though problematic, organizational solutions. The global regulatory systems' use of private actors to carry out public functions is more widespread, and it leads to a variety of organizational arrangements, ranging from simple to highly complex.

(b) The EU and global administrations thus reveal a combination of limited similarities and marked differences. They are different in terms of the "constitutional" anchorage of their public administrations, which is present in one case but not in the other. Their organizational models and the role assigned to private actors in the exercise of administrative functions do tend to converge. But this convergence takes place at the general level of their overall orientation, while the specific arrangements maintain important, distinguishing specificities.

This pattern of limited similarities and marked differences has several explanations.

The similarities are produced by a common functional need, that of guaranteeing an effective implementation of the laws and policies of the regulatory systems beyond the State through organizational arrangements politically acceptable to their member States.

The differences relative to the position of the EU and global administrations in the institutional system, as well as those relative to the peculiar supranational component of the EU administration, derive from the particular historical formation of the various systems beyond the State. As it has been strongly argued in the perspective of institutional realism, the international community has always lacked the political conditions for the development of a truly unitary legal system. The Westphalian model has been gradually displaced by global governance, not by global government. States have not been replaced, but rather repositioned in a series of interconnected

regulatory systems beyond the State. And debates about the possibility of a universal republic or a constitutional State of global dimensions have an essentially normative and philosophical character. The establishment of a EU executive power and of a supranational administration, by contrast, has been made possible by the particular political conditions in the European region after the Second World War, and represents an important step of a wider process of regional cooperation.

As for the different development of the organizational models for the EU and global administrations, it can be explained, on the one hand, by the existence in the EU of an executive power, on the other hand, by the particular place occupied by the European Commission in the European legal order. The Commission functions both as a EU administration and as a political institution. As a EU administration, it characterizes the EU administrative system as a system based, among the other things, on a genuinely supranational component. As a political institution, it seeks to orientate the negotiations leading to the building of the EU administrative system, so as to protect its own position as a supranational administration. A different play of forces governs the evolution of global administrations. Choices regarding their development emerge out of multilateral negotiations in which national governments, individual sub-state bodies and international organizations may participate. These negotiations are not less complex and uneasy than those taking place in the European legal order. But the plurality of the actors participating to the institution-building process, the absence of a global government, the possibility that even sub-State bodies set up new global administrations, and the lack of a genuinely supranational voice in the institutional framework of global regulatory systems, contribute to explain the essentially multinational character of global administrations, the possibility of establishing systems of public powers independent of both national governments and international political institutions, the wide and differentiated recourse to private actors and techniques in the exercise of administrative functions.

(c) The limits of these conclusions are self-evident. Such conclusions should be tested in a wider empirical inquiry. Moreover, it would be necessary to consider possible reciprocal influences between the EU and global administrations, asking whether the two sets of organizations are developing in a contrastive way or instead supporting each other; clarifying the relationships that are established between the two organizational systems; examining the substantive rules which they must implement and the underlying regulatory techniques; and crossing the results of the organizational examination with a comparative analysis of functions, proceedings and judicial protection mechanisms. Notwithstanding their preliminary character, the proposed conclusions yield certain implications.

First, they enable us to detail some overall representations of the EU and emerging global administrative systems.

With respect to the EU, the dominant interpretation identifies in the construction of an integrated or composite administration one of the main features of the development of a European administrative system in the past 20 years. Obviously, this interpretation is by no means challenged here. A comparison between the EU and global administration, however, shows that the European “administrative

integration" does not imply the simple backwardness of the supranational component to the advantage of the transnational or multinational ones, as sometimes suggested by legal and political science studies of European administration. Rather, it gives rise to a more complex redefinition of the role of the supranational component, which must cooperate with the transnational components in the context of pluralistic composite administrations. The most accurate accounts of European administrative integration, in any case, will not be displaced by this observation, which simply confirms the complexity of the European administrative system as well as of the game of forces which is at the basis of its functioning.

With respect to the organizations of the global legal space, the comparative inquiry carried out in this chapter confirms that fluidity and differentiation are two constitutive elements of the global legal space, as emphasized by most of the studies on global administrative law. Fluidity and differentiation are likely to characterize global public powers in the medium term and to resist possible attempts of rationalization and reform. The development of global regulatory systems, in fact, passes through processes of negotiation in which there is no institution like the European Commission, specifically attuned to interests different from the intergovernmental one and playing the double role of a political institution (participating to legislative decision-making process) and an administrative one (implementing it). Thus, an important element conditioning the decision-making process is missing at the global level and negotiation takes place between national governments, individual sub-state bodies and international organizations.

Second, the conclusions of this comparative examination allow to put forward some hypotheses about the future developments of the EU and global administrative organizations.

Comparison, and the accent that it puts on the peculiar position of the Commission in the EU administrative system, suggests that the evolution of the European administrative organization will continue to be focused on models characterized by the different combinations of transnational and supranational components. This tendency is moreover confirmed by some recent reforms. The already recalled new governance of the energy sector, for example, is based on a clear "regulatory dualism" at the EU level, where both a strictly supranational regulator (the Commission) and a European but composite or mixed regulator (the new Authority) are called to implement the EU sectoral regime. This reform fits in with a more general orientation of the Commission, which has affirmed, in the terms of a legal principle, the "unity and integrity of the executive function", on the basis of which "the legitimacy, effectiveness and credibility of the Community depend on preserving, even reinforcing the unity and integrity of the Community executive function and ensuring that it continues to be vested in the head of the Commission, if the latter is to have the required responsibility vis-a'-vis Europe's citizens, the Member States and the other institutions".[47] At the same time, however, the importance of the

[47]See in particular COM (2002) 718 and COM (2005) 59.

supranational component in the future European administrative system should not be over-emphasized. The Commission's statement on the existence of a "legal principle" of the "unity and integrity of the executive function" is obviously problematic. And it is possible that the specific functional needs of the European social and economic space will determine an expansion of the agencification process beyond the Commission's sphere of influence, through the establishment of European agencies serving European bodies other than the Commission. What if, for example, the European Central Bank were to decide to establish an executive agency subject only to its supervision?

With reference to possible developments in global regulatory administrations, the comparative inquiry carried out in this chapter suggests that the absence of a genuine global government, meant as a set of higher institutions, will not be overcome in the near future. The interconnections between the various sectoral sub-governments operating in the global legal space will likely intensify. Moreover, the distances between the ways in which the different systems regulate the relations with their Member states' legal systems could narrow. In addition to this, embryonic attempts at creating higher authorities might emerge, for example in response to the effects of the financial crisis. But it would be wrong to see in these phenomena the traces of a process moving towards the establishment of a global government. Rather, they should be read as tendencies which might lead to the consolidation and reinforcement of the global governance, meant as a cooperative arrangement that does not replace states but does frame their action in increasingly thick network of interdependent ultra-state organizations.

Finally, the comparison between the two orders of administrative organizations beyond the State carries some implications of a general order. These ought to form the basis of an autonomous study, aimed at attempting to reconstruct the distinctive traits of the "new" administrative law resulting from the development of administrative law well beyond the national boundaries. Without anticipating such reflection, we can observe that the comparative inquiry of the EU and global administrations calls for a reconsideration of the argument that modern administrative systems represent an intermediary set of bodies between the political power and the collectivity. It is a true assumption of administrative law scholarship that administrations are placed between constitutional organs and the general collectivity, although the precise position of administrations does obviously vary from case to case and according to the historical period which s taken into consideration. The comparative inquiry carried out in this chapter, however, shows that non-national administrations are not always placed in the same position of intermediary bodies between the political power and the collectivity. This is certainly true with reference to the European administrative system. But global administrations tend rather to accentuate their specific political power, reinforcing their ability to operate as autonomous sectoral governments and obfuscating the distinction with the sectoral political institutions that ought to govern them. This situation is not unknown in the experience of the general legal orders of the past. But it is completely new to modern administrative law, based as it is on the experience of the state.

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Chapter 3
EU and Global Judicial Systems

Barbara Marchetti

3.1 Introduction

How alike are the World Trade Organization Appellate Body and the Court of Justice of the European Union (EU)? And is the Court of Justice similar to the Tribunal of the Law of the Sea or to the World Bank Inspection Panel? And in any case, can judicial systems be adequately compared by comparing courts?

There is no doubt that the aforementioned bodies are very different from one another and that they belong to diverse systems and contexts. The EU is more advanced and sophisticated than many global organizations, and if we had to classify its judicial system, a State or Federal system comes more readily to mind than one from a global organization, such as the World Trade Organization.[1]

Nevertheless, following a functional approach, it is possible to find grounds of comparison between the EU judicial system and some global systems. Following this comparative method, we can compare specific elements of the systems that carry out the same functions.[2]

The purpose of this chapter is not to examine the differences and similarities between the EU judicial system and the judicial systems of the various emerging

[1]Shapiro (1999), p. 328; Dehousse (1998). Nevertheless, it should be born in mind that the European Union has its origins, just like the WTO and the Mercosur, in the regional international organizations for commercial trade. (Holmes (2001), p. 79: "It is clear that the experience of the EU influenced the way in which the WTO was set up. In principle the two entities are comparable in the sense that the WTO, like the EU, is a form of preferential trading arrangement and the two can be compared with each other").

[2]"Incomparables cannot be usefully compared": Graziadei (2003), p. 100, who cites Zweigert and Kotz (1998). In this sense, see for example Weiler (1999), p. 34, who observes that "panels and appellate body fulfil the same function and cover the same issue based on similar norms that national courts and the ECJ fulfil in the European Union".

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global regulatory regimes. Arguably, this would be too vast and arduous a task to deal with here. More modestly, this chapter will discuss to what extent, in relation to the different functions exercised within the EU and a number of global regulatory systems, the judicial mechanisms operating to safeguard their legal and institutional system of rules and interests may be considered to be functionally equivalent in resolving judicial problems.

The inquiry will be articulated as follows. In Sect. 2 the EU judicial system, its architecture, and its various components relating to the EU international, constitutional and administrative dimensions will be analyzed; then the dispute settlement system of the World Trade Organization and of the United Nations Convention of the Law of the Sea, will be examined to identify their functions and fundamental features (Sect. 3). Next, the Mercosur system for dispute resolution will be considered, on the one hand, and the World Bank review mechanisms on the other (Sect. 4). Finally, some concluding remarks will be offered (Sect. 5).

3.2 The Multiple Functions of the EU Judicial System

As is well-known, EU courts, which include not only the Court of Justice and the General Court but also, for the role they perform in the system, national courts acting as EU decentralized courts,[3] behave as international courts, constitutional courts and administrative courts, according to the specific case at hand.

Their first sphere of jurisdiction, which is triggered for the purposes of ensuring international compliance,[4] is exercised when the European Court of Justice, examining an action brought by the Commission or by a State under Arts. 258 and 259 of the Treaty on the Functioning of the European Union (TFUE), finds that a Member State is in breach of its EU obligations. This sphere of competence constitutes the first power conferred by the Treaties on EU courts and determines a de facto judicial review on national (legislative and administrative) acts.[5]

The establishment of such a legal mechanism appears primarily to guarantee the reciprocal safeguarding of the Member States and the EU. Operating as an international court, the European Court of Justice resembles many other judicial body instituted in the global context for dispute settlement between States: nevertheless,

[3]In this sense, among others, Craig (2006), p. 284: "the rationale for inclusion of national courts is that they are enforcers of Community Law in their own right".

[4]Here, the intention is simply to suggest that due to the role of the courts regarding the violation of the Treaties, the Court of Justice resembles the international jurisdictions that exercise analogous roles of dispute settlement between States in other international contexts.

[5]Falcon (2004), p. 1153; Falcon (2007), p. 151. According to the author, the Court undertakes a "hard look review" of State actions under Art. 258 of the Treaty, because the conduct giving rise to the lack of compliance is usually based on a law or legal provision of the State concerned: this is precisely the reason why it transforms itself, substantially, into a kind of judicial review court, which may review any act of any State.

its jurisdiction is obligatory and exclusive,[6] a feature that cannot be found in many other global judicial bodies.

The infringement action, and this too is an original element of the EU legal system, may be brought by the Commission acting in its role as "guardian" of the EU[7] (Art. 258) or by Member States (Art. 259), which, even when acting as plaintiffs, have to submit a report to the Commission demonstrating the alleged violation. This means that an action brought before the Court by a Member State is conditioned by the Commission's opinion (or in the absence of an opinion, it takes effect after a period of 3 months).

The international jurisdiction of the EU courts and the submission phase of the relative action are characterized by a great deal of negotiation.[8]Only a minimal part of the Commission's letters of notice actually translate into infringement proceedings brought before the Court of Justice (about 10%), because frequently diplomatic consent allows political settlements to be reached and States agree to conform, without the necessity of formal infringement procedures.[9]

However, in that context, it is not possible, for the Commission or for other Member States, to resort unilaterally to countermeasures when Member States fail to comply with EU obligations.[10] Nevertheless, after the Maastricht Treaty, a Court judgment may impose pecuniary sanctions to Member States refusing to adopt the necessary measures needed to comply with a previous judgment ascertaining a violation.

The high frequency with which political agreements regarding the conflicts between Member States are negotiated and reached shows that dispute settlement is not the core function of the Court of Justice, although, naturally, it remains extremely important for managing the conflicts resulting from the violation of EU Treaties obligations.

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[6]Arnull (2006), p. 34, who underlines that obligatory and exclusive features are frequently lacking in international public law. On the question of the exclusivity of jurisdiction by the Court of Justice Lavranos (2007), p. 121, referring to an action brought by Ireland against England before the International Tribunal for the Law of the Sea.

[7]The Commission has vast discretion about these matters. On this point Arnull (2006), p. 35: "as the CFI explained in SDDDA vs. Commission, "the Commission is not bound to initiate an infringement procedure against a Member State; on the contrary, it has a discretionary power of assessment, which rules out any right for individuals to require it to adopt a particular position"".

[8]Schepl and Blankenburg (2001), p. 17: less than 10% of the procedures initiated with a letter of notice end up before the Court (from 1988 to 1994). In a similar vein, Dehousse (1998), p. 18.

[9]Dehousse (1998), p. 18.

[10]Joint cases 90 and 91/63, *Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium* [1964] ECR I-625. This could be considered the result of a different and greater institutionalization of the European common market interests and could explain why the Commission has in the European Union a guardian role, while the same mechanisms are missing, for example, in the WTO, where countermeasures are frequently a consequence – even monitored by the DSS mechanisms – of the lack of compliance with the obligations established in the agreements and the actions brought before the DSS is only reserved to the States, without recognition of any role in this sense of the Secretariat.

The constitutional jurisdiction of EU Courts is strictly related to the degree of development of the system and has a fundamental significance. Exercising such jurisdiction,[11] EU courts are called upon to decide not only the disputes over possible conflicts of jurisdiction between EU institutions and between the EU and the Member States but also the questions on how to interpret the Treaties and on the interpretation and validity of EU secondary law.

Here the European Court of Justice has, over time, assumed the role of judicial review court,[12] thanks to its activity in interpreting the Treaties and elaborating the theories of direct effect and of supremacy in the relations between EU legislation and national states. Using its jurisdiction,[13] the European Court of Justice has, in fact, inferred supremacy – in regards to national laws – from the Treaties and from the legislative acts issued by the EU institutions, which has had and has gradually caused the EU to look less like an international organization and more like a constitutional federal State.[14]

The recognized supremacy of EU law over national law is completed by the mechanism for providing preliminary rulings (Art. 267 of the Treaty), which has and has had a fundamental role and function in the development of EU legislation.[15]

The General Court and the Court of Justice also guarantee EU administrative justice: they are called upon to investigate the validity of the acts of EU institutions according to the provisions of Art. 263 of the TFUE and to declare any failure to act by the same institutions; in this role, the EU courts even decide disputes in areas such as contractual and extra-contractual responsibilities of the institutions.

With regard to this sphere of jurisdiction, however, the role as the EU administrative court is not exclusively up to the EU judicial bodies, but – as stated - to national courts as well, which are called upon to review administrative decisions taken by national authorities acting as the EU administrative authority.[16]

Viewed as a whole, the judicial review of the EU regulatory machine is carried out by a coordinated network of EU and national jurisdictions.[17]

This kind of administrative justice is, however, based on an integrated network of EU and national courts responding to a rationale of coordination and separation. EU courts do not directly review national administrative decisions (limitations that

[11]Constitutional law requires an order between superior-constitutional sources and derived sources. According to Shapiro (1999), p. 328, the Court of Justice evolved from an international court to a constitutional court in the moment at which EU legislation also evolved from a division of power, as regards its institutional framework.

[12]Shapiro (1999), p. 328.

[13]Van Gend en Loos (26/62) and Costa Enel (6/64). On the consecration with these decisions of the theories of direct effect and supremacy, Arnull (2006), p. 161.

[14]Shapiro (1999), p. 330. In the same sense, Kilpatrick (1999), p. 142; Von Bogdandy and Bast (2006), p. 281; Zuleeg (1997), p. 19.

[15]Shapiro (1999), p. 330.

[16]Likewise Falcon (2007), p. 146.

[17]According to an efficacious expression from Schepl and Blankenburg (2001), p. 17.

could not exist, and for example, do not exist in the United States)[18]; and national courts cannot declare EU acts invalid (Foto-Frost judgment[19]), having instead to refer questions to the European Court of Justice for preliminary rulings.[20]

All in all, the three spheres of jurisdiction that comprise the EU judicial system reflect the EU's international, constitutional and administrative features. Depending on which jurisdiction is exercised and what interests are to be protected (of the EU, of the Member States, of individuals, of the uniform application of EU law), standing, subjects involved, remedies and effects of the decisions are all subject to change.

The co-presence of many spheres of jurisdiction and the integrated character of the EU judicial structure are the reasons which underlie the complexity of the EU legal system and provide the motivation for undertaking this comparison.

3.3 The Judicial Systems of the WTO and of the Convention on the Law of the Sea

The juridification process variously affecting global organizations also brings with it their judicialization. International relations are increasingly regulated by legal rules and this strengthens the tendency to objectify the resolution of disputes arising from the violation of these rules, assigning them to neutral or quasi-judicial bodies or to courts.[21]

Juridification and judicialization, with the subsequent formation of global legal systems, are, however, parallel processes.[22] This is particularly apparent within the World Trade Organization which, in part due to the stage of evolution it has reached,[23] constitutes – as we will see – an ideal paradigm for comparison.

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[18]Falcon (2004), p. 1153.

[19]Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, [1987] ECR I-4199.

[20]Craig (2006), p. 285: "thus while national courts can declare EC norms to be valid, and whilst they must treat ECJ decisions that a community norm is invalid as having *erga omnes* effect, they cannot themselves declare a Community norm to be invalid".

[21]The evolution of international dispute settlement is analyzed, among others, by Weiler (2004), pp. 550–551.

[22]Where juridification is not, on the contrary, consistently issued or affirmed, eventual conflicts between the subjects of the organizations tend to be resolved according to diplomatic mechanisms, not entrusted to third parties but to dynamics and procedures of a political-international nature.

[23]The World Trade Organization was established as an institutionalization of the GATT agreements. In 1948, when the GATT agreements were enacted, it lacked any form of juridification. Only between the 1970s and 1980s were the juridification and judicialization processes started, and since then, they have taken on an ever increasing role in resolving panel disputes. Due to this evolution, along with the creation of the WTO, obligatory (and exclusive) judicial mechanisms were provided to resolve the conflicts arising from the violation of the agreements. See Stone Sweet and Mathews (2008), p. 68.

Along with the WTO's dispute settlement system, this chapter examines three other global judicial systems: the institution at the heart of the United Nations Convention on the law of the sea (characterized by the introduction, in 1996, of the International Tribunal for the Law of the Sea), the dispute resolution system of Mercosur and the World Bank's Inspection Panel. In a similar way to the EU, these organizations, for the most part, regulate economic interests, so that they lend themselves to fruitful comparison with the European experience.[24]

In the WTO, the law-making function is entrusted to a negotiation procedure (based on the rule of unanimity), whereas it lacks both a secondary normative function (if we exclude the procedural rules of the dispute settlement system – DSS) as well as an administrative function, which is the reason why not even the WTO has a true administrative apparatus. The Secretariat, which works alongside the general assembly and the DSS within the organization, does only perform instrumental administrative tasks.

The application of the rules of the agreements depends on the behavior of the contracting States, which must respect and implement them through their legislative and administrative actions. In case of violation of the agreements, the panels and Appellate Body of the Dispute Settlement System act as decision makers in relation to disputes,[25] assuming a fundamental role within the system. The WTO's DSS, in fact, seized of the judicial function, interprets the agreements in order to resolve disputes and, in this way, has become the place where the

[24]For an extensive investigation on the phenomenon of the International Courts, Treves (1999); Brown (2007), who reflects in particular on the dangers that the proliferation of the international courts and tribunals would have, in terms of fragmentation, "on the unity of international law"; Merrills (1998). On these issues, Charney (1999), p. 697; Cassese (2007), pp. 609–626; della Cananea (2005), p. 125; Cassese (2006, 2009).

[25]In 1947, GATT Articles XXII and XXIII established that the questions concerning the implementation of the agreements and the eventual cases of their violation would be managed by contracting parties, without providing for any different mechanism for dispute resolution or for any possibility to turn to judicial bodies (*dual* model). The contracting parties recognized common principles and rules as valid and effective and used diplomatic mechanisms to resolve eventual bilateral conflicts caused by violations of the agreements. In 1952, the panel practice was introduced, by which the parties could decide to refer the disputes under the agreements to panels, in which the litigating parties were not necessarily included (*triadic consensual* model). The panel practice initially had difficulty in becoming accepted and, until the 1970s, the contracting states obstructed the way for the *legalism procedure* (only six disputes were formally referred to the panel between 1960 and 1970). The idea to build a neutral adjudication function within the WTO system was aimed to ensure neutrality in the resolution of the conflicts emerging from the implementation of the agreements. With the Tokyo negotiations in 1979, the first agreement, called the Dispute Settlement Understanding, was added, which took account of some proposals coming from the US aimed at reinforcing the panels by identifying peculiar procedural rules and functional measures for the legalization of the dispute resolution system. And only with the Uruguay Round negotiations did the dispute settlement system settle down in its actual obligatory *triadic* model: the consensus of both parties is not necessary to activate the mechanisms of the resolution system and the decisions taken by the judicial bodies are binding. Moreover, the dispute settlement system is the only court that presides over the violation of WTO agreements.

Organization adopts its policies.[26] In a certain sense, this represents the motor of the system and monitors the compatibility or conformity of the States' legislation and administrative conduct.[27]

The dispute settlement function exercised by the DSS presents interesting analogies with the jurisdictions exercised by the Court of Justice according to the provisions of Arts. 258 and 259 of the Treaty. In both cases, notwithstanding their different historical development,[28] and despite the persistence of significant differences (some features of the Dispute Settlement System give reason to question whether it really is a jurisdiction), the observance of the agreements is guaranteed by a third and neutral body (impartial vis-à-vis the violating State) which, when interpreting the treaties, is called upon to investigate the conformity of the States' actions regarding the rules and is able to impose their decisions upon them.[29]

The similarity goes further than this: although ample space exists for the diplomatic resolution of the disputes in both the judicial systems, in each case the court's jurisdiction for international compliance is obligatory, in the sense that conduct by either of the two disputing parties (even where the facts have been reviewed by the EU Commission's filtration process) is sufficient to go to court and to obtain a binding decision for both parties) and exclusive, because the DSS in the World Trade Organization and the Court of Justice in the EU are the only judicial bodies that preside over the above mentioned violations.

Nonetheless, the fact that a few features are shared should not allow some important divergences to be forgotten: the central role the Commission plays in promoting actions of infringement (which has no parallel in the WTO, where they are referred to the Secretariat) bears witness to the strong institutionalization of EU interests. This is also reflected by the fact that, in the European context, the practice of countermeasures and of unilateral retaliation is prohibited, which, however, continues to characterize the enforcement phase of the decisions adopted by the DSS of the WTO.[30]

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[26]Stone Sweet and Mathews (2008), p. 68, according to which the States, aware of this role, use the dispute resolution system "in part, to evolve treaty rules they favor, and to block interpretations to which they reject. The AB is gradually exerting dominance over the normative evolution of the regime, which is to be expected given the legal system's steady case load, and the AB's trustee status".

[27]Referring on this point, Marchetti (2009), p. 567.

[28]As we observed, the international jurisdiction of the Court of Justice represents the first attribution of the Court's jurisdiction and is provided for by the institution of the EU and the Treaty of 1950. In the WTO context, on the contrary, disputes were for a long time assigned to mechanisms of negotiated resolutions, which slowly evolved, from 1970 onwards, to a dispute settlement system founded on neutral third-parties judicial bodies.

[29]Even if doubt could be cast on the jurisdictional character of the DSS, lacking some features of a jurisdictional nature.

[30]Not by chance, the enforcement phase of the DSS decisions and the limited range of the consequences deriving from the failure to observe them is a potential ground for criticism of the WTO system.

Moreover, the EU has conferred powers of enforcement on the Commission, so strengthening the protection of the EU's interests, whereas an equal administrative function of vigilance and control is not given to the WTO Secretariat.

Judicial review functions, however, remain excluded from the WTO dispute resolution system, because unlike the EU, the World Trade Organization lacks the constitutional and administrative articulation of the former institution.[31]

The United Nations Convention on the Law of the Sea came into force in 1994 and regulates the rights that Governments have in international waters. It conserves and manages marine resources, protects the marine environment and controls the mining and scientific research activities. It contains many customary laws on the use of the sea, which merge together with a body of more recent rules, as well as the creation of novel institutions and new global bodies. Moreover, the convention regulates a binding procedure for dispute settlement between States, due to the interpretation and application of its rules, which obliges the case to be submitted by one of the parties to a judicial body that makes binding decisions (compulsory jurisdiction).[32]

In this light, in 1996, the International Tribunal for the Law of the Sea was established with the goal of creating a permanent judicial body for the settlement of the disputes arising from the application and interpretation of the Convention.[33] Its jurisdiction is non-exclusive in character, in the sense that even if States recognize its authority to issue decisions that are binding in nature for the disputing parties, it does not represent the exclusive forum for resolving controversies concerning international maritime rights, as the parties can freely decide to apply to the Tribunal or choose another court.[34] In fact, Art. 287 of the Convention establishes that after a written declaration, the contracting parties can choose between four options for settling disputes: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal (Annex VII), or a special arbitral tribunal (Annex VIII).[35]

[31]The debate on the point is very wide: see, among the others, Cass (2001), p. 39; Petersmann (1996–1997), p. 398.

[32]Treves (1999), p. 12.

[33]Oxman (1996), p. 353.

[34]Naturally, if both parties to the dispute agree that the dispute should be submitted, at the request of any party to the dispute, to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in Part I, unless the parties to the dispute otherwise agree (Art. 282 of the convention). The choice of the procedure must occur "when signing, ratifying or acceding to this Convention or at any time thereafter, (. . .) by means of a written declaration" (Art. 287 n. 1 Conv.). It is interesting to point out, however, that the declaration does not affect the obligation of a State to "accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part Xl, section 5" (Art. 287 n. 2).

[35]In particular, Art. 1 of Annex VIII establishes that each party in a dispute arising from the interpretation and application of the articles of the Convention relating to: (1) fishing; (2) the protection and preservation of the marine environment; (3) marine scientific research; and (4) navigation, can initiate special arbitration proceedings after a written notice is given to the other party or parties to the dispute.

Furthermore, each of the contracting parties may apply to the International Tribunal for the Law of the Sea only if the defendant has accepted its jurisdiction beforehand.[36] In these terms, its jurisdiction is obligatory, but on condition that the disputing States have previously declared their acceptance of it (unless in the case where the International Authority is the plaintiff).

In exactly the same way as the arbitration courts (ordinary or special) provided for by the Convention and the International Court of Justice, the International Tribunal for the Law of the Sea exercises international jurisdiction exclusively: its mandate is confined to disputes concerning the violation of Convention by the States.[37]

The Convention provides for identifying a few common procedural rules for all of the courts under Art. 287. In particular, each court's jurisdiction covers all of the disputes arising from the application and interpretation of the Convention; provides for the acceptance of scientific or technical expert evidence in the proceedings; for the power to impose interim relief; it guarantees the principle of audi et alteram partem, and is based on the binding and final nature of the decisions.

Generally only contracting parties have standing to bring an action before the International Tribunal for the Law of the Sea,[38] even if in some specific cases, explicitly provided for by section XI of the Convention, some entities other than the States have standing to apply to the court.[39]

This section, in particular, lays down that the International Seabed Authority (ISA),[40] the institution specially created to safeguard the seabed Area,[41] a global

[36]Point 5 of Art. 287 of the Convention, in fact, establishes that if the parties to the dispute have not declared their acceptance of the same procedure for settling the dispute, the dispute must be taken to Arbitration (Annex VII). Point 3 of Art. 287 also favours the Arbitration Court: "A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII". On this point Merrills (1998), p. 186: "a dispute may be referred to the Tribunal when both parties have made a declaration accepting its jurisdiction".

[37]On the argument Treves (1996), p. 305.

[38]Article 20 n. 1 Statute of the International Tribunal for the Law of the Sea: "The Tribunal shall be open to States Parties".

[39]Merrills (1998), p. 186: "Unlike the ECJ, the Tribunal is open to entities other than states, including international organizations in certain circumstances (Art. 20(2)), and under the same provision may be used by states which are not parties to the Convention".

[40]The International Seabed Authority is the organization that the contracting States go through to organize and control the Area's activities, and, in particular, to manage its resources. Its principal organs include an assembly, a council, a secretariat and an Enterprise. The Authority's organization and subdivision of tasks and responsibilities among the different organs is complex and provides for the emanation of rules, regulations and procedures concerning the equal distribution of financial profits and other economic advantages deriving from the activities conducted in the Area, as well as the payments and contributions received under Art. 82 , taking into consideration the interests and needs of developing countries and peoples that do not have full independence or a self-governing status (Art. 160 letter f (i)). Those concerning the exploration (and transport, treatment and commercialization of minerals), however, are referred to the Enterprise.

[41]According to the provisions of Art. 1 of the Convention, Area is defined as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

administrative body in the true sense,[42] can institute proceedings before the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea for settling the Tribunal's deep seabed disputes,[43] to protect the Area's natural resources, which were declared the "common heritage of mankind" by the Convention.[44]

Through the exploitation and commercialization of extracted minerals, this Authority, which is primarily concerned with managing the resources of the Area, enjoys a specific regime under the Convention that, amongst other things, provides for immunity from jurisdiction,[45] a particular legal treatment for its goods and assets,[46] and other types of privileges.[47]

The judicial system, therefore, rests on different bodies, each competent to resolve the same disputes. The contracting parties themselves have discretion to choose which forum to use. Only one exclusive jurisdiction hypothesis exists concerning admissible actions before the Sea-Bed Disputes Chamber of the Tribunal, a special chamber for deep seabed disputes relating to the management of the Area.[48] If the Authority sues a State before this special Chamber of the Tribunal, the

[42]Wolfron (2008), p. 11.

[43]In each case, even international organizations and natural persons and legal entities can appear before the Sea-bed Disputes Chamber of the Tribunal to resolve the conflicts relating to the seabed (Arts. 14 and 35–40 of the Statute). See Treves (1999), p. 22.

[44]Section 2 (Area principles) establishes that the Area and its resources belong to all of mankind (Art. 136). The next Art. (137) on the legal regime of the Area and its resources, provides that "all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority".

[45]Article 178 of the Convention establishes that "the Authority, its property and assets, shall enjoy immunity from legal process except to the extent that the Authority expressly waives this immunity in a particular case".

[46]Article 179 provides in particular for "the property and assets of the Authority, wherever located and by whom so ever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action". According to the provisions of the following Art. 180, they are moreover exempt from restrictions, regulations, controls or moratoria of any nature.

[47]For example, Art. 181 provides that the archives of the Authority, wherever located are inviolable whereas Art. 183 provides that the Authority, its goods, and activities necessary to perform its responsibilities are exempt from custom duties and taxation.

[48]Merrills (1998), p. 187. The special Chamber for the deep seabed disputes has a real jurisdiction and a special composition. It is composed of 11 judges, which are chosen by (and among) the 21 judges that make up the Tribunal in order to guarantee a non- homogeneous geographic representation and diverse legal traditions. Nominations last for 3 years. The Chamber's jurisdiction is defined through complex mechanisms of the administration of the Area. Disputes between States, between a State and the Authority, between the Authority and a possible contractor, and between the parties to a contract, as well as natural persons and legal entities may be heard by the Chamber. It is primarily a functional authority, which is why all disputes concerning the Area are drawn into the sphere of its jurisdiction.

contracting State, even not previously having accepted the jurisdiction, must appear before this Court.

The Authority, on the other hand, as previously mentioned, is also granted immunity from any legal action.

Thus, two judicial subsystems can be derived: a general one, dealing with dispute settlement between States, which brings to mind the triadic model of resolving disagreements, in which the contracting States are the main actors, able to choose the dispute settlement forum and enjoying ample room for the direct negotiation of the dispute; and one regarding Area disputes, in which the Authority, responsible for its protection can bring an action against the States before the Sea-bed Disputes Chamber of the Tribunal to settle disputes over the seabed, where they are subject to its jurisdiction.

In its turn, this subsystem presents an interesting peculiarity: although the Authority exercises normative and functional administrative powers to protect the Area and to exploit its resources, and although it may be a party in legal proceedings before the Chamber of the Tribunal, it does not have to appear before any judicial body.[49]

3.4 The Mercosur System and the World Bank Inspection Panel

Mercosur, a South American regional organization, was created in 1991 by the Treaty of Asuncion and encompasses four Latin American countries: Argentina, Brazil, Paraguay and Uruguay.[50] The goal of this bloc is the creation of a Common Market, in which a free-trade zone, a customs union, and a common market policy are guaranteed. In these terms, an analogy between the EU and Mercosur is evident.[51] Several of Mercosur's institutional and constitutional features resemble those of the EU: the governing bodies of Mercosur (Common Market Council, Common Market Group, Trade Commission, Parliament, Secretariat) issue secondary normative acts and exercise administrative functions, which are binding and imposed on the member States as well as on individuals.[52]

[49]Merrills (1998), p. 190: Art. 189 of the Convention prohibits the Sea-bed Disputes Chamber to exercise on behalf of the Authority its discretionary powers. Moreover, it cannot pronounce itself on the legality (nor declare invalid) of any rules, regulations and procedures of the Authority, which would violate the Convention. According to Merrills, "these prohibitions are an uncompromising assertion of the controversial proposition that certain disputes concerning the exercise of legal powers are unsuitable for adjudication".

[50]In 2006, Venezuela was added as a full member State to Mercosur; other States were added as associate members (observers): Bolivia and Chile in 1996, Peru in 2003 and Colombia and Ecuador in 2004. In general, on the economic integration process of Mercosur Beha (2000); Duina (2006).

[51]Bilancia (2006); Ventura (2005).

[52]Ouro Preto Protocol (Protocol annexed to the Treaty of *Asunción*, on the institutional framework of Mercosur), Arts. 9, 15, 20: Decision, resolutions and guidelines are binding upon the member States.

Internally, the regional organization, first with the Brasilia Protocol and finally with the Olivos protocol, has developed a dispute settlement system, approved in 2004, in which the member States, individuals and legal entities can submit motions (although individuals and legal entities must do so indirectly). This is the result of an evolutionary process.[53] When Mercosur was first established, its legal system had a dyadic structure which involved bilateral negotiations of the disputes mediated, in the last resort, by institutional committees (Common Market Group (CMG) and Common Market Council (CMC)).[54]

With the Brasilia Protocol, the transition was made to the triadic phase, with the creation of a Mercosur ad hoc Tribunal (MAHT).[55] The process of judicialization was completed with the subsequent Olivos Protocol in 2002,[56] which redesigned the dispute settlement system previously introduced by the Brasilia Protocol and instituted the Permanent Tribunal of Review (PTR), as an appellate court delegated to ensure the uniform interpretation of Mercosur's law.[57]

Currently, Mercosur dispute settlement is binding in nature and aimed principally at the States, which can directly bring an action before the MAHT. Nevertheless, the jurisdiction is not exclusive and, under the provisions of Art. 1 of the protocol, the States have the option of using other forums. In particular, when a dispute falls within the scope of the WTO agreements, it may be submitted to either the WTO or to Mercosur, at the discretion of the complainant.[58]

The MAHT and the PTR have both jurisdiction to hear disputes relating to the interpretation, application and violation of the Treaty of Asunción, the Ouro Preto Protocol, the protocols annexed to the Treaty, Common Market Council decisions, Common Market Group resolutions and Trade Commission directives (Art. 1

[53]The extent of this evolution can be considered typical of the evolutions of dispute settlement international functions: from a *dyadic* phase to a *triadic* phase, from diplomatic and facultative mechanisms to obligatory mechanisms.

[54]These committees naturally cannot issue binding adjudication decisions upon the parties, but are limited to formulate recommendations.

[55]Articles 43 and 44 Brasilia Protocol. Granillo Fernandez (2003), p. 31.

[56]The Mercosur dispute settlement system entered into force on January 1, 2004.

[57]Chapter VII Procedimento de Revision. Article 17 establishes that either of the parties to a dispute may submit notice of appeal to the Permanent Review Tribunal against the decision of the Ad Hoc Arbitration Tribunal, within a period of no more than 15 days from the date of its notification. Appeals are limited to issues of law dealt with in the dispute and the judicial interpretations contained in the Ad Hoc Arbitral Tribunal's decision. In any case, the disputes can be submitted directly to the Permanent Tribunal without first going to the MADT. See O'Keefe (2002).

[58]The parties can first try taking the dispute to the Trade Commission. In any case, an attempt at bilateral mediation must be made before initiating proceedings, as confirmation of the preference for diplomatic solutions originally established by the Treaty of Asunción. In case the negotiations should fail, the States may submit the dispute to the Common Market Group for consideration. At the end of the proceedings, the CMG may make recommendations which are non-binding in nature.

Olivios Protocol); however, they do not have the power to review the rules and decisions issued by Mercosur Institutions.[59]

In these terms, the judicial system maintains an international and intergovernmental footprint, without having the power to review the validity of the acts taken by the Commission, the Council and the Group of Mercosur.

Even after the Olivos Protocol, private parties are still required to take an indirect path. They must first submit claims to the national section of the Common Market Group of the State where they reside. The national section will then decide whether or not the claim can be taken to the Tribunal.[60] In fact, to fall within the framework of the interstate conflicts subject to the Tribunal's jurisdiction, the private claim has to become a State claim.

The disputes before the Tribunal are concluded by an arbitration award: if not appealed to the Permanent Tribunal, the Tribunal's decision becomes res judicata.[61] In the event of appeal, however, the arbitrator's award is automatically stayed.

These are significant differences, when compared to the way the World Bank's Inspection Panel[62] is currently run, to the extent that its inclusion in the group of international organizations with judicial functions can be questioned. The panel was created in 1993 by the Board of Executive Directors of the World Bank[63] in order to improve the accountability and the transparency of the institution's operations. The World Bank's goal is to make loans to and finance projects in developing countries with the aim of improving the social and economic conditions of their inhabitants.[64] Because the realization of these projects, however, can, in turn, have detrimental effects on the environment, indigenous peoples and on other local interests, the Bank pursues several safeguarding policies and procedures, which ensure that adequate preliminary inquiries and an effective balancing of the interests involved with the financing are made. The Inspection Panel is closely interconnected with these binding guidelines, which were developed in response to the massive criticism of the Bank, arising from the opposition of local citizens

[59]See O'Keefe (2002), p. 9.

[60]Article 40 co. 1. A private party request must contain sufficient elements to permit a reconstruction of the violation and damage suffered. On the basis of these assumptions, the national section decides whether to accept the claim and proceed to initiate negotiations with the State responsible for the violation. If this negotiation fails, the Common Market Group will intervene (Art. 42).

[61]Article 26 of the Olivos Protocol.

[62]Circi (2006), p. 271; Marshall (2008); Orakhelashvili (2005), p. 57; Carrasco (2008), p. 3; Battini (2003), p. 262.

[63]IBRD 93-10 and 93-6 Resolutions.

[64]It consists of a multilateral bank for development and has 184 member countries. The countries are represented by a 24-member Board of Executive Directors. The bank has adopted a weighted system of voting where votes are weighted according to the amount of money each country puts in to the bank, thus stronger economic countries have more control. The Board must approve all the projects financed by the Bank, which are proposed by the Bank Management, and nominates the Bank's President.

concerning two projects in India in the late 80s.[65] In fact, the Panel guarantees a forum for locally affected people who believe that they have been, or are likely to be adversely affected as a result of the Bank's failure to abide by its policies or procedures.[66] Nevertheless, it is not an actual court: it does not adopt binding decisions or decide true disputes. It consists of three members nominated by the President of the World Bank and approved by the Board of Executive Directors, so ensuring independence[67] from the Bank management and the competency to carry out their 5-year terms.

Both those potentially damaged by Bank-financed projects (including association representatives[68]) and single Board members can present a request for investigation. In order for the request to meet the eligibility criteria, it must allege that acts or omissions by the Bank, in violation of its policies and procedures, have caused or could potentially cause harm to the requesters. Additionally, those submitting the request must first make an attempt to discuss the issue with the Bank management; if they are unhappy with the response, they may proceed to the panel.

If such conditions are met, the Inspection Panel declares that the request is admissible, and according to the information gathered, formulates a recommendation for the Board of Directors asking for authorization to start an inspection. At this

[65]These included the Sardar Sarovar dam and canal projects on the Narmada river in India. The criticism received by the Bank stimulated the President at that time, Lewis Preston, to engage in 1991 B. Morse, administrator of the Development Program of the United Nations, and T. Berger, ex-judge of the Supreme court of British Columbia in Canada (known as the Morse Commission), to undertake an independent review of the projects. The Commission's final report, drawn up in 1992, revealed numerous violations of the Bank's policies, which would have caused serious harm to the environment and to the people, and invited the Bank to reconsider the projects.

[66]"The primary purpose of the Inspection Panel is to address the concerns of people who might be affected by Bank projects and to ensure that the Bank adheres to its operational policies and procedures in the design, preparation and implementation of such projects", in Accountability at the World Bank. The Inspection Panel 10 Years On, The World Bank, 2003, p. 3, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8_07.pdf. According to the procedural norms established in 1994 to regulate the Inspection Panel's functioning, whose role "is to carry out independent investigations". After an inspection is requested, the Panel must, in fact, "inquire and recommend".

[67]The independence and integrity of the Bank's panel is guaranteed by strict bans and eligibility criteria: for example, a member may be removed from the panel only for just cause; panel members are precluded from any future employment by the Bank; and they cannot serve on the Panel until two years have elapsed since the end of their employment with the World Bank. Moreover, the components of the Panel – who must be of different nationalities – cannot participate in claims and requests in which they may have personal interests, and they cannot be involved with specific interest groups.

[68]Paragraph 12 of the Resolution establishes that each group of 2 or more peoples from the country where the project is taking place may present a request to the panel if, as a result of the violation of the Bank operational policies and procedures, their interests have been or are likely to be directly affected. Local subjects may present the request on their behalf or, in the exceptional case in which adequate representation of the territory's interest has been met, even non-local subjects may represent on behalf of those alleging damage.

point, if the Board authorizes the inspection, the panel proceeds with the investigation, which calls for extended participation by the interested parties, and concludes with the submission of a final report containing the Panel's decision regarding the Bank's compliance with or violation of its operational policies and procedures.[69] This report is then passed on to the Board. The Bank management then has 6 weeks to submit recommendations, responding to the Panel's report and indicating any remedial changes that it intends to adopt.

In the light of these two reports, the Board informs the requesters whether it intends to intervene and what type of action it intends to undertake to remedy the violations. However, the Bank's governing body is not bound, in legal terms, to comply with the conclusions reached by the panel.[70]

The set of rules governing the functions and operations of the Inspection Panel does not allow a clear identification of the nature of the body or of its principles.

Certain features of this procedure bring the judicial function to mind: the panel's action is the consequence of a claim proposed by private citizens; these citizens, seeking protection of their interests, present their request, which is founded on the Bank's violation of its obligatory rules (procedural and substantive) according to a process that recalls courts providing judicial review for administrative action. Others, however, including the fact that in the end, the panel is incapable of producing binding effects on the Bank action, could lead to the conclusion that the Inspection Panel should be categorized as merely a monitoring mechanism.[71]

However, on account of this ambivalence, a forum has been created, where private citizens (looking to the protection of their interests) present their claims through an international organization. What is more, although the final report is not legally binding on the Bank, the procedure concludes with the Bank resolving any violation made by Management through non-compliance with the rules that govern its actions. If the significant rise in the number of claims brought before the Inspection Panel is considered, together with the steadily increasing confidence in its operations, confirmed by the support for the Bank's investigational activity,[72] it could be included in the list of institutions demonstrating judicial purposes, even though it is still conditioned by the political will expressed by the Board.

[69]Circi (2006), p. 282.

[70]Battini (2003), p. 269: the Inspection panel "is a hybrid, since it exhibits some of the features of an administrative jurisdiction, combined with others, on the whole predominant, which are characteristic of an independent advisory council".

[71]Battini (2003), p. 269, according to whom the lack of obligation of the forum means that it is not cannot be included as a remedy.

[72]http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/AnnualReport05-06.pdf. From the Inspection Panel's annual report, there was a considerable increase in the number of requests from 2004 to 2007 made with respect to the previous period. Of the 22 requests referred to the Panel over the 3-year period from 2004 to 2007, only 1 was disregarded because it did not meet the criteria, whereas the other 22 were registered. The Board authorized investigations for all of the 21 requests.

If that proposition is valid, the Inspection Panel could be considered as not only the place for resolving interstate conflicts, such as the hypothesis mentioned above, but also as an embryonic version of a global administrative court (still retenue),[73] in which private citizens, as long as they are able to demonstrate that the Bank has not complied with specific rules, can legitimately bring a claim against a global administration directly (not through their State's representation) before a global judicial (or quasi-judicial) body.

3.5 Some Comparative Reflections

In general terms, the dual (or dyadic) model of dispute resolution, meaning a system lacking a third body in charge of resolving disputes, implies that the relations between States remain governed by the reciprocity principle, which forms its foundation.

When such a model is insufficient and needs to be replaced to achieve more certainty in the system's rules, the conditions for creating a triadic model of dispute settlement are met, where dispute resolution is assigned to neutral third bodies.

Nevertheless, triadic models of dispute settlement may differ in kind; they may be either consensual, or obligatory.[74] In the first case, the litigating States decide, from time to time, whether or not to refer the dispute to an ad hoc body, and it is that act of delegation that gives the body legitimacy and authority.

In the second case, in which an obligatory triadic system is established, the judging body is permanent and only the recourse by one state is necessary (and sufficient) for the body to be seized of the dispute. Here, the act creating the judicial body substitutes for the act of delegation and makes the judicial body the permanent judge of the disputes between the parties.[75]

Once set up, the triadic system of dispute resolution performs a governing function, which consists of the capacity "to generate normative guidance about how one ought to behave, to stabilize one's expectations about the behavior of others and to impinge on ex ante distributions of values and resources".[76]

The greater or lesser development of global judicial systems, therefore, depends on the degree with which the States aim to create a system of objectified norms and of the consequent concession of a part of their decision-making power. Assigning their power to decide disputes to third bodies means, in fact, partly renouncing

[73]Here we refer to the *justice retenue* which in France regulated the Conseil d'Etat jurisdiction before 1872.

[74]Stone Sweet (1999), p. 147.

[75]From this point of view, the Court makes up the paradigmatic shape of the *triadic* system of the resolution of the controversies: Stone Sweet (1999), p. 150. On the point see Shapiro (1981).

[76]Stone Sweet (1999), p. 150.

their sovereignty, for which diplomatic mechanisms and the rule of unanimity in decisional bodies would be more effective.

If we observe the evolution state of the various judicial systems considered, we form the impression that, in general, the dual model of dispute settlement is declining and a process of judicialization of the conflicts is expanding.[77] Even though there remains ample space for the bilateral negotiation of conflicts, most global systems provide for triadic mechanisms (obligatory and sometimes even exclusive) of dispute resolution.[78]

The need for more predictable and objective rules has given rise to the conditions, in the World Trade Organization, for the creation of an obligatory and exclusive dispute resolution system, based on typical procedural rules of the national and international jurisdictions, entrusted to independent bodies, more capable of making policies than intergovernmental assemblies are.

Obligatory mechanisms of interstate dispute settlement have been established even in the United Nation's Convention on the Law of the Sea and in Mercosur, with the gradual assignment of dispute resolution to third and impartial bodies. In these two areas, the processes appear more (or less) advanced and structurally diverse, but in both the definite abandonment of the dyadic model of conflict management seems evident.

Compared with what occurs in the EU, Mercosur has established a structural basis for a judicial system similar to (although less developed than) the EU system, with the Permanent Tribunal of Review and the Mercosur ad hoc Arbitral Tribunal; despite not being exclusive in nature, this is a true obligatory legal system.

The Convention on the Law on the Sea, on the other hand, has created a dispute resolution system with more international features, in which elements of consensual settlement still remain, tied to a greater or lesser degree to the requirement of prior acceptance of the judicial bodies' jurisdiction.

In all three cases, nevertheless, one common factor seems to emerge: assigning the important function of interpreting the regulatory systems' rules to these judicial bodies creates a tendency for unilateral interpretations and, therefore, more certainty in the law, conferring on them a propelling role in their legal context. In this role, these judicial bodies, also from the viewpoint of the complexity and intricacy of the decision-making processes (often founded on the rule of unanimity), replace the general assemblies in determining the policies of the system, producing, in some cases, problems of accountability.

[77]The legal mechanisms still remain "very much oriented towards member States in accordance with the sovereign equality of States model", not being a democratic model of accountability, in which control mechanisms of the actions are entrusted to individual parties. Where, in fact, this is anticipated (i.e., the World Bank Inspection Panel), decisions made are not binding on the parties. On this argument, de Wet (2008), p. 11.

[78]This can be considered true of the World Bank, if the Inspection Panel's structural position as a third body is accentuated.

The Inspection Panel does not fall within the category of mechanisms for dispute settlement. It is not a forum for disputes between member States, and therefore does not exhibit, in that sense, features of a typical international jurisdiction. On the contrary, it can be considered not as a jurisdictional but as a judicial body with a review function, which resembles the General Court and the Court of Justice in their capacity as administrative courts. Thus, in general, none of the contexts described here seem close to the judicial system of the EU.

Mercosur, even though it shares some structural institutional features with the EU and has the same goal of legal integration, does not seem to present analogous developments: its judicial system remains anchored to international jurisdiction features, without evolving towards a model of administrative and constitutional justice.

As of today, the DSS of the WTO and the formerly mentioned tribunals of the Convention on the Law of the Sea lack features comparable to those of the EU and are contemplating significant developments in one system, that of international law, with a plan for obligatory (and sometimes exclusive) mechanisms of dispute resolution with interstate character.

Nevertheless, even considering the feature of the international function of the EU, elements of significant divergence remain, even in this case: on one side, the peculiar role played by the Commission (and thus by EU general interests) seem to prove that the intergovernmental paradigm has been superseded; moreover, a different enforcement system of the decisions reached in both the EU and global contexts seem to demonstrate a differing degree of internationalization of the two remedial systems.

Therefore, the stamp of EU law is still unique in the context of regulatory organizations beyond the State: in fact, it is made up of constitutional law and administrative law,[79] which presuppose the process of European integration on the one hand, and the constitutional features of the EU on the other. As has been asserted, "the unusual role played by the ECJ stems from the fact that it operates in a very different institutional environment from that inhabited by traditional international jurisdictions".[80]

Since 1950, the existence of an EU administrative apparatus (High Authority), able to adopt binding decisions against States as well as individuals, with a judicial review system over its own acts, has always shaped a judicial system in which EU courts have typical constitutional and administrative functions and simultaneously act as international courts for Treaty compliance.

[79]Dehousse (1998), p. 16.

[80]Dehousse (1998), p. 16. A further difference: in addition to having several jurisdictions – as stated – EU judges are called upon to resolve disputes relating to taxes, commerce, society, intellectual property, consumer protection, and so on; see also De Burca and Weiler (2001), p. 6. On the contrary, judicial bodies of global organizations (WTO, World Bank, Convention on the Law of the Sea, Mercosur, etc.) do not accumulate different jurisdictions or have a general competence.

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Chapter 4
The Influence of European and Global Administrative Law on National Administrative Acts

Bernardo Giorgio Mattarella

4.1 Introduction

The concept of administrative act is one of the most important in the administrative law scholarship of many western countries. Yet, it does not have a central position in the European administrative law scholarship, in which only few scholars, mainly from countries belonging to the civil law tradition, have investigated the legal regime of European institutions' decisions[1] and the impact of European Union (EU) law on national administrative acts.[2] As far as the global administrative law is concerned, these issues have been substantially neglected so far.[3] Such a dismissal may be explained by referring to the imprinting of the American law on global law (and of the American scholarship on global law scholarship), or simply by reckoning that some of the issues, that in the civil law tradition are addressed within the theory of administrative act, can be systematized differently, for example within the conceptual frameworks of administrative procedure and judicial review.

However, such dismissal poses a challenge to many European administrative lawyers. On the one hand, if there is a global administrative law resulting from different legal regimes (each requiring administrative decisions to be made), there is also a bunch of legal issues which can be grouped together and addressed with the

[1]Among the first contributions, from the Italian scholarship, De Vergottini (1963) and Sacchi Morsiani (1965).

[2]For the French legal scholarship, among the most recent contributions, Noguellou (2007).

[3]For an exception, using the theory of administrative act to conceptualize an international assessment programme, von Bogdandy and Goldmann (2009). See also Kaiser (2008), focusing on a case of "international administrative act subject to examination by the designated contracting party".

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conceptual tools provided by the theory of administrative act, to which they are accustomed. On the other hand, when studying the relations between the state law and the law beyond the state, European administrative lawyers cannot avoid assessing the impact of the latter on the rules governing national administrative decisions and on the pertaining legal theory.

This chapter aims at this second target, i.e. at exploring the influence of EU and global law on domestic administrative acts, in terms of both law and legal theory. It is, on the one hand, an attempt to use the theory of administrative act to investigate some legal issues, arising by ultranational law, which are sometimes neglected by the EU law scholarship and, even more, by the global law scholarship. It is, on the other hand, a test of that theory, aiming at assessing its ability to endure and adjust to the changes prompted by EU and global law. It is also a comparison between the functioning of the EU and the global legal systems, explored under their influence on national administrations. Finally, yet to a more limited extent, it is an inquiry on the interaction between the two.

The analysis will be conducted mainly through the exam of legal provisions and case law, which in Sect. 2 will be grouped according to the typical steps of administrative decisions: the legal basis for administrative acts, their making, their contents, their legal effects, their execution, and their review. For each of these steps, hypotheses of influence of EU and global law, as well as of reciprocal influence, will be examined. In Sect. 3, the techniques of influence will be considered, proceeding from the stronger instruments of EU law to the more diverse and subtle ones of global law. Parallels and similarities will also be highlighted. Section 4 will draw some conclusions relating to controversial issues. The main outcome of the analysis will be that the theory of administrative act shows a tendency to adjust to the influence of the law beyond the state, and that even the impact of the latter on the rule of law and democracy is quite less stressful than one could expect.

4.2 The Scope of Influence

4.2.1 The Legal Basis

The influence of EU and global administrative law on national administrative acts has several facets. First of all, the very existence of a national administrative act can be influenced by the law beyond the state. The latter can mandate or exclude the issuance of an act by a domestic administration. In this hypothesis, it is not the national law that confers or denies the national administration the power to issue an administrative decision, because the issuance is required or prevented by EU or global law.

As for EU law, good examples of such kind of influence are provided by the regulation of state aids. As it is very well known, the Treaty on the Functioning of

the European Union normally prevents Member States' administrations from granting aids distorting competition in the European market.[4] The same provisions envisage domestic administrative acts mandated by EU law, as they empower the European Commission to decide that a state shall abolish or alter a granted aid within a period of time: such a decision forces the national administration to issue an act obliging the beneficiary to refund the aid. Another example, in the Treaties, is the duty of national authorities to enforce pecuniary obligations imposed by European institutions on persons other than states.[5]

Also secondary law provides examples of administrative powers conferred or denied to national authorities. Such authorities are often prevented from taking certain measures, or empowered to take measures not envisaged by national legislation but by EU legislation. EU law confers the power to adopt counter-measures aimed at ensuring free access to cargoes in ocean trades: where "not provided for by the national legislation of a Member State they may be taken [. . .] by the Member State concerned on the basis of this Regulation".[6] On the contrary, EU law denies the power to impose an administrative penalty in order to protect the EU's financial interests, unless a Community act has made provision for it.[7] A few more examples are provided by the law of European security. This confers powers to new national administrations (such as the supervisory bodies in the Europol system); it also encourages, promotes or commands the exercise of powers already belonging to them (for example, the investigating powers[8] or the expulsion or refusal of entry of third country nationals[9]); it forbids the exercise of certain powers (police powers having an effect equivalent to border checks are prohibited[10]). While in all the above cases administrative acts are ruled by the law, it is a European rule of law which holds sway.

A more recent and no less important example of European influence on the power to issue administrative acts is provided by the 2006 Directive on services in the internal market.[11] First, the Directive thoroughly disciplines authorizations. Its provisions restrict the very possibility that an authorization scheme may be employed for the access to a service activity, stating that such a scheme can only be justified by an overriding reason relating to the public interest, provided that the objective pursued cannot be attained by means of a less restrictive measure.

[4]Article 107 ff., TFEU.

[5]Article 299, TFEU. On the forced execution of the EU law, see Dìez-Picazo (2005).

[6]Article 5 of Council Regulation (EEC) No 4058/86 of 22 December 1986.

[7]Article 2 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995.

[8]See, for example, Arts. 3 and 10 of the Europol Convention.

[9]See, for example, Art. 13 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[10]Article 21, Schengen Borders Code.

[11]Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006.

The Directive also defines some of the authorizations' required attributes, thus influencing the intrinsic features of administrations' decisions, which will be considered *infra*. Second, the Directive imposes on Member States a duty to cooperate, mandating the carrying out of all necessary checks, inspections and investigations. Domestic authorizations and similar controls are also hindered by many more EU regulations, which rely on different models of regulation, such as certification systems.

Similar provisions can be found in the global law, for example in some of the agreements adopted within the World Trade Organization (WTO) framework: both the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and phytosanitary Agreement (SPS) deprive states from a portion of their right to regulate the features of tradable goods and services. Not much different from EU law, which resorts to harmonization and mutual recognition, the WTO law aims alternatively at harmonizing national laws or at forcing them to recognize other states' regulations as equivalent to their own. Both techniques restrict the ability of national administrations to impose authorizations and controls on the trade of foreign products.

There are also cases of joined influence of EU and global administrative law on domestic administrative acts. In many sectors, the EU law lends its obliging power to global legal regimes, making their implementation an obligation for national administrations. This is the case of many industrial products, for which national rulemaking and adjudication powers have to be used according to global rules, as implemented by EU law. This is also the case of restrictive measures against terrorism suspects, which are set by EU law implementing United Nations (UN) Resolutions. Such measures impose on individuals a duty of cooperation with public administrations, thus conferring administrative powers to the latter.[12]

As shown by the above examples, ultranational law affects the national administrations' power to issue administrative acts. It has therefore an influence on the rule of law as applied to administrative acts. It affects the basic principle that in some civil law countries is called "principle of legality": while it is still true that the power to issue certain administrative acts can only be conferred by the law, this law does not necessarily have the form of a national statute. The examples also affect the understanding of that principle. The administrative acts envisaged by the law beyond the state are often "restrictive" ones, which impose obligations on individuals or restrain their rights. For such powers, the national law often requires a statutory basis, but this requirement is put into question by the tendency of global and European law to direct national administrations.

[12]See Art. 5, of Council Regulation (EC) No 881/2002 of 27 May 2002, establishing *inter alia* a duty to cooperate with the competent authorities listed in Annex II in any verification of information.

4.2.2 The Procedure

The second area of influence is the administrative procedure. The principles and laws regulating the administrative procedures have usually a larger scope than those regulating the administrative acts, since they also matter for procedures which do not result in the issuing of such acts. Nevertheless, in many European countries the administrative procedure is traditionally considered a sequence of actions, aimed at the issuance of an administrative act. Thus to regulate the administrative procedure means primarily to regulate the making of administrative acts.

Both EU and global administrative law affect administrative procedures in two ways. First, with general principles and provisions, concerning all administrative procedures. Second, with special provisions, concerning single sectors or kinds of procedures.

As for the general provisions, a remarkable convergence of EU and global law can be detected from the observation of both legal provisions and case law.[13] On the European side, the most relevant legal text is the Charter of Fundamental Rights of the European Union, which has become binding in 2009, when the Lisbon Treaty came into force. Its Art. 41 of the Charter proclaims the citizens' right to good administration and describes its contents, affirming the rules of impartiality and reasonable time, the rights to be heard and to access individual files, and the duty of the administration to give reasons for its decisions. Before being expressed in this Charter, these principles have long been affirmed by both EU[14] and national courts, the latter often enforcing or making reference to the EU law or to the common constitutional heritage of the Member States.[15] Some of these principles have also been affirmed by the European Court of Human Rights on the basis of Art. 6, concerning the right to a fair trial, as well as on the basis of other articles of the Convention.[16]

The same principles are stated not only by the general administrative procedure acts of many western countries, but also by international treaties and by rules and guidelines of many international and global organizations, which either commit themselves to respecting rules based on such principles,[17] or force national administrations to do so,[18] or do both. Global administrative case law also offers

[13]For a general overview, Franchini (2004).

[14]Cassese (2004) and Bignami (2004).

[15]Such as the Italian Constitutional court, which has made reference to such heritage in order to affirm the right of information in the proceeding (Decision No. 104 of 2006), and the Spanish one (see Chap. 7).

[16]As in the famous *Taskin* case of 2004 (Taskin and Others v. Turkey, Application No. 46117/99). For an overview of the procedural rights affirmed by the Court, Council of Europe 1996.

[17]See, for example, Art. III of the Internet Corporation for Assigned Names and Numbers bylaws, as amended 28 October 2010, and the *Icann Accountability and Transparency Frameworks and Principles*, published in 2008.

[18]The most obvious example is the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention of 1998). For a broad review of global rules imposing participation, Cassese (2006).

strong evidence of the circulation of these principles.[19] Among the most famous cases, the 1998 decision of the WTO Appellate Body, which affirmed that a United States regulation, imposing an embargo on the importation of shrimps from countries that allowed fishing methods harmful to marine turtles, constituted an arbitrary discrimination, since those countries had not been allowed to take part in the decision-making process[20]; and the 2004 decision of the International Tribunal for the Law of the Sea in the *Juno Trader* case, which stated that the confiscation of a cargo by the Guinean authorities had resulted in a breach of the UN Convention of the Law of the Sea because, among other violations, the relevant procedures had been performed *inaudita altera parte*.[21]

It should be noticed that, while in some global regulatory regimes these rules can only be invoked by states, in other regimes, as well as in the EU law, even individuals and private organizations can profit from them. It should also be remarked that these procedural principles tend to be applied to both rulemaking and adjudication. The rules on participation and due process have probably a larger impact on rulemaking, while the right of access to administrative files corresponds more to adjudication, but all of these principles tend to settle and to impose themselves to national administrations, occasionally broadening the scope of national administrative procedure acts. EU and global laws on administrative procedure not only converge, strengthening each other and producing a global (or western) common law of administrative procedure,[22] but also affect national law, primarily of EU Member States.

Apart from the general provisions, similar to the ones that can be found in many national administrative procedure acts, there are also ultranational law provisions, which regulate special kinds of procedures. The most obvious example is the thorough EU regulation of national public procurement procedures, which leads to administrative acts, such as contract notices and the award of contracts.[23] Global law is of course less detailed, but it also regulates public procurement with a few basic principles, largely similar to the European ones.[24] At the European level, evidence of supranational restriction of national legislative powers is also offered, once again, by the EU law of authorizations. The provisions of the aforementioned Directive on services in the internal market describe many steps of the corresponding procedures.

Further evidence of the influence on national administrative procedures, exerted by both EU and global law, is offered by the provisions relating to the protection of the environment. Public participation in such procedures concerning the

[19]On the WTO law of administrative procedures, see Stewart and Badin (2009), p. 13 ff.

[20]WT/DS58/AB/R 12 October 1998 (98–0000). On this case, Cassese (2005).

[21]Decision n. 13 of 18 December 2004 (Saint Vincent and the Grenadines v. Guinea-Bissau).

[22]Cassese (2006).

[23]See mainly the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004.

[24]See Art. VII ff. of the WTO Agreement on Government Procurement (GPA).

environment is one of the foremost principles of the Aarhus Convention, that EU Member States are obliged to observe under both international and EU law.[25] Among others, the rules requiring environmental assessments are a good example of both external influence on national law and circulation of legal models. Originally introduced in US law in the 1960s, since then environmental assessment has been promoted by both the EU and the global law. At the global level, the most active institution is the World Bank, which, already from the 1980s, has required such assessment as a condition to finance projects with potentially adverse environmental impact.[26] At the European level, several directives, concerning different kinds of assessments, dictate detailed procedures, which all national administrations have to follow.[27] In this sector, the EU law often acts as an agent of global law. As many member States, it is a party to the 1991 UN Economic Commission for Europe (UNECE) Convention on Environmental Impact Assessment in a Transboundary Context and to the 2003 UNECE Protocol on Strategic Environmental Assessment, which have required adjustments in the EU legislation. Furthermore, the European Commission guidelines on the strategic environmental assessment refer repeatedly to the Aarhus Convention provisions, illustrating its influence over the corresponding EU directive.

4.2.3 The Decision

Not different from the national one, ultranational law regulates the way in which administrative decisions are made and also its content, i.e. the administrative power to state, order, forbid or allow. Administrative acts must comply with the law and the relevant law is often a mixture of national, EU and global law. This is the case of both rulemaking and adjudication.

A large amount of domestic administrative rulemaking is either aimed at implementing or affected by EU or global law. Some national authorities, endowed by national law with strong regulatory powers, are bound in their exercise by the law beyond the state. Entire sectors of the economy are ruled by national bodies, whose regulations are affected by EU law and global legal regimes. Good examples are offered by the banking sector, in which national regulations are strongly affected by EU directives as well as by principles agreed within the Basel

[25]See Chap. 17.

[26]See, in particular, the *Operational Directive on Environmental Assessment*, OP 4.01, first issued in 1989.

[27]Concerning the public participation, for example, see Art. 5 ff., Council Directive 85/337/EEC, on environmental impact assessment; Art. 6 f., Council Directive 2001/42/EC, on strategic environmental assessment. In less detailed terms, Art. 6.3, Council Directive 92/43/EEC, on impact assessment for natural habitats.

Committee on Banking Supervision,[28] and by the food safety sector, in which national regulations are based on the description of foods and safety standards released by both European authorities and the Codex Alimentarius Commission.

A second reason why these two examples are relevant is that they both display an interaction between EU and global law. In exercising their powers, the national banking regulators are bound by extremely detailed EU directives, which in turn implement the Basel Committee rules. When issuing regulations as well as deciding upon the establishment of a credit institution or performing their supervisory tasks, they issue decisions that are deeply rooted in global and EU law. Similarly, the EU lends its power to the Codex Alimentarius standards, forcing domestic authorities to issue regulations consistent with them. National authorities are also urged to use their authorization and prohibition powers to require private businesses to comply with such standards. The relation between EU and global authorities is of course bidirectional. The former affects global regulations, taking part in their decision-making process, and then enforces them. The frequent results is a joint influence on national administrative acts.

As the above examples also demonstrate, EU and global administrative law often influence both rulemaking and adjudication. Further cases of influence on adjudication acts can be mentioned, some of them arising from well-known events and important decisions. In 2008, the central banks of six different states or regional organizations, including the European Central Bank and the US Federal Reserve, simultaneously decided to cut interest rates, in a joint effort to steady the global economy. Such move, aimed at addressing a global problem with a coordinated use of national administrative powers, shows that even in the absence of legal provisions, a global administrative organization or a simple agreement can affect the contents of domestic administrative decisions.

Another famous case is the well-known *Kadi* affair,[29] which points to another area in which EU and global decisions affect national ones, leaving state authorities little or no discretionary power in such a sensitive domain, as the freezing of financial assets of terrorism suspects. The same happens with the UN sanctions against states implemented by EU regulations, as in the famous *Bosphorus* case, concerning the impounding of planes belonging to former Yugoslavian persons.[30] These cases are, of course, good examples of the interaction of EU and global law in binding national administrative authorities, such as the competent autorities listed in the EU Regulation implementing the UN resolution on sanctions.[31] The EU law implements global law and commands national administrations to do the same.

[28]See Chap. 16.

[29]See the European Court of Justice (ECJ)'s Judgement of 3 September 2008, Joined Cases C-402/05 P and C-415/05 P. For an assessment of the UN listing procedure based on the theory of administrative acts, Feinäugle (2008), p. 1520.

[30]On this case see the decisions of the ECJ (Judgement 30 July 1996, case C-84/95) and of the ECHU (30 June 2005, Application No. 45036/98).

[31]Council Regulation (EC) N. 881/2002, Annex II.

Limitations of national administrations' discretionary powers are indeed a likely product of EU and global Law. EU law requires of both European and national administrations compliance with rules that circumscribe discretion, such as the principles of proportionality and non-discrimination, which are set by countless regulations and court decisions. At times, supranational law almost erases national discretionary power, as it requires administrative acts to be entirely bound by previously established objective criteria. This is the case of the aforementioned Directive on services in the internal market. Harmonization of national legislations often leads to a strict European rule of law: for example, the EU law lists the cases in which national authorities may reduce or withdraw reception conditions for asylum seekers.[32] The level of harmonization sometimes goes as far as to dictate the precise object of certain kinds of an administrative acts (e.g. the issuing of a visa[33]).

Even the withdrawal of prior administrative acts, that in many national legal systems is considered a broadly discretionary decision, may be directed by supranational law and, under certain circumstances, is made mandatory by that law for its own purposes.[34] The law of European security offers further examples of supranational regulation of national administrative powers, like the power to withdraw the residence permit of a third country national[35] and the reception conditions for asylum seekers.[36] In all these cases, the supranational rule of law prevails over the national rule of law or completes it. The withdrawal of an unlawful administrative act is instrumental to the EU law rather than to national law. Withdrawal of prior administrative acts is also one of the domains in which the influence of the European Court of Human Rights is evident. Although neither the Convention nor any of its protocols explicitly regulate the matter, the case law offers several examples of the incidence of this law on the national administrative power to withdraw acts such as the registration of attorneys[37] and business licences.[38]

Albeit with different techniques, global law imposes on national administrations compliance with the same legal principles. In the WTO law, for instance, the principle of proportionality is both stated in the treaties and affirmed by the case law. As for the former, the TBT Agreement requires national regulations not to be

[32]Article 16, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

[33]See, for example, Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas.

[34]ECJ, 20 March 1997, case C-24/95, *Alcan*; 7 January 2004, case C-201/02, *Delena Wells*; ECJ, 13 January 2004, case C-453/00, *Kühne & Heitz*; ECJ, 19 September 2004, joined cases C-392/04 and C-422/04, *i-21 Germany*; ECJ, 18 July 2007, case C-119/05, Lucchini; ECJ, 12 February 2008, case C-2/06, *Kempter*.

[35]Article 3, Council Directive 2001/40/EC of 28 May 2001.

[36]Article 16, Council Directive 2003/9/EC of 27 January 2003.

[37]*Buzescu v. Romania*, n. 61302/00 of 24 may 2005.

[38]*Rosenzweig and Bonded Warehouses Ltd. v. Poland*, n. 51728/99 of 28 July 2005.

"more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".[39] Similarly, the SPS Agreements affirm the principles of non-discrimination, proportionality and sufficient scientific evidence.[40] As for the latter, the *Apples* case can be mentioned, in which the Appellate Body ruled that the restrictions on apples imports from the USA, imposed by Japan's Government, violated the SPS Agreement, being disproportionate with respect to the risk of spread of fruit deseases, as identified by the scientific evidence.[41]

The examples are, however, many. Almost every business, in areas such as the accounting and auditing sectors[42] and the product safety,[43] is subject to EU and global rules, which influence many national authorities in the exercise of their regulatory and supervisory powers and in the issuance of both rules and individual decisions.

Finally, another hypothesis of European influence on national administrative decisions is that of the so-called mixed proceedings,[44] at least in the case of top-down proceedings, in which the final decision is made by a national authority, but is partly the result of the European administration's activity.

4.2.4 The Legal Effects

The legal effects of national administrative acts, consisting of the creation or extinction of rights an duties, are of course normally determined by national law. There have always been spillover legal effects as, for instance, those produced by deportations and expropriations, which can affect foreigners. The legal doctrine traditionally labels these effects as "international administrative law".[45] EU and global law, however, not only increase the frequency of these traditional hypotheses,[46] but also bring about new ones, in which it is not only the practical effects, but also the legal ones, that take place out of the territory of the issuing authority's state.

As noted above, both supranational and global regulation intensively use the mutual recognition mechanism, which – at the same time – prevents states from

[39]Article 2.2.

[40]Articles 2 and 5.

[41]See Albanesi (2008).

[42]See Chap. 14.

[43]Schepel (2005).

[44]della Cananea (2004).

[45]Mattarella (2005).

[46]As argued by Battini in Chap. 9.

limiting the circulation of foreign goods and services and enables national administrative acts to produce their effects beyond the state borders.[47]

EU, however, is not only about circulation of goods and services, but also about circulation of people. The EU legislation on citizenship and immigration, as well as that on justice and security, give rise to further cases of extension of legal effects. Several acts, performed by administrative authorities of one Member State, produce effects on the territory of all other Member States. This is obviously the case with the control of the external borders. Other kinds of acts do the same: the administrative acts which grant the European citizenship produce their effects in all Member States; the European arrest warrant can be enforced in other States; visas and residence permits grant the right to reside in the territory of Member States other than those that have issued them;[48] for expulsions of third country nationals the mutual recognition principle operates;[49] stadium bans for violent individuals may be extended to cover football matches held in other Member States.[50]

Global regulatory regimes, on their part, are diverse enough to provide further examples of extraterritorial legal effects. These effects can simply originate from the relations between the regulatory body and the law of the country where its offices are based, especially if it is not an international organization, but rather a private company or association. One may point at the well-known case of the Internet Corporation for Assigned Names and Numbers (ICANN), a Californian non-profit corporation whose exposure to the US Government decisions has often been the object of debate.

Antitrust is another domain in which the effects of national (or European) administrative acts easily cross the respective borders. This may happen for mergers, as the one between General Electric and Honeywell, two US-based companies, which were stopped in 2001 by the European Commission, as incompatible with the European common market. It may also happen for agreements and concerted practises, causing overlapping or duplicating decisions, as in the *Tokai Carbon* case, in which a global cartel was sanctioned both by American and by EU antitrust authorities, and the European courts refused to apply the principle *non bis in idem*.[51] Both hypotheses call for a global coordination of competition policies. In this matter, EU administrative law could be considered as a part of the problem, global administrative bodies and undertakings, such as the International Competition Network and the WTO, should be regarded at as possible solutions.[52]

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[47]On these effects, Gautier (2007), p. 1072 ff.

[48]See, for example, Art. 14.1, Council Directive 2003/109/EC.

[49]Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.

[50]Council resolution of 17 November 2003, on the use by Member States of bans on access to venues of football matches with an international dimension.

[51]FI, 15 June 2005, case T-71/03; ECJ, 10 May 2007, case C-328/05 P, *SGL Carbon*. On these cases, Agus (2007).

[52]See Chap. 12.

4.2.5 The Material Execution

Although national administrative acts can be granted by EU and global law the ability to perform extraterritorial effects, as a rule this is still a legal occurrence rather than a material one. The decision made by the administrative authority of a state is executed in a different state, but its execution is the business of an authority of the latter. There is a breach in the correspondence between territory and the effects of the administrative act, but not in the correspondence between territory and the administrative execution. The ultimate kind of influence of supranational law on national administrative acts takes place when even the second correspondence is broken, because a national administrative authority enjoys the power to both issue and execute a decision out of the borders of its state.

Indeed, the EU law generate such breaches, or at least exceptions to the state authorities' monopoly over the execution of administrative tasks. This occurs, for example, when EU antitrust officers carry out inspections.[53] In these cases, however, it is the decision of a European authority to be executed, not a national administrative act. Hence, these cases fall out of the scope of this chapter.

However exceptional, the ability to execute administrative acts beyond the borders of their states is occasionally granted to national authorities by supranational law. When this happens, it is not only the administrative decision but also its execution, and sometimes the use of force, that belongs to a national authority, different from the one that the rule of territory would require. Border crossing is real, not just virtual.

This occurs, in particular, in the area of the European security, where, in certain cases and under specific conditions, police officers of one member State can act in the territory of another Member State. This border-crossing ability may depend on the existence of joint investigation teams[54] or Rapid Border Intervention Teams. More generally, it may depend on rules enacted by the Council according to Art. 42 of TEU. The Prüm Convention, concluded by seven Member States and later integrated into the Union's legal framework, has gone much further on this path, establishing *inter alia*: that officers from one State may carry arms and ammunitions on flights to or from another State; that State officers may cross the border of another State and take provisional measures, without its prior consent; that officers from one State, who are involved in a joint operation within another State's territory, may wear their own national uniforms there, as well as carry arms, ammunitions and equipment; and finally that a Member State may "confer sovereign powers on other Contracting Parties' officers involved in joint operations or, in

[53]See Regulation (EC) No. 1/2003 of 16 December 2002.

[54]Council Framework Decision of 13 June 2002 on joint investigation teams.

so far as the host State's law permits, allow other Contracting Parties' officers to exercise their sovereign powers in accordance with the seconding State's law".[55]

Global law does not provide for similar occurrences. Of course, global regulators can operate and issue their decisions within states. This is, for example, the case of the national offices or single officers of organizations such as the World Bank, the ICANN and the International Standard Book Number (ISBN) System. In these cases, however, the decision itself is a global one and not a national one, thus falling out of the scope of this chapter. It may also happen that national administrations make decisions involving the use of force and execute them in the territory of other states, as in the case of peace-keeping operations, but these cases fall within the domain of traditional international law. Apart from this domain, no global regulatory regime shows a capacity to enable a national administration to execute its decisions in the territory of a different state.

4.2.6 The Judicial Review

In many national legal systems, the concept of administrative law originated from the need of administrative courts to single out the acts of public authorities which could be contested in front of them, in opposition to the preliminary or instrumental acts (which could not be contested). Impugnability, therefore, is an essential feature of administrative acts. There must be the chance for a judicial review. EU and global law have an impact on this feature too. From this point of view, the European and global influence is consistent with the European tradition, since EU and global law often simply reassert the principle of judicial review, forcing the states to abide by the principle of judicial review and preventing them from departing from it for some kinds of administrative acts.

EU law affirms the principle both in the primary and in the secondary law. Article 19 of the Treaty on the Functioning of the EU (TFEU) requires Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". In many sectors, the EU legislation requires Member States to establish specific forms of control over the administrative activity carried out by national bodies in the exercise of EU functions. For instance, third-country nationals have the right to appeal against the refusal of entry by national authorities.[56] The provision of administrative remedies is also frequent. Under the Europol Convention, for example, each Member State has to designate an independent supervisory body and individuals can request that the supervisory body review the communication to Europol of data concerning them.[57]

[55]Convention on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, Art. 18 ss.

[56]Article 13, Regulation (EC) No. 562/2006 of 15 March 2006.

[57]Europol Convention, Art. 23.

As for global law, the most obvious example is provided by the Aarhus Convention, among whose principles figures the right of access to judicial review in environmental matters: not only can private parties claim a breach of the Convention to the UNECE Compliance Committee, but the national law has also to provide for internal review mechanisms. An example of such complaints is the *Vlora* case, in which also a review by the World Bank's dispute resolution bodies was invoked in an issue concerning environmental assessment.[58] Once again, this Convention displays a case of implementation of global law favoured by EU law, which in turn requires the national law to set up review mechanisms.[59]

Global law also introduces new potential petitioners, such as foreign states and foreign private parties, which are entitled to challenge administrative decisions. WTO law, for example, envisages both the self-defence on the part of the states, and their possibility to prompt the review of other states' decisions, by its panels and Appellate Body. One possible consequence of this is the enlargement of the very notion of administrative act, which tends to include decisions that the national law might consider political rather than administrative in nature.

A similar widening of the notion of administrative act can be produced by public procurement law, which extends a typical feature of administrative acts – the judicial review – to decisions that the national law might consider private decisions, made in the exercise of the administration's freedom of contract. The EU law obliges Member States to ensure that "decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible",[60] also specifying the features and powers of the reviewing bodies and the main procedural steps. Not much different, global law confers to the suppliers the right to challenge national administrative decisions, and it fixes the characteristics that reviewing bodies must have and the way they have to operate.[61]

4.3 The Techniques of Influence

4.3.1 The Higher Law

In the previous section, several legal provisions and judicial cases have been mentioned, which are fairly different from each other. Their diversity depends not only on the heterogeneity of substantial matters, but also on the differences between the various legal orders and on the resulting differences between the ways

[58]See Cassese (2009), p. 35 ff.

[59]Article 10 ff., Regulation (EC) No 1367/2006.

[60]Article 1, Directive 2007/66/EC of 11 December 2007.

[61]Article XX, Agreement on Government Procurement.

in which each of them affects the national law. In this section, these different techniques will be described.

Although in the previous section many parallels between EU and global administrative law have been sketched, the analysis of the techniques of influence will display relevant differences between the two, since the EU law has much stronger instruments to control Member States' national law with respect to global law. The analysis will, however, display relevant similarities and interactions.

In its relations with Member States' internal law, the EU law is a higher law, which prevails upon it. In case of conflict, national courts and administrations must enforce the applicable EU law rather than the national one. This is the outcome of a very well-known evolution of the European Court of Justice's and of many national supreme courts' case law. As far as administrative acts are concerned, this means that the rule of law that regulates their issuance is not only a national rule of law. As a matter of fact, supranational law joins national law in conferring the administrative powers as well as in regulating the administrative procedure and the contents of administrative decisions, and in defining their legal effects and material execution. EU law does not need to be filtered or implemented by national law: it rules directly over national administrations' activity. A national administrative act, which breaks the EU law, is invalid, not less – in a sense, more – than one which breaks the national law.

However, the EU regulation of national administrative acts is stronger when the law is respected than when it is breached. More precisely, the EU law leaves more room to the national one on the procedural ground than on the substantive one. It therefore affects more intensively the grounds of invalidity than its consequences.[62] As for the former, as already observed, invalidity ensues the violation of EU law as well as the violation of national law. As for the latter, it is still the national law which establishes the consequences of the breach of EU law. This is, of course, mainly the result of the EU reliance on national courts, in their role of guardians of EU law, which amplifies the importance of national procedural rules.

In other words, it is up to the EU law – as well as to the national law – to decide when an administrative act is void, but it is only the national law that defines what it means that an administrative act is void. In spite of some hesitation on the part of the European Court of Justice, which in peculiar circumstances has affirmed procedural rules concerning the treatment of national administrative acts conflicting with EU law, the settled state of the question is expressed by the principle of the effectiveness. This principle implies that Member States are free to regulate the consequences of the breach of EU law, as far as these consequences do not result in a smaller protection for the EU law than for the national one. For issues like those relating to time-limits for arguing the breach of EU law and to the administration's power to disapply an administrative act contrary to EU law, the Court has consistently affirmed that "in the absence of Community rules governing a matter, it is for

[62]See Galetta (2011), p. 7 ff.

the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law".[63]

As a result, the legal regime of domestic administrative acts conflicting with the EU law is, by and large, the same of those conflicting with national law.[64] In many European countries, this means a condition of provisional production of legal effects. In other words, the act is not void, but it can be annulled. If this is the case, there is an obligation of the Member States to enforce EU law, by removing their administrative acts contrary to it. This obligation is not very different from the obligations that can proceed from international law and from global regulatory regimes.

It should be finally observed that, although only supranational law works as an higher law as a rule, the national law can recognize a similar status to the law stemming from international or global sources of law. A good example is provided by two 2007 decisions of the Italian Constitutional Court. The Court, relying on a constitutional norm that requires the national law to comply with both the EU law and the international obligations,[65] has struck down the legislation on compensation for the expropriation of private property, because it conflicted with the European Convention on Human Rights.[66]

4.3.2 The Binding Law

Apart from such exceptions, global law, like international law, does not have as effective instruments as the Eu law does. As a matter of fact, it cannot simply prevail over national law, but has to be ratified and implemented by it. It cannot be considered as a higher law, but only – once it has been transposed into national law – a binding law. As a consequence, failure of global regulations is a relatively frequent occurrence, in opposition to the high degree of success of the European law.

However, once the transposition has occurred, its influence on national administrative acts is not much weaker: whenever they break the global law, as transposed in the national legal order, they are invalid and can be annulled. The states often

[63]ECJ, 4 December 1995, Case C-312/93.

[64]Although this conclusion is disputed in national legal scholarships, and particularly in the Italian one: see Greco (2007), p. 934 ff.; Chiti (2008), p. 542 ff.; Mattarella (2003), p. 1000 ff. For the German system, see Arnold (2007), p. 580 f.

[65]Article 117 of the Italian Constitution.

[66]Decisions 348 and 349 of 2007.

have an obligation to ensure the respect of global law, and in this case their courts are required to annul administrative decisions conflicting with it.

This explains why, for instance, the influence of WTO law on public procurement is relevant, although not as relevant as that of EU law in Member States. The Agreement on Government Procurement does not enjoy supremacy and direct effect.[67] Nevertheless, it binds the EU and Member States, which will face legal proceedings if their administrations do not comply with its prescriptions.

Moreover, global law often has its own courts and allows private parties to challenge national decisions in front of them.[68] There are several provisions and cases, mentioned in the previous section, that can be recalled. The Yellowstone case[69] is also a good example. Upon request of some environmental associations, in 1995 the UNESCO World Heritage Committee, which implements the World Heritage Convention and keeps the World Heritage List, decided to hear the case concerning a mining extraction project in Montana, close to the famous Yellowstone Park. It then inscribed the site in the World Heritage in Danger List and ordered the United States to take all the necessary actions to mitigate the threat to the Park, which the United States actually did, as later acknowledged by the Committee.

4.3.3 The Higher Law Enforcing Binding Law

Further reducing the distance between supranational and global law, the former often lends its obliging power to the latter, as in some of the examples mentioned in the previous section. In the *Kadi* case, the main legal issue regarded the possibility, for the European courts, to review the lawfulness of the EU decision that implemented a UN Security Council resolution, mandating national administrations to freeze financial assets of individuals and private companies. In the environmental protection area, EU law enforcing the Aarhus Convention regulates many national administrative acts. In the banking area, EU regulations enforce rules agreed within the Basel Committee. In further areas, such as auditing and product safety, global rules, mainly produced by private regulatory bodies, make their way into the EU law, affecting the performance of national administrative tasks.

Towards global regulatory regimes, the EU law plays often the role of a partner rather than of a competitor. Depending on several factors – the existence of EU regulations in the concerned matter, the features of the global regulator, the EU role in the global rulemaking, its ability to influence the global rules or restrain their strength – the EU law may either leave room to the global one or make it binding,

[67] See Chap. 15.

[68] For a discussion of this hypothesis, Kingsbury (2009), p. 29 ff.

[69] Cimino (2008).

may either simply refer to it or incorporate it in its acts, may either acknowledge entire regulations or act as a filter. The global law, for its part, is often affected by European regulatory needs and adjusts itself to them, in order to be enforced at the European level. The European legal orders are among the main sources of legal principles and rules for global regulators.

4.3.4 The Bargained Law

Sometimes the enforcement of supranational and global law is not legally necessary or mandatory, but simply the object of negotiations and agreements with national authorities. This is true for EU law, where the contents and the terms of implementation of EU regulations are often the results of agreements and working groups, although these results are usually sanctioned in EU institutions' unilateral decisions. It is especially true for several global regulatory regimes, whose ability to affect national acts and procedures relies not on legal provisions or binding agreements, but on contractual relations.

The main example is the funding of public works by global bodies like the World Bank and the International Monetary Fund. As a condition for funds and loans, these institutions often require that the national administrative acts, necessary to carry out the works and spend the money, comply with rules established in their guidelines, such as those concerning public participation and judicial review. In such cases, national administrations are not obliged by any international or supranational law source to abide by those rules, but they have to if they want to obtain the funding. Compliance with global law, in such hypotheses, is the object of a bargain between global and national administrations and is driven by the financial strength of the former. A similar functioning is that of the World Heritage Convention.

At the European level, something similar may occur in the negotiations between the European Commission and countries willing to join the EU. In the assessment of candidate countries, many EU documents make regular reference to "administrative capacity" as a condition for enlargement and requires measures such as the enactment of an administrative procedure act, the simplification of procedures, and the strengthening of judicial review. In this way, the EU law influences the national administrative procedures and decisions, even before being able to bind directly the national administrations.

4.3.5 The Stronger Law

As the previous hypotheses demonstrate, the global and the European law do not always need binding mechanisms within national legal systems in order to influence the performance of administrative tasks, an agreement being sufficient. In further

cases, there is not even need of such an agreement, as the global law is strong enough to assert itself without a prior general endorsement and even without the national authorities' consent.

In some cases, national administrations are not obliged to comply with global regulations, but are compelled to do so by the need to join a global regulatory regime. This is what happens for the governance of the Internet,[70] In many countries, public administrations are in charge for the management of the domain names registration, and indeed their decisions assume the form of administrative acts. Still, the issuance and the effects of these acts depend on global rules.

In other cases, global law is so authoritative that domestic administrative authorities treat it as binding even it is not. As an example, the international wanted persons' notices, issued by the Interpol in order to seek the location and arrest of a person in view of its extradition, are not legally binding,[71] as national authorities are free not to honour them. Still, they usually do, acting as if they were obliged to search and arrest the interested persons.[72]

In further cases, global regulatory regimes are so well established in the private sector, that compliance with their rules is considered a normal requirement for private individuals or businesses. In the absence of any legal provision, public administrations and even courts tend to refer to such compliance as a condition for the issuance or for the legitimacy of administrative acts. One good example is public procurement, where contracting authorities often require, as evidence of the economic operators' technical abilities, certifications of conformity with the International Organization for Standardization (ISO) standards. Another one is the ISBN, a book identification code system born for commercial purposes, but used by administrative authorities and courts to identify true publications, as opposed to non-published printed works.[73]

4.3.6 The Absence of Law

As the above examples show, domestic administrative acts are influenced by several kinds of EU and global rules and decisions, stemming from supranational institutions and from a diverse range of global regulatory bodies: international organizations as well as private or mixed associations, transnational committees

[70]Carotti and Casini (2008).

[71]As occasionally stated by national courts, such as the Indian Supreme Court in the *Lakhani* case: "The notices issued by INTERPOL are not considered as administrative decisions on individual cases with transnational effect. They are not construed as an 'international administrative act'. They lack a character of regulation. They do not constitute an international arrest warrant and they are not in any other form binding the individuals concerned legally" (Decision of 7 August 2009).

[72]Savino (2010), p. 30 f. See also Schöndorf-Haubold (2008), p. 1740 f.

[73]As it happens in Italy for university job contests: Mattarella (2006).

and more. In all these cases, the national rule of law is combined with European or global rules.

The last hypothesis that can be put forward occurs when global rules are themselves absent. In some cases, global law manages to influence national administrations even without setting rules to comply with. This happens when global law takes only an institutional shape and not a positive one, i.e. when there are global organizations and procedures, but global norms are missing. One example can be found in the mentioned case of the coordinated decision of several central banks, to adjust their countries' interest rates. This agreement was not prompted by any law, yet has an undeniable legal relevance. Another example is provided, at the European level, by the "Bologna process", which has prompted substantial changes in the educational systems of many countries and in the way their authorities exercise their powers, on the basis of agreements between universities.

After all, administrative law is about administrative powers and acts, more than about statutes and regulations.

4.4 The Problems of Influence

4.4.1 The Concept of Administrative Act

Many elements of the legal regime, which in many European countries is identified with the term "administrative act", have been considered in the previous section. Discussing the distinctive features of this legal concept goes obviously beyond the scope of this chapter, and the influence of EU and global law is not strong enough to disrupt the theory of administrative acts – at least, not stronger than domestic factors which could undermine its basis. However, the described phenomena do actually affect this theory to a certain extent, because they put into question some conventional thoughts about administrative acts.

First of all, some of the characteristics that are often ascribed to the administrative acts are not always confirmed by the above-described experiences. For one thing, EU and global law loosen the traditionally strict relation between administrative acts, on one side, and the state and its territory, on the other side. They also cast doubts on the very deep-rooted idea that administrative acts are always public law acts, issued by public administrations.

Indeed, the EU law, plainly uninterested in the domestic public–private divide, requires administrative procedures and judicial review for acts which may well be issued by private parties, such as contract notices and awards.

Several global regulatory regimes do the same. Being often private themselves, global regulators mandate for implementation at the national level, dictating acts and procedures, irrespective of the public or private nature of the implementing bodies. In some areas, such as environmental protection and product safety, both

EU and global law envisage implementation through private subjects, which are requested to issue acts having the typical features of administrative acts, like certifications.[74]

At the same time, EU and global law affect the scope of the concept. Imposing compliance with rules like those concerning participatory rights of interested parties', statement of reasons and judicial review means requiring the issuance of administrative acts, as opposed to other kinds of legal acts. Public procurement is a good example again. As already noticed, contracting administrations have to issue a contract notice, in accordance with certain rules, rather than looking for their contracting parties freely. It has also been already remarked that global regulations, such as the WTO agreements, require compliance with those same rules by governmental acts that, in the absence of such regulations, could not be treated as administrative acts by domestic law. Similarly, decisions concerning public works, funded by supranational or global institutions, have to be made in accordance with certain procedures. This all means that some domestic decisions have to assume the formal shape of administrative acts rather than following other legal models.

Finally, the law beyond the state makes the distinction between rulemaking and adjudication less relevant than it is in some national legal systems. Both global and European regulators regulate more than they adjudicate but, when they adjudicate, they tend to apply the same law. Above all, they equally influence national rulemaking and national adjudication.

EU and global law, therefore, affect the very nature and scope of the concept of administrative act. They also give affirmative indications on its basic features. Considering the manner in which they often treat national administrations' decisions, one can conclude that there are few common features. First, those decisions have to be made following a procedure, allowing interested parties' participation, have to be the object of some sort of official statement, usually explaining their reasons, and have to be open to judicial review.

These features are not quite different from those that the legal scholarship of many European countries usually ascribes to the administrative acts. They are also consistent with the actual origin of the concept, which in many countries derives from the national laws regulating the judicial review and from the later ones regulating the administrative procedures.

4.4.2 The Rule of Law

Administrative acts are, of course, subject to the rule of law. This does not necessarily mean that their issuance must be envisaged by the law, but it does

[74]See Chap. 18.

mean that they need to comply with the applicable law. The preceding analysis has shown, first, that the applicable law is not always national law, but often supranational or global law. Moreover, the law beyond the state often prevails over national one in regulating national administrative acts, either because it is a higher law, directly enforceable by public administrations, or because the national law is compelled to adjust to it.

Overall, the influence of EU and global law is growing stronger both on the law regulating various kinds of administrative acts, and on the general legal regime of the administrative act. Some rules, such as those governing public participation and the statement of reasons, show a convergence of national and ultranational law. This convergence, in turn, produces a global regulation of administrative acts and procedures.

Another remark, which can be inferred by the preceding analysis, is that administrative acts do not only have to comply with EU and global law, but often are also instrumental to their enforcement. Many national administrative acts have the purpose to implement EU and global regulations. What has been reported about the material execution of administrative acts provides further evidence, showing that national public administrations often act to enforce the EU and global law rather than the national one.

Finally, the legal regime of administrative acts tends to adjust to the prevalence of the law beyond the state over the domestic one. The EU law principles affecting the withdrawal of national administrative law provides a good example, which demonstrates that the withdrawal act can be an instrument for the supremacy of EU law over national law. Judicial review, for its part, is often required by the EU and global law in order to ensure compliance by national legal orders.

4.4.3 Administrative Acts and Democracy

These remarks show that national administrative law are often directed, at least to some extent, by the law pertaining to legal orders different from the national one. This of course puts into question the "democratic" view of administrative acts, meant as decisions enforcing or obeying the law stemming from national political representative bodies. The gap between the national democratic process and the law regulating national administrative acts raises delicate legitimacy issues. Being such issues relevant to the whole theory of EU and global law, they go far beyond the scope of this chapter. Yet, few observations, specifically pertaining to administrative acts, can be made.

On the one hand, it is undoubtedly true that the law beyond the state may cause limitations to political representation. This is the case, in particular, of many global legal regimes, whose ("stronger") law is produced by bodies in which only few states are represented, but affects the administrative acts of many more states. In such cases, from the not represented states' point of view, there is a real problem of democracy and accountability of regulators.

On the other hand, it is disputable that the shift in the regulation of administrative acts, from the national level to the EU and global ones, weakens democracy, because it is disputable that the legal regime of administrative acts supports democracy. Indeed, in the national legal systems, that regime is designed non-simply to ensure compliance with the will of parliaments, but also – or mainly – to limit the autonomy of politically directed public administrations, to induce their compliance with the law (not only with parliamentary law, but also with constitutional and judge-made law), and therefore to curb the political influence on the performance of administrative tasks. Hence, the shift of some of the forming that legal regime to different sources could be acceptable or even desirable, as a useful division of the power to control public administrations, provided that those sources are themselves democratic and accountable in some way.

The consequential issue, then, is whether the law beyond the state, influencing national administrative acts, is itself a democratic law, i.e. whether EU and global legal orders and bodies provide adequate representation to those which will be affected by it and sufficient protection to the interested parties. It is, once again, a broad issue, which is considered here only with exclusive reference to the regime of administrative acts. The issue is obviously easier to address for EU law, which proceeds from a single legal order, than for global law, due to the extreme diversity in its sources and organizational models.

As for the former, the law making processes of EU law envisage several instruments of representation and protection of private parties. Therefore, there is not a peculiar problem of legitimacy or accountability concerning the influence on national administrative acts. However, the substitution of national law with European law, in the regulation of administrative acts, may actually reduce the chances for representation and judicial protection, first of all making them more expensive. Moreover, the peculiar structure of the administrative procedures, partly regulated by the EU law, can actually limit the chances for individual protection, especially in the mixed proceedings. In the national legal systems, the instruments of protection of individuals towards administrative acts are designed for decisions made by domestic authorities, and their performance may be impaired by the shift of decisions to the European or global level.

This is even more true for global law. It is obviously impossible to draw general conclusions, correct for all global legal regimes. Democratic concerns can be more or less appropriate, according to the subject matter, to the nature and constituency of the legislating bodies, to their rulemaking procedures, to the existence of reviewing bodies and more. In some cases, national governments and interested groups are adequately represented, lawmakers are accountable, procedures are transparent and there is room for review. In others, lawmakers represent only some interests and their decisions are close to participation and scrutiny. In these cases, of course, domestic law can hinder or limit the influence of global law on national administrative acts, but, as it has been shown, this is not always possible, owing to the strength of global regulatory regimes.

On the other hand, EU and global law often forces national law to grant protection to individuals, at times a stronger protection than domestic law would

allow. What has been remarked about interested parties' participation and judicial review can be recalled here as evidence of beneficial influence.

The overall outcome of the ultranational regulation of administrative acts is acceptable. It undermines the state monopoly on the law governing public administrations. However, if democracy is not only about political representation and elections, but also about obedience to rules and about balance of powers, it does not necessarily offend democracy. In this perspective, and under certain conditions, the EU and global influence on national administrative acts could be regarded as a beneficial stimulus to democracy.

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Part II
Exchanges of Legal Principles

Chapter 5
The Genesis and Structure of General Principles of Global Public Law

Giacinto della Cananea

5.1 Principles of Law in the Global Legal Space

Although confirmed by Art. 38 of the Statute of the International Court of Justice,[1] the idea that there exist general principles of law that are recognized by civilized nations has lost ground in recent years. This fact raises the question of whether such general principles have any order-providing meaning or value beyond the State. If compared to the apparently "natural" systematic structure of state legal orders, the global legal space appears to lack a body of general rules[2] and seems dominated by sectionalism and fragmentation.[3] Indeed, it resembles the medieval legal order, characterized as that was by the simultaneous presence of various legal orders competing with each other.[4]

In reality, studies of legal history have led to a different understanding. We now know that that systematic structure was not natural. It was an integral part of a general pattern of morphological transformations undergone by the legal orders of states. Following a course resembling a parabola, that pattern is now in the descending phase. The multiplicity of the interests deemed worthy of protection

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[1]Article 38(1)(b) of the Statute of the International Court of Justice states, "[T]he Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply: [. . .] (c) the general principles of law recognized by civilized nations". See Cheng (1987). See also, for a discussion of the various theories, Gaja (2008), advancing the thesis that the concept has lost importance, and della Cananea (2007), holding that although it is a residual concept, it may still be useful for a theory of general legal principles.

[2]See Cassese (2003), p. 121.

[3]See UN International Law Commission (2004). See, also, Koskenniemi and Leino (2005).

[4]For one of the best accounts, see van Caenegem (2002). See also Grossi (1995).

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makes the task of guaranteeing a systematic ordering of legal rules an extremely arduous one.[5]

In the meantime, some of the rules emerging in the global space are clearly and increasingly frequently detaching themselves from the sectoral and fragmentary tendency characterizing the majority of them. The judicial review exercised by national courts and the monitoring carried out by international and supranational judicial bodies transcend controls simply directed at urging and verifying that public authorities actually comply with the rules that they themselves have stipulated. Albeit less frequently, public authorities are called to respect more general rules. These are secondary rules (in the sense that Hart accords the term) regarding the organization and delegation of power. They regulate the ways in which powers are exercised by subordinating decisions to the execution of an established procedure and the duty to justify the choices made.

Such rules may more properly be referred to as principles. Compared to rules, they present more than one distinctive feature, starting with the greater importance that they assume.[6] Principles reveal the true nature of a legal order far more clearly than rules do, even if the latter are more numerous and are ordered sector by sector. Their purpose is, precisely, to remedy the marked sectionalism of the various areas of the law and thus to guarantee a certain degree of consistency and uniformity. Without necessarily taking the form of unifying criteria, they offer guidance for solving cases when specific rules are lacking or are shown to be inadequate. They avoid the denial of justice (*non liquet*). They guarantee the constant and timely adaptation of legal institutions to changing conditions and the demands of society.

Furthermore, principles operate differently from rules. Whether principles are enunciated by political institutions (e.g. through Constitutions, Treaties, Acts of Parliament or Directives) or are forged by judges or arbitrators, they are formulated in more general terms than rules are. They therefore possess a certain degree of legal indeterminacy. For this reason, they lend themselves to use in a variety of situations. Their range of application is also very wide in terms of the"parties affected, since they are not limited to a specific category. Let us suppose, for example, that when dealing with the dismissal of a public-sector employee, an English judge had limited himself to stating that that specific type of measure was unlawful without the prior hearing of both parties. The “rule” stated in such a ruling could not have been applied to other situations existing at that time, nor to those that did not exist then but came into being subsequently. An interpretation by analogy would have been necessary. The act of referring to natural justice, however, permitted the principle to be applied on other occasions, even when the contexts were very different.[7]

[5]Habermas (1988), p. 9.

[6]Kelsen (1952), holding that “principles . . . are the most important norms”. For the thesis that the distinction between “principle” and “rule” is quite logical, see Dworkin (1977). For the converse argument that the distinction is the result of political choices, see Raz (1972).

[7]For this example, see Radford (1990).

Precisely because principles have such a wide-ranging applicability, they cannot enter into all the detail that may prove necessary. They do not have the same effect as rules.[8] They refer to certain aims or values that are considered worth preserving, promoting and applying. Thus, they do not simply require an act of interpretation but must be weighed one against the other and reconsidered in the light of experience.[9] They inevitably leave greater margins of appreciation to decision-takers and review bodies.

This does not imply, however, that general principles are not legal norms. Such thesis had its supporters during the less recent phase of legal science, when positivism prevailed, but has gradually been revised in line with an increasing awareness of the fact that judges consider general principles to be mandatory, enforceable rules.[10] Nowadays, national judges, international courts and arbitrators have no doubts about the legal value of general principles of law. They use them for guidance when interpreting specific rules, to the point of expunging the latter from a legal order in cases where it is impossible to accord them a meaning that is compatible with a specific principle.

Were we to confine ourselves to this observation, however, we would achieve no more than a strictly positivist understanding of the law. We would simply observe the existence of a certain number of general rules, operating alongside more specific rules governing each sector. But since the Nuremberg trials, as Chaim Perelman has noted, alongside principles that even the exegetic school could have recognized, courts have increasingly frequently resorted to "common" general principles of law. This trend has been endorsed by Art. 38 of the Statute of the International Court of Justice and, more recently, by Art. 21(1)(c) of the Statute of the International Criminal Court. The latter not only refers to the written rules but also to other principles and rules of international law. Alongside the "established principles of the international law of armed conflict", there are the "general principles of law derived by the Court from national laws of legal systems of the world".[11]

The tenor of this provision recalls that of the International Court of Justice. Nevertheless, the qualification of principles on the basis of their being shared by civilized nations has been superseded. Coined in the 1940s, it reflected the pre-existing situation and the distinction between countries having a shared legal culture and the rest. Differences between the various legal orders no longer lend themselves to a classification based on the dichotomy between civilized and uncivilized nations. This is clearly demonstrated both by the absence of any mention of such dichotomy and by the reference to the legal systems of the world, i.e., all of them. A consequence of this, however, is the difficulty of knowing all

[8]For this distinction, see Alexy (2000).

[9]See Cardozo (1921), p. 21.

[10]Crisafulli (1941).

[11]See Burke-White (2002), noting the growing interaction between courts in the international criminal law context. For Perelman's remark, see Perelman (1990).

those legal systems.[12] A further difficulty derives from the limit that Art. 21 sets, namely, consistency with internationally recognized human rights. The underlying logic is understandable, given that the Court's task is to prevent crimes injuring both individuals and groups of individuals from remaining unpunished. But it has a further effect. It supports the thesis that human rights limit the pluralism of peoples or, rather, the degree to which the different traditions and rules characterizing each culture are equally admissible in the international assembly.[13]

Time will tell what use the judges will manage to make of the new provision, what new vistas it will be able to open up to legal thinking and how it may better be used in conjunction with the other rules governing the actions of public authorities. In any case, the passage from a sectoral provision to a more general rule of law remains to be achieved. And the possibility that it may be achieved cannot fail to be shot with rational pessimism. The breadth of the scope of reference, the various social contexts' differing degrees of maturity and general uncertainty regarding the political will to reform would all suggest this. Nevertheless, there have been significant points of convergence between national legal orders during the period under consideration. The international community has increased its pressure to see some procedural guarantees observed and introduced into all countries, with higher minimum standards than those set in the past. The demands have not been limited to those countries that may be regarded as dilatory or more backward: they have also involved those whose law is often considered to be a model for other countries. The very institutions operating beyond states have themselves been subjected to rules and principles directed at protecting not only their founding bodies but also those ultimately affected by their actions.

These facts and the political choices underlying them have been confirmed by legal analyses that are more empirical than theoretical. In this area, too, legal theory has been slow to follow both the concrete institutional developments and the conceptual framework adopted by practitioners. It has confined itself to tracing certain principles to those prevailing in some legal orders. That has been helpful, however, because it has contributed to spreading a "conventional wisdom" that shapes opinion well beyond the narrow circle of experts on the subject. It is nevertheless now necessary to consider the significance and limitations of the work of recognizing procedural principles. Since the common and distinguishing features of these principles can indeed be determined, the value of defining such a category is not so much prescriptive as descriptive. It can indicate both the direction in which the law is evolving and the need to adapt the theoretical categories that jurists use.

[12]See Delmas-Marty (2004), p. 15. See, also, Cassese (2001).

[13]For this thesis, see Rawls (1999).

5.2 The Distinctive Features of General Principles of Global Public Law

The principles serving to achieve procedural (rather than substantive) due process of law present common, recurring features. Such features are also distinctive, when compared to those characterizing other categories of legal principles. They have to do with the genesis and structure of general principles of the law.[14]

As far as the genesis is concerned, this new category of principles is distinct from that of the principles of conventional international law. Some have been established by specific treaties or by sources founded under them, such as the principle of participation by members of the public in the procedures regarding the environment established by the Aarhus Convention. Likewise, there are principles *sans texte formel* that are not stated by any provision. Indeed, their usefulness becomes evident precisely in those situations where a specific rule is wanting. Judges and arbitrators deduce them from one or more existing rules by way of interpretation and generalization. Fairly often, these principles are drawn from other legal orders. This technique is reminiscent of the references to the *lex alius loci* that were customary during the era of the *ius commune*.[15]

There is also a specific recurring difference between these principles and those of customary international law. The latter are the product of generally accepted practices in inter-state relations. They produce their effects in the international legal order and do so only indirectly within national legal orders, insofar as the latter conform to them.[16] The general principles of global public law, on the other hand, are the result of a comparison between legal institutions that have developed initially within individual States. They constitute a corresponding number of valuable guarantees *vis à vis* public decision-making.[17]

A consequence of the judicial or quasi-judicial manner of begetting unwritten principles is that it emphasizes the importance of the work carried out by reviewing bodies .[18] Another consequence is that there emerge two methods for deciding what the law should be declared to be. There is the activity that, in the continental European states, has been deemed reserved to political bodies and is directed at "making" the law. But this activity is flanked, guided and limited by the work carried out by reviewing bodies, applying general principles of law. However, these legislative rules and general legal principles and doctrines are all equally legal norms. In other words, there is no conflict between them that could echo the one between positive law and natural law.

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[14]The wider formulation "general principles of *the* law" is used here instead of the narrower one ("*of* law") because these principles are applicable to the whole range of legal relations to which public authorities are party (as suggested by Bobbio (1967), p. 890).

[15]Gorla (1992).

[16]As Art. 10 of the Italian Constitution provides.

[17]Cf. Joyner 2005.

[18]See Bobbio (1967), p. 892.

Passing from the genesis of the new general principles of public law to their functions, it may be noted that some principles respond to the typical aim of contemporary international law. They serve to guarantee co-operation between states, rather than their mere co-existence. The institutional premises have changed, however. Intergovernmental co-operation and the actions of international and supranational institutions often have a direct effect on private parties. This creates the need to regulate decision-making processes and guarantee a certain degree of objectivity and non-arbitrariness. The principles of procedural due process of law that have been imposed at a European Union (EU) level meet such a need. These are the duty to hear affected parties and to give reasons for the decisions that affect them adversely; technical accuracy in the preliminary fact-finding activities; transparency; the judicial review of decisions and interim measures aiming at guaranteeing its effectiveness. Until only a few years ago, these principles found no specific anchorage in other regulatory regimes and this fact reinforced the idea that the EU was a legal order *sui generis*. However, precisely the fact that the rules and decisions of other legal orders beyond the State (most markedly, the United Nations) collided with EU principles has contributed to inducing policy-makers to adapt to them. Aspects of good administration and guarantees have also been assimilated by multilateral economic regimes, with varying results.

The structure of the new principles, on the other hand, is different from that of the principles of international law deriving from what used to be called civilized nations. The scope of application transcends states, to which the third category of principles provided for by the International Court of Justice's Statute refers. It is vaster, since it includes supranational and international public authorities, such as the EU and the UN, respectively. The range of parties requesting observance of those principles is also wider. It is not limited to the traditional parties in international law i.e. states. The latter are joined by other public authorities that operate both at a domestic level and beyond the State. Centers of reference for interests that do not enjoy legal personhood in the international legal order (such as environmental associations) can also call for respect of the transparency and participation principles. The margins of effectiveness for some tried and tested procedural institutions have been reviewed and adapted. Other, even more tried and tested institutions (that have taken decades to develop within individual states) have been subjected to modifications and have sometimes been genuinely transformed. Thus, there has not been a simple transposition of principles and institutions from some states' legal orders to the international and supranational ones but, rather, a mutation.

5.3 The Genesis of General Principles: Sources and Origin

Previous assertions regarding the genesis and structure of global principles must now be treated in greater detail. As far as the genesis is concerned, the *Factortame* case and the dispute before the World Trade Organization (WTO) regarding the importation of fish products provide a useful starting point.

The world trade dispute regarding sea turtles[19] was not actually resolved according to particular rules agreed between the parties. Nor were general WTO rules applied. One might think that the Appellate Body referred to national rules, as is often the case in arbitrations or judicial hearings.[20] This hypothesis has to be discarded, however, because it conflicts with the rules of law which the applicants sought to see observed, namely the substantive principle prohibiting barriers to trade. The hypothesis is also confuted by the legal arguments adopted by the Appellate Body. These do not contain any reference to the principles found in the US legal order, nor to the rich case-law of its courts.

Having excluded the possibility that the basis for the procedural guarantees was to be found in the national legal order, one may ask whether the Appellate Body applied the rules of its own legal order governing world trade. A quick look at the General Agreement on Tariffs and Trade, however, is enough to reveal that it has no rule of this type. It would therefore have been possible to follow a different logical course, based on the establishment of horizontal connections between different bodies of rules, even if they were not ordered hierarchically. Another of the agreements on which the WTO is based, the TRIPS Treaty, imposes two specific procedural duties on contracting parties (Arts. 41–50).[21] The first is the duty to offer private economic operators the opportunity to be heard. The other is the duty to make the provision of effective remedies possible, from which one may derive, at the very least, the requirement that the national measures capable of affecting operators' interests must contain reasons. Thus, in the first case, an analogy-based interpretation would have been sufficient and in the second, an extensive type of interpretation (in the purposive sense) would also have been necessary. Nevertheless, the Appellate Body did not make any reference to the rules contained in the other agreement.

Nor did it even begin to attempt to base its decision on precepts of natural law and deduce the *ratio* from the most general criteria of an ethical nature. Such an attempt would, however, have resulted in a clear and questionable deviation from the positivist line previously followed.[22] In other cases, the Appellate Body has drawn on the general principles of international law deemed significant for dispute-resolution purposes, such as the duty of good faith.

[19]The dispute concerned the US ban on the importation of shrimp and shrimp-related products. While the Panel Report (WT/DS58R, 1998) excluded that the ban might be justified on grounds of public policy exception, the Report of the Appellate Body (WT/DS58/AB/R, 1998) held that the protection of environmental resources may justify national measures limiting free trade (although it eventually found that US measures did not pass the "arbitrary discrimination" test: see the second Report of the Appellate Body, WT/DS58/AB, 2001). For further details, see Appleton (1999), advancing the thesis that "tinkering with the exceptions in Article XX [. . .] is likely to alter the rights and obligations" stemming from the treaty; and Cassese (2005).

[20]Whether this option may be used by arbitral bodies is debatable: see Gaja (1986).

[21]I am grateful to Professor Jerome Reichmann of Duke Law School for this observation.

[22]For a detailed analysis of the principles used by WTO dispute-settlement bodies, see Cameron and Gray (2001).

Once the options of following a strictly positivist or natural-law line have been excluded, it only remains to acknowledge that another method was used to strike a proper balance between the interests at stake. The Appellate Body admitted, in principle, that the aim of safeguarding a protected species was potentially capable of legitimizing the limitation of imports. It therefore did not trouble itself with the question of whether a proper legal basis for the exercise of the powers was lacking. It saw its task, rather, as that of ascertaining whether the national regulator's conduct had been "arbitrary and capricious". The issue was thus how such powers should be exercised, in order to prevent discretion degenerating into arbitrariness. In order to avoid this risk and prevent every kind of unjustifiable discrimination, according to the Appellate Body, both the right to be heard and the duty to give reasons must be respected.

The European Court of Justice followed a similar line of reasoning in its *Factortame* judgement. The Court had to evaluate whether the provision of interim relief was a mandatory duty in the specific institutional framework of Great Britain, which prohibited its issue against the Crown. A good dose of deference towards a deep-seated constitutional tradition would not have been unjustified. There also existed a means of showing the Court's reluctance to affect a national institutional framework: the principle that every individual Member State enjoys autonomy to conduct trials according to its own, national procedures. It is true that the Court had set and enforced a precise condition, namely, that the exercise of rights deriving from EU rules should not be compromised. But financial compensation could have been considered sufficient.

It is also true that, proceeding from the specific solutions thought up by the legislators and judges, Advocate-General Tesauro had identified the outline of a general legal principle common to various legal orders, requiring judges to grant interim relief.[23] That happened in almost all the Member States' legal systems, however. The limitative value of the adverb "almost" is not without importance. It denotes the absence of an invariant in the strict sense. Thus, the Court could have stated that, if there was a common tendency, it was not shared by the British legal order. There was no pre-existing general principle of EU law the observance of which the Court of Justice was bound to guarantee. It therefore could have shown a sort of deference towards British procedural law, whilst nevertheless observing its difference from *id quod plerumque accidit* (that which happens most of the time).

The Advocate-General's meticulous description of the various national systems contrasts with the summary fashion in which the Court judged interim relief to be indispensable. Of particular significance is the brief passage in which, in a certain sense, he freed himself of the issue of whether a general principle refuted by the Defendant State may be considered common to the Member States. The Court, on the other hand, limited itself to reasserting the established principle of the

[23]Opinion of Advocate-General Tesauro, Case C-213/89, *Regina v. Secretary of State ex parte Factortame* at paras 21–23. For further details and analysis, see Oliver (1991) and Caranta (1992), p. 231.

supremacy of EU law over national law, the premise that there was a need to guarantee the former's effectiveness and the corollary of the Court's own duty to apply EU law in a uniform manner.[24] Once the issue of the relationship between the legal orders had been posed in terms of hierarchy, it was no longer possible to assert the presumption that the British laws were compatible with EU law.[25] This would have prevented the rules being fully effective in a uniform manner in all the Member States. Hence the duty on national judges to disapply the rule that prevents them from granting interim relief.

The interpretation not of a specific rule but, rather, of the legal order's founding principles, in a systematic manner, thus served to rectify the line that the Court had previously followed. It allowed it to hold that non-written principles exist. The latter require judges to suspend the application of a legislative instrument in a situation for which the national legal order does not provide and where interests protected by EU rules are at stake.

The judicial decisions examined differ both in their institutional premises and in their effects. Yet they have the common feature of the importance accorded to general legal principles. The determination of principles is, for the most part, the work of judges and arbitration bodies.[26] It is no less important than the work of interpreting the provisions established by the policy-setting bodies in States and in the institutions that the latter create. Potential conflict between rules and principles helps to persuade legislators and governments to modify their conduct and the rules from which they draw their inspiration. Nevertheless, the importance of principles is not only seen in those situations where a specific rule is lacking or deemed unclear. It also manifests, less clearly but no less importantly for the law, in their orientation of the work carried out by public authorities.

Thus, there emerge a point in common with and a point of distinction from the theories that would have general principles derive from natural law. Those theories were based on the conviction that, even were one to suppose that God does not concern Himself with human affairs, there are legal norms that are universally valid because they concern eternal truths in just the same way that mathematical laws do. More recent theories hold that there exists a law common to all, although this law does not have a religious foundation. The rulings issued by judges and arbitration bodies are not based on natural law but, rather, on principles deemed common both to state and to international and supranational legal orders.

That said, it must nevertheless be added that legal norms do not arise *ex nihilo*. They are inevitably influenced by objectives that are being pursued, by established

[24]Court of Justice, Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433, paras 18–22. See, also, Oliver (1991), p. 251.

[25]For this remark, see Sir Wade (1990).

[26]Raz (1972), p. 848. Hersh Lauterpacht had already referred to "judicial legislation" in his *General Rules of the Law of Peace* 1936 (arguing that general principles include "municipal jurisprudence", "equity" and "justice"). For the thesis that the "new constitutionalism" depends on judges, see Shapiro and Stone Sweet (2002); Cass (2001).

practices and by the most tested institutional frameworks. Such fact raises the question of whence the new general legal principles originate. Legal thinking neglected this question for a not inconsiderable period. It had been influenced by the way of thinking prevalent less recently, according to which the issue of origin was a philosophical one or, in any event, of little legal importance. What mattered, rather, was the basis for principles' validity i.e. their source, in a formal sense.[27] More recently, however, a renewed interest in the origin of principles has been noted. Thanks to these (sometimes painstaking) recent studies, one can discern the influence of the various national models.

The effects of this influence are evident in some of the recent Reports of the WTO's Appellate Body. Consider again the *Shrimp* case: at the heart of the dispute centering on the dialectic relationship between freedom of trade and the protection of natural resources at risk of exhaustion, there was not just the weighing of conflicting interests. There was equally a procedural issue concerning the intervention of third parties in the dispute. Whereas the *locus standi* of the other contracting parties was admitted,[28] the admissibility of an intervention by other legal persons was challenged. The legal persons in question were the non-governmental organizations charged with protecting the environment.

The existing rules did not provide for interventions of this type. They accorded (and accord) the dispute-resolution bodies a wide margin of discretion with regard to the use of evidence. The bodies already had the power to acquire information, to request the presentation of documents that were important for resolving the dispute and to hear experts.[29] The Appellate Body made wide-ranging use of these powers and amended the Panel's opinion. On the basis of the *ubi lex noluit, dixit* argument, it did not consider itself obliged to attribute a preclusive effect to the fact that the positive rules do not contemplate the adducing of documents that have not been requested. It stated that the rules neither provide for interventions by private parties, nor exclude them. It therefore allowed the intervention, for which the instrument of the *amicus curiae* brief was employed.[30]

This dispute lends itself to various evaluations. One can glimpse a functional type of logic in the judge's decision, in the sense that third-party interventions are to be allowed insofar as they contribute to a better understanding of both the facts and the interests at stake. It is on the basis of such logic that the intervention of centers of reference for collective interests has been allowed by judges in various countries. That said, it should be added that it is not just a rule regarding access to the facts that is at stake. It is the access of interests to the trial that is at stake. Admission of interventions protecting interests of a trans-national nature during the preliminary

[27]Bobbio (1967), p. 892.

[28]For example, Morocco was allowed to present an *amicus brief*: see the Report of the Appellate Body WT/DS231/AB/R, *EC-Sardines*, 2002, Sect. 162.

[29]See Art. 13 of the Understanding.

[30]See the reports of the Appellate Body, WT/DS58/AB/R 1998 and WT/DS138/AB/R – *US – Lead and Bismuth II*, Sect. 39 (pointing out that "neither the DSU, nor the Working procedures … prohibit acceptance of such briefs").

fact-finding phase results in an extension to other parties of the *locus standi* that the organization's "constitutional" rules reserve to the contracting parties. What is more, to public parties are added private parties, with significant legal and political repercussions for the prioritization of the interests at stake. It therefore comes as no surprise that some member states of the WTO have reacted at a political level to what has been perceived as an unjust alteration of the powers connected to membership of the organization.[31] The fact that the Appellate Body has laid down rules to circumscribe the impact of those powers and has established that only members of the organization have the right to intervene in disputes nevertheless confirms that a change occurred.

Criticism of the nonchalance with which certain principles are included among the common ones for general application may also be leveled, in the context of the composite regional legal orders, against the European Court of Justice. According to this school of thought, the high-road, indeed the only road that allows the risk of arbitrariness to be avoided lies in comparing all the legal orders affected and seeking a sort of general common denominator.[32] Nevertheless, it is sufficient to take a simple glance at the Court of Justice's case-law to realize that the Court has not confined itself to seeking a common basis of this kind. It has drawn on general legal principles that are common to some national legal orders, even at the price of the odd strained interpretation. It has activated, guided and imposed processes of adjustment.

5.4 Recognition or Creation of Principles?

One may therefore ask whether the reference to general legal principles might not serve another purpose, namely, that of rendering the nomopoietic function performed by arbitration bodies and judicial organs (and, indirectly, the legal culture of their time) less transparent.[33]

It is not indispensable to take sides in the debate on the judicial activism of both the WTO's Appellate Body and the Court of Justice. In the dispute regarding due process of law in the United States, the Appellate Body did not conceive its task as that of simply identifying the rules in force, whether deriving from the Convention or from customary practice. Nor did it argue that procedural due process of law is a principle shared by all the legal orders of the contracting parties. Instead, it

[31]For a critical view of the choices made by the Appellate Body, see von Bogdandy (2000).

[32]According to Capotorti (1980), "the Court has never precisely ascertained the degree of communion".

[33]See Giannini (1996), p. 902 (arguing that "behind every statement of a principle and, even more so, of a general principle, there lies a jurist, indeed, very frequently a group. . . of jurists").

examined the premise that the rules required for an orderly life in the global community were pre-existent and that its task consisted of making them explicit.[34]

The work of the Court of Justice in the *Factortame* case was certainly no less incisive but was less transparent. Had it interpreted the task assigned it under the Treaty literally, it ought to have adopted a technique similar to that of a syllogism. The syllogism's major premise should have been that all the general principles common to the legal orders are, as such, general principles of EU law. The minor premise would have been that a certain principle is, precisely, common to the national legal orders. It would have followed that the said principle must be counted among those that the EU judge and the national judges must ensure are observed by public authorities. An analysis of EU case-law (particularly the less recent judgements to which the more recent ones refer, under the precedent rule[35]) nevertheless reveals a rather different state of affairs. When, in the *Transocean Marine Paint Association* case, the Court of Justice attributed the status of general legal principle to the duty to hear affected parties before adopting measures adversely affecting them, a principle of this kind could hardly be said to be general or common to the legal orders.[36]

It was not a general principle in that it was applied to certain categories of procedure (particularly those producing adverse effects) but not all of them (even if an unfavourable effect was indeed produced). Unfavourable effects can also result from the grant of benefits that are reserved to certain individuals or groups, without others being able to present a formal protest or challenge the action legally (e.g. money, public housing and free medicines). They result even more clearly from the adoption of rules, plans and programs. In such a context, interventions in the related administrative procedures were at first excluded and then allowed in a limited fashion in both the Italian and the British legal orders. And yet it was not a question of a general principle. In fact, the general principle of *audi alteram partem* did not exist in the Dutch legal order where the Transocean Marine Paint Association had its registered office.[37] Nevertheless, in that case, the Court did not hesitate to count it among the common principles, anchor its own review of lawfulness to it and quash the measure on the grounds of procedural unlawfulness.

It certainly cannot be said that, in *Transocean*, the Court of Justice followed the line of reasoning adopted by the courts in the Anglo-Saxon legal orders. If anything, it generalized and made the most of an institution, namely, the right to controvert facts or issues during an administrative procedure. This legal right certainly reflects the concept of fairness that is a part of Anglo-Saxon culture. Yet it corresponds to

[34]According to Gorman (2005), international judges do not consider the existence of a special legal basis to be relevant.

[35]See Stone Sweet and Brunell (2002). As regards the role of precedents in Community case-law, see Arnull (1999).

[36]Case 17/74, *Transocean Marine Paint Association* v. *Commission* [1974] ECR 1063 para. 15. For further remarks, see Usher (1976) and Bignami (2004).

[37]Usher (1999), p. 77.

values that the legal orders in continental Europe also share.[38] In this manner of proceeding, however, the line of demarcation between the activity of recognizing the existence of common principles and the genuine creation of new principles is not always clear.[39]

5.5 The Structure of General Principles

Further distinctive features of the general principles of global public law emerge when their structure is examined. There are several significant similarities (and not just lexical ones) with the general legal principles recognized in national legal orders. In the same way, not a few legal tools show the influence of their corresponding national tools. This would confirm the hypothesis that a process of harmonization through minimum standards is under way. A comparison of the old institutions with the new ones, nevertheless, reveals profound differences. In addition to the absence of specific remedies, the rules that the various regulatory regimes and international and supranational orders require to be observed differ from the national ones in terms of detail.

They differ, above all, with respect to the parties. The scope of the new principles' application transcends the confines of States and includes the new international and supranational authorities. The range of parties who may request due observance of the new principles is also much wider than in the past. Not only do States have the right, so do the institutions created by them (e.g. the EU). Continuing with this example, the EU, in its turn, requires observance of the global principles when exercising its rights within the WTO. The infranational bodies included amongst the Organization's membership (such as Hong-Kong and Taipei) may do the same. Regional bodies and local government can likewise refer to the general principles of law sanctioned by a supranational legal order (such as the European Court of Human Rights (ECHR)) and call on central governments to respect them.

The range of private parties is no less complex.[40] Some procedural guarantees have long been recognized for the protection of officials and agents working for international and supranational institutions. Others are being established for the

[38] Kelly (1992).

[39] Gaja (1986), p. 543. For the comment that it is pretty difficult to circumscribe the activity of the international and supranational judges, see Ginsburg (2005). The importance of the due process principles has been noted by the judgement issued by the Itlos in the *Juno Trader* case on 18 December 2004, at para. no. 13 (confiscation of a vessel by a State).

[40] The position prevailing during an earlier phase in the science of international law (namely that private individuals only have *locus standi* when they apply to organizations created by States: see Reuter (1958), p. 87) must be put in its historical context rather than relativized. In this sense, see Stein and Vining (1976), pp. 113 and 120. See also Hoffman (1999).

benefit of all those who feel the effects of the decisions that those institutions take. Alongside the individuals, there is increasingly frequently room for parties representing collective interests. Thus the action of global public authorities is subjected to the double scrutiny of the respective supervisory bodies and of individuals and groups. The intention is to verify that global standards for goods and services are adopted and funds are disbursed according to objective parameters that are not polluted by aprioristic preferences for certain uses and countries.

Such a goal can be achieved on one condition: that the existing institutions be adapted, amended and reconceived in the light of the general principles directed at achieving procedural due process of law. This modification occurs when an institution is used for purposes other than those originally envisaged. When the Commission carries out checks, private parties are recognized the right to present complaints. In Inspection Panel checks, another goal has been added to that of guaranteeing respect of the rules. There is the additional aim of giving voice to all those who are subjected to the negative consequences of the activities that have been financed. The effect is only felt directly by project managers but there are repercussions for national authorities, independently of the fact that the latter may be equipped with rules that are just as or even more well-developed.[41] Even tried and tested institutions that have taken decades to develop in individual States have been subjected to modification and sometimes to what can only be described as distortion. For example, US law has long provided for intervention in administrative procedures for the purposes of defending certain specific parties and allowing the participation of unspecified categories. The WTO's case-law has altered the contours of this institution. It has established that, where co-operation between governments is not achieved through the usual diplomatic channels, national governments are obliged to institute the related regulatory procedures. Such procedures must allow the respective governments (rather than the economic operators) to intervene in the proceedings.

The functional differences mentioned earlier are therefore matched by structural differences. General legal principles undergo variations, adaptations and contaminations when they are transposed from one kind of legal order to another. Such fact makes legal comparison all the more necessary.[42] The traditional theoretical categories need to be revised. To the extent that distinct *res* are involved, new *nomina* will be required. These general legal principles can therefore be called global, so as to distinguish them more clearly from the principles exclusively proper to international law.

[41]For an account, see Shihata (2002), p. 85. Former president Bissel has emphasized the importance of the Inspection Panel in terms of public accountability: see Bissel (2001).

[42]Delmas-Marty (1998) p. 108. See also Van Hoecke and Warrington (1998), for the thesis that European integration has an impact on comparative methods.

5.6 The Achievement of Procedural Due Process of Law

The mutation also affects the way in which due process of law is understood. Procedural principles relating to dispute settlement lie at the heart not only of the judgements given by arbitral and judicial bodies but also of theoretical reconstructions. Those principles have gradually been honed within the framework of a specific category: the denial of justice.[43]

Such fact has more than one positive feature. Thanks to the development of a series of standards, the legal relationship to which public authorities are party has been put on a sounder footing. Such footing reaches well beyond a simple prohibition (sanctioned by codes or other enactments) of the denial of justice (*non liquet)*. The fact that the exercise of jurisdiction has been traced to principles that are higher than the positive rules in each State has allowed it to be established that those principles should exist. Judicial and quasi-judicial activities may have certain implications for and effects on public policies but they must not pursue objectives of a political nature. Above all, they must not permit (still less, produce) arbitrary discrimination between parties. Thus, the ancient aspiration to give each party "his fair share" and limit the arbitrary acts of political authorities is realized. In this respect, the judgement of the European Court of Human Rights in the dispute regarding exploitation of the Turkish gold-bed assumes a paradigmatic value. Turkish citizens had applied to it for justice after the national government had complied only partially, and out of time, with a ruling from its own administrative court. For this reason, the Human Rights Court reached the conclusion that Art. 6 had been breached. Were it to hold otherwise, it observed, the guarantee of a fair trial would be deprived of "any useful effect".[44] The effectiveness of judicial review thus constitutes an essential condition without which there is not sufficient legal certainty. It is a constituent element of the rule of law that every state that is a Party to the Convention must respect.

Despite this fact, there is a dearth of legal theory regarding procedural due process of law outside the legal orders of individual states. The analysis refers almost exclusively to the judicial process. The use of the singular for the terms "theory" and "analysis" should not be surprising. Once a trial's issues for determination have been identified, an approach concentrating on guaranteeing the interests at stake has prevailed. The consequential risk is that trials, and their capacity to push legal orders towards the ideal of justice, are overrated. That is not all, however. There is also the risk that all that is new and original in the current trends may not be fully understood.[45]

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[43]For the theory of an "evolving standard" that includes (over and above certain specific – and grave – procedural anomalies) the systemic defects in justice that is provided by a State, see Paulsson (2005), p. 68. See also Bjorklund (2005).

[44]Eur. Ct. HR, Case *Taskin and others v. Turkey* (2007) Sect. 137. For earlier cases, see Sudre (2005).

[45]See Krisch and Kingsbury (2006).

Such a perspective is limited and misleading, however. Without detracting from the importance that the principles regarding jurisdiction undoubtedly enjoy, the importance of the principles governing exercise of the powers held by the political and administrative institutions is uncontrovertibly greater. These principles affect the concrete capacity for choice, decision-making and action enjoyed by the authorities to which the rules assign powers and responsibilities. They serve to limit and structure the exercise of discretionary power and make it reviewable, so as to prevent it degenerating into abuse.[46] They regulate the moment of evaluation, requiring accuracy in the enquiries that administrative bodies are bound to carry out. Above all, they regulate the moment of volition during which a particular choice between the interests at stake becomes a concrete reality. That choice must be made in observance of specific existing rules. These, in their turn, must be interpreted in a way that is consistent with the general principles of due process of law.[47] In cases where there are no specific rules, it only remains to refer directly to the principles.

Consider the WTO Appellate Body's decision regarding the importation of fish products. The lack of sensitivity in the majority of commentators towards themes concerning administrative action contributed to their focusing their attention on other aspects. That decision is not only innovative for the fact that it concerns the weighing of freedom of trade against other interests. It is equally so for the way in which it redefines and applies principles relating to the exercise of power during a procedure. In the matter relating to the financing of the new Mumbai motorway, the absence of every trial-related element is even more evident. The project manager's correct application of the criteria and methodology established by the World Bank was the issue for consideration. Reference to this matter also serves to point out that the salient feature was not the tipping of the scales of justice in favour of one or other particular interest. It was, rather, the giving "voice" to the arguments of all those who, rightly or wrongly, considered that the realization of the new infrastructure infringed their rights.

Thus, on the one hand, long-established principles regarding access to the courts and the publicity of judgements are flanked by others, directed at guaranteeing the effectiveness of those judgements. On the other, to the trial-related principles are added those regarding the forms of action through which public authorities establish rules and adopt measures. Reference to the due process of law established by the Fourteenth Amendment to the US Constitution therefore has a precise value.[48] As in the United States, so in the regional and global regimes of the EU and the ECHR and of the WTO and the UN, respectively, due process is no longer understood only in the original, trial-related sense. It has assumed the more general meaning of a source of duties intended to guarantee that public decisions are not

[46]Davis (1969), p. 9.

[47]See Itlos, *Saint Vincent and the Grenadines v Guinea Bissau* (*Juno Trader case*) Sect. 77.

[48]Treves (1959).

only taken within a framework of open procedures that allow parties to be heard (by adducing evidence and presenting arguments) but are also accompanied by an adequate statement of reasons, for the purposes of transparency and review. In this way, it is not the activity directed at reaching decisions that is shaped by rules but the very production of the rules itself. This, too, is subjected to (albeit blander) duties to examine the significant interests and to provide reasons.

That is certainly not to say that public institutions have lost the power to affect (sometimes profoundly) not just the law governing ownership and enterprise but civil liberties as well. Indeed, recent and pithy manifestations of such powers have not been lacking. It is to say, rather, that just as entitlement to those powers is no longer a feature exclusively proper to States, so limits on their exercise are also being set by the new legal orders. In contrast to the statements of their more radical critics, the agreements establishing the regulatory regimes and international and supranational legal orders do not result in the re-introduction of the principles of public authorities' abstentionism in the social and economic spheres. Quite the opposite; in a certain sense, precisely the setting of limits on the ways in which public power is exercised presupposes an activism.

Procedural obligations create corresponding restrictions for public decision-makers. They force them to consider the interests at stake and to provide reasons for their choices. They do not leave the choice of disclosing the motives for action or inaction to the caprices of those who govern. Nor do they allow the consequences of any decision to have a prejudicial effect on the interests to which the international or supranational rules attach importance. Forms of interim relief and obligations to compensate the unjust injury of those interests stand in the way of that. It is in this sense and within these limitations (we are, after all, dealing with principles and standards, not a universe of binding rules assisted by courts and corps of officials charged with ensuring their observance) that the due process of law results in the recognition of duties both to provide justification (in the form of reasoned argument) and to treat all parties equally.[49]

Nevertheless, it should not be forgotten that the law is considerably more fragmented when it reaches beyond individual states. Governments can therefore avail themselves of another kind of discretionary power. This regards the choice of the body of rules that they consider most advantageous for realizing the interests that they decide to protect. Such interests are not only just the interests of the general public but also those of specific classes of persons (exporters, investors etc).[50]

[49]For this thesis, see Bull (1977). For the observation that positive rules now enunciate many traditional principles of natural law, see Grossi (1998), p. 5.

[50]See Benvenisti (1999). See, also, Benvenisti and Downs (2007).

5.7 Public Law Within and Beyond the State: From Separateness to Specialization

The existence of a body of general legal principles that are common to the legal orders both of states and of international and supranational institutions raises two questions. The first is whether the traditional dichotomy between domestic public law and international law has consequently lost its significance. The second is whether the new principles have a universal value or only a relative one.

A preliminary caveat may be useful at this point. Whether the non-definitive view on the appropriateness of the dichotomy-based paradigm be positive or negative, it is only of limited value. It must be weighed with other non-definitive scientific views of the same or opposite kind. It should at least be recognized that the relationship between "domestic" and "international or supranational" public law can be considered from several angles and that those angles may be of varying importance. The possibility that the epistemic community may be slow to grasp the significance of the empirical enquiry should also be recognized. The fuzziness of less recent conceptual systems, the weight of tradition and the authority of the academics who have contributed to creating it should not be underestimated. The dichotomy between "internal" and "external" public law was challenged by Kant, in the perspective of a universal public law that was indispensable for a permanent peace.[51] Conversely, it was considered obvious, indeed almost axiomatic, in Hegel's philosophical formulations and Kelsen also stood by it.[52] Furthermore, the school of which Triepel was one of the most important exponents[53] saw such dichotomy as the basis for the international law paradigm (understood as a separate field of study).

Apart from the weight of tradition, those who consciously continue to follow the traditional paradigm (albeit in a variety of directions) are expressing concern of a pragmatic kind.[54] This concern regards the implications of the methodological premises of another formulation that is earning growing consensus. This second formulation emphasizes that the new institutions are largely indebted to the administrative law of various states. This results in the need for the theoretical categories to be treated as a part of the theories of administrative law, albeit with the appropriate adaptations.[55] There is nevertheless an inherent risk in this, according to the supporters of the traditional paradigm. The risk is that if the institutions

[51]Kant (1795). For a revival of Kant's formulation, see Rawls (1999), p. 10.

[52]See Hegel (1821), Sect. 259 (arguing that the idea of the State has immediate reality); and Sect. 333 (where it is observed that the laws of States "have their reality, not in a universal will but, rather, in their will to a particular end"). In a similar sense, see Kelsen (1934).

[53]Triepel (1899). See also Lauterpacht (1936), emphasizing that, for Triepel, the obligatory force of international law depends on agreements between States, which is "nothing else but a denial of international law".

[54]von Bogdandy et al. (2009).

[55]Stewart (2003).

directed at preserving democracy and the rule of law within state institutions are extended to the new international and supranational legal orders in a generalized manner, then precisely those reasons for which the new legal orders have been created may be compromised. This is not just a scholarly concern. It is a real risk that should not be underestimated. Insofar as legal science is a practical science,[56] it certainly cannot disregard it.

It is nevertheless necessary to see whether the data would confirm the paradigm's continuing validity or whether they challenge it and therefore require its revision.[57] The data considered here demonstrate that the procedural guarantees that have been developed in some legal orders to defend private parties against the arbitrary impositions of those who govern and administrate are no longer an exclusive prerogative of those states. They define the activity of public authorities in, precisely, their capacity of public authorities. They make a hugely important contribution to the law's evolution. They have profound implications for the academic disciplines that study it. Both the traditional assumption that states are the only parties to the law of nations[58] and the conviction that administrative law is a feature exclusive to states (perhaps not even to all of them) and certainly not one belonging to other kinds of legal order,[59] must be relativized. Both were based on a now superseded idea of the separateness of the law's various component fields. It is preferable to configure the relations between legal principles in terms of specialization. All this would suggest that the existence of two distinct public-law cultures is not axiomatic. Even were one to continue to consider it so, however, the possibility that the two cultures may at least be closer and better integrated, with benefits for both, cannot be ruled out.

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[56]Pugliatti (1950) and Alexy (2000).

[57]Battini (2007), p. 150, signalling the dichotomy's "crisis".

[58]See Kelsen (1952), p. 3.

[59]Giannini (1988), p. 15.

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Chapter 6
Administrative Law Beyond the State: Participation at the Intersection of Legal Systems

Joana Mendes

6.1 Intersections: The Reception of International Law by EU Law

This chapter is a first approach to the analysis of the modalities and the effects of the interplay between the European Union (EU) and international regulation[1] on participation procedures enshrined in EU legislation, as well as on those followed in practice by the EU institutions and bodies. Its main purpose is to examine whether the reception of international law by EU law may bypass participation that would otherwise be granted by the EU institutions and bodies. Depending on the modality of participation at issue, this possibility may hinder the procedural protection of the persons affected or the standards of political or social legitimacy that have become accepted in EU governance.[2]

[1]The author considers it still premature to defend "global administrative law" as a body of law distinct from international law. This position does not deny the significance of regulation occurring in the international sphere that does not involve states, nor does it deny the advantages of approaching distinct aspects of international regulation from an administrative law perspective. Instead, the author questions whether this can give rise to a separate legal discipline and whether "global administrative law" is the adequate name of a putative new discipline of law. Therefore, contrary to other contributions in this book, the term "international law" will be used in a broad sense. It encompasses not only intergovernmental law, concerning treaties and relations among states, but also the law establishing and regulating legal regimes not necessarily involving states. The attribute "global" will be used, together with "international", to qualify "regulatory regimes" or the level of regulation transcending nation states, which as such are not capable of embodying "global administrative law" as a separate discipline of law.

[2]On the distinction between formal and social legitimacy, see Weiler (1991), pp. 415–416.

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This analysis builds on three main premises. First, the varied forms of interaction between the European and the international, or, more broadly, global level of regulation intertwine procedures developed at different regulatory levels. These may lead to unitary outcomes, even if the link between such procedures may not be formally established. The chapter shares the view according to which there is a functional division of competences between the different levels of regulation, or rather "an implicit ordering of functions in which the effectiveness of law is sought through managed interaction between the [international, the European and the national] systems", the concrete shape of which depends on the circumstances of each case.[3] In some cases, this interplay ultimately impacts on private persons' legal spheres. Even if instruments adopted by international organizations or bodies are not explicitly directed at conforming the legal sphere or conduct of natural and legal persons, they may have such an effect through the mediation of other public entities. Then it is even more important to assess the effects of the interactions between different legal systems on participation, since this is one of the procedural standards on the basis of which the legitimacy of public decisions may be assessed.

Second, the consequences that such interactions may have on the rights and legally protected interests of individuals inevitably raise, more specifically, the question of the role of the rule of law at the intersection between European and international law. Together with Palombella, rule of law is meant here as conveying a normative ideal of limitation of power beyond the 'authoritative will' dictated in the positive rules in force. Given this very purpose, the rule of law purports the adoption of substantive and procedural standards.[4] Although acknowledging the difficulties of defending the existence of a unitary conception of rule of law shared across legal systems, it is submitted that there exists "some recognisable shared positive law reference" on the basis of which it is possible to establish "point[s] of legal connection among the systems".[5] Furthermore, it is submitted that the granting of procedural safeguards before the exercise of public power that interferes with the rights and interests of private persons, among which participation, is one of these points of connection.

Third, given the accountability and legitimacy flaws that tend to be pointed out with regard to international or global regulatory schemes, procedural rules backing the interactions between legal systems are ever more relevant. This is a widely

[3]Bethlehem (1998), p. 195. According to Bethlehem, "each system constantly acts upon, and interacts with, the other systems" while addressing the same subjects and the same subject matters (p. 194). In a similar sense, Cassese (2005a), pp. 680–685.

[4]Palombella (2009), pp. 449–452. According to Palombella, "the rule of law surely points to a complex and debated set of ingredients and characters, which the existing law may be asked to achieve and embody; it functions as a normative standard" (p. 454).

[5]Idem, pp. 459–460. Palombella defends that this sustains the deference of constitutional democracies to international law, which is therefore a content dependent deference (p. 459). He further stresses that this content-dependent deference has been recently upheld by the European Court of Justice in the *Kadi* case (Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 285, 286).

shared claim,[6] but nevertheless one that leads to divergent normative views regarding how procedural rights should be implemented at the international level. In this chapter, the problem is addressed from the viewpoint of the mentioned interaction between different levels of regulation, in particular between European rulemaking and decision-making, on the one hand, and the international regulatory bodies or fora that condition or influence these 'internal' procedures, on the other.

The scope of the chapter is limited to participation of private persons in rulemaking or decision-making procedures developed at the international or global level that entail the mentioned interaction with EU administrative law. Participation rights of national governments (or of the EU) before international organizations or bodies as well as before other national governments are not considered here.[7] It is submitted that these instances of participation pertain more to the typical negotiation processes undertaken at the international level, or to the logic of establishing multilateral cooperation – more broadly, to the dynamics of international relations between states – than to standards of legitimacy.[8] Nevertheless, it is not ignored that national delegations may be an indirect gateway of private persons (especially NGOs) into international or global regulatory regimes. Furthermore, while it is acknowledged that rules of participation established at the international level (e.g. Aarhus Convention) may enhance opportunities of participation before the EU and national administrations,[9] this type influence of international law on EU law will not be analyzed here, except where this effect might result from the analysis of specific procedures.

The chapter is structured as follows. Section 6.2 broadly sketches the different meanings of participation predominant in supranational and international settings. This stresses the points of contact between the international and the EU governance approaches in this respect. Moreover, mapping the different facets of participation allows us to better focus the question addressed in this chapter: may the values and

[6]See, among others, Cassese (2005a), p. 688; Esty (2006), pp. 1521–1522.

[7]Sabino Cassese has mapped the different categories of participation existent at the global level and has distinguished five different types: participation of private persons before national administrations imposed by global norms; participation of national governments before international organizations; participation of national governments before other national governments; participation of international organizations in the administration of other international organizations; and participation of natural and private legal persons before international organizations (Cassese (2006), Section 2a). See also Cassese (2005b), p. 121, where he underlines the difference between notice and comment rules at the global and at the domestic level, to the extent that the former are usually destined at enduring participation between "equals", that is states.

[8]Indicating further reasons for these categories of participation, see Cassese (2005b), p. 181 and p. 195 (the pages are quoted according to a previous version on file with the author). Also, participation of international organizations in the administration of other international organizations can ultimately be underpinned in this same rationale.

[9]Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Arhus Convention), done at Aarhus, Denmark, on 25 June 1998 (available at http://www.unece.org/env/pp/documents/cep43e.pdf).

rationales of participation as endorsed in EU procedures be compromised by the reception of rules and decisions adopted by international or global bodies? This will very likely occur if the reception of international law by EU law bypasses participation procedures that would otherwise be followed by the EU institutions and bodies. In this case, the hearing of the interested persons should be displaced, created *ab origine*, or, at least, take into account decisions adopted at the international level. Section 6.3 highlights the difficulties in securing participation in the realm of, in fact, intertwined procedures where decisions adopted at the international and at the EU level converge in unitary outcomes. Finally, Section 6.4 analyzes a number of examples of different forms of interaction between international and EU law regimes and examines the possible impacts on EU participation rules and practices. The chapter concludes with an assessment of the consequences of "managed interactions" between legal systems on the opportunities of participation envisaged in the procedures analyzed.

6.2 Multiple Facets of Participation

Participation of natural or legal persons in the making of global regulation, in particular through the creation of notice and comment procedures, has been largely perceived as a prominent part of a putative 'global administrative law regime'. It is both a sign of the increasing impact of international or global regulatory regimes in the regulation of private conduct and, at least from one perspective, a sign that classical elements of administrative law exist and are maturing at the global level, or even a yardstick against which to measure the degree of maturity of global administrative law.[10] In particular, participation mechanisms and procedures ensured by international bodies have been interpreted or suggested by many authors as a means to increase the democratic legitimacy, accountability, transparency and visibility of decision-making by international bodies, thereby compensating for the lack of proper democratic structures at the global level.[11] Participation has been praised as means of strengthening good governance at the global level, or, at any rate, a rule that forms an intrinsic part of the emerging or maturing global administrative law.[12] These claims have either built upon existing participatory mechanisms or upon normative desires that similar mechanisms would be created. Only few have alerted to the potential risks of such endeavour.[13]

[10]Cassese (2006), p. 197 (version on file with the author) and Section 3a; Kingsbury et al. (2005), p. 37.

[11]See Steffek and Kissling (2006), pp. 136–7 and literature therein quoted. On the democratic value of participatory procedures at the international level, see for example, Kinney (2002), pp. 429–430.

[12]Esty (2006), pp. 1530–1534; Harlow (2006), pp. 194–5, pp. 203–204.

[13]Schmidt-Assmann (2008), p. 2076, alerting that a multiplicity of participatory possibilities may "confuse a clear view of responsibility, which is a basic prerequisite of democracy".

Undoubtedly, several participation mechanisms have been put in place by different international organizations, not least due to changing public perceptions regarding their legitimacy.[14] Insofar as these involve the so-called civil society in policy and rulemaking, or even adjudication at the international level, they certainly constitute a noteworthy development. Participation opportunities given to private persons in the global arena are characteristic of a phase of development of international law that includes private persons, and not only states or public regulators, as subjects of law. The existent forms of participation range from the inclusion of non-government representatives in the delegations representing states within a given organization, to procedural participation of NGOs that have been granted a consultative status and act as representatives of a transnational community, or, still, to provisions fostering consultation procedures followed by States or international organizations.[15]

Admittedly, opportunities of participation of civil society or, simply put, natural or legal persons, in global rule-making might be intended as – or even have the potential of – creating a public sphere at the global level. The interactions between decision-makers and those who might be considered concerned by regulatory acts might constitute avenues of legitimacy and, eventually, be the basis of increased transparency of international or global regulatory regimes, or even create new fora that will ultimately enable distinct forms of accountability.[16] Nevertheless, only empirical studies informed by theoretic conceptions of participation and democracy will allow assessing the extent to which this potential normative value of participation is or can be concretized.

At a less value-laden level (which cannot be fully detached from the former), opportunities of participation are bound to create links of collaboration between regulators and regulatees that may prove relevant to both sides of the 'regulatory

[14]Steffek and Kissling (2006), p. 154, mentioning the "shaming campaigns" conducted by NGOs on the legitimacy of WTO.

[15]Battini (2005). For the first type, Battini gives the example of the participation of employers' and workers' delegates of industrial organizations at the General Conference of the International Labour Organization (Arts. 3.1, 3.5 and 4.1 of the ILO Constitution, available at http://www.ilo.org/ilolex/english/constq.htm); for the second, the consultative role of NGOs based on Art. 71 of the United Nations Charter. Other examples of the former are the inclusion of NGOs in the Codex Alimentarius Commission (see "Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission" in Codex Alimentarius Commission. Procedural Manual, 19th edn, 2010 – available at ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual_18e.pdf). An example of the third type mentioned is the Code of Conduct for Responsible Fisheries, which urges States to provide for consultation in decision making with respect to the development of laws and policies related to fisheries (Art. 6.13, 11.3.2). Moreover, as will be seen below in more detail, the Codex Alimentarius Commission fosters the consultation of interested parties during risk analysis procedures (see Procedural Manual, Section V, Points 7 and 14).

[16]Participation, transparency and accountability are distinct concepts. They cannot be taken as synonyms nor as indistinctively serving similar normative concerns. Specifically on the distinction between participation and accountability, see Stewart (2006).

chain'. The former acquire information that could otherwise be out of reach (depending on the degree of diffuseness of regulatory capacities in each sector), have a means of better tailoring regulation to regulatory needs, of enhancing comprehensibility of regulatory processes, as well as, potentially, acceptability of regulatory outcomes, thereby facilitating compliance. The latter have the expectation that the substantive interests they voice in the procedure are taken into account and that they might, ultimately, be able to influence regulatory outcomes. As highlighted by Cassese, different rules on participation at the global level obey to different rationales.[17] Accordingly, these assumptions regarding the rationales of participation need to be tested in the light of the concrete regimes in which they emerge.

Scholars of European governance are certainly familiar with these more value-laden and more instrumental functions of participation. Indeed, similar rationales have spurred the prominent role of participation in the regulatory reforms undertaken, in particular, by the European Commission in the turn of the century.[18] Such rationales of participation seem to prevail in institutional discourses and practices regarding regulation that originate in a supranational setting, where 'incomplete' public institutional structures – from a democratic or a rule enforcement perspective – frame regulatory activities that stand on somewhat shaky normative grounds. Nevertheless, a more fragmented, less structured picture of participation emerges at the international or global level, due to the lack of institutional unity that exists at the EU level, the differences between sectors notwithstanding.

There are more concrete points of contact between the opportunities of participation developed at the global level – wherever they are ultimately implemented – and at the European level. More than parallel developments informed by similar concerns or regulatory needs, there are criss-crossing lines between the European and the international system in this respect. The EU procedural rules on participation in investigatory proceedings regarding anti-dumping measures have been influenced by the rules defined in the 1994 WTO Anti-Dumping Agreement is a case in point.[19] Perhaps more conspicuously, the current EU rules on public

[17]Cassese (2006).

[18]Cf. Commission of the European Communities, "European Governance. A White Paper", COM (2001) 428 final, Brussels, 25.7.2001, pp. 10, 15–17; Communication from the Commission, "On impact assessment", COM (2002) 276 final, Brussels, 5.6.2002, in particular p. 5 and 7–9; Communication from the Commission, "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission", COM (2002) 704 final, Brussels, 11.12.2002.

[19]Articles 6.1–6.5, 6.9, 6.11–6.13 of the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994 (available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf); Paragraph 5 of the preamble, Arts. 5 (10) and (11), 6 (2) and (5) to (7) of Council Regulation n. 384/96, of 22 December 1995, on protection against dumped imports from countries not members of the European Community (OJ L 56, 6.3.1996, p. 1).

participation in environmental matters are largely due to the transposition into EU law of the Aarhus Convention.[20]

More or less formal opportunities of participation should, however, be distinguished from participation rights proper.[21] The substantial difference between one and the other lies on the procedural position of the individual – quite fragile in the first case, legally protected in the second – and on the discretion of a public authority to grant or otherwise access to a decisional procedure – predominant in the first case, bounded by legal rules in the second. Participation rights are ultimately grounded on rule of law concerns. Participation rights, in their most complete or perfect form, are legally protected procedural rights that ensure the procedural protection of the underlying substantive rights and legally protected interests. They are, therefore, the reflection of substantive legal positions. They are grounded, in part, in the moral imperative of giving a voice to those who might be adversely affected by an act of a public authority. In part, they stem from requirements of sound decision-making, since the information and views brought to the procedure by the participants are likely to contribute to a better representation of the interests deserving legal protection that are involved in the factual situation being regulated. Both rationales converge under the rule of law.[22] Participation rights have emerged fundamentally in the realm of adjudication. Indeed, formally, they have been largely excluded from rulemaking procedures, be it at the national, European or international levels.

6.3 Hindrances to Participation at the International-EU Intersection

Participation, it is argued, whichever its rationale, should occur at the procedural moment in which the decision is actually formed. This is the only way of securing its *effet utile*. However, this raises several difficulties. First, the complex interactions between the European and the international legal orders escape linear forms of influence and are determined by the concrete circumstances at issue.[23]

[20]Articles 6–8 of the Aarhus Convention (quoted above note 9); Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17); Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ L 264, 25.9.2006, p. 15).

[21]On the plural facets of participation, stressing the difference between a legal and a non-legal approach to participation with reference to the EU, see Mendes (2009), pp. 258–66.

[22]See further Mendes (2011), Chapter 2, Section 2.1.

[23]Bethlehem (1998), p. 195.

This means that one needs to analyze the specific dynamics of regulation in each case without prejudiced positions based on assumptions of hierarchy or on the formal value of rules. More importantly, it might not be possible to locate the exercise of public authority at one single level, since this may be the result of "an interconnected effort of functionally interwoven bureaucratic actors".[24]

Second, rulemaking or decision-making procedures that stand at the intersection between the international and the European level are often the result of diffuse policy processes characterized by a fair degree of informality.[25] As a result, the link between regulatory acts adopted at the international level and those adopted at the European level might not be formally recognized. This adds to the difficulties of defining the moment in which the content of the act is effectively formed, which in itself causes hindrances to the exercise of participation. Moreover, when addressing this issue from a strictly rule of law perspective, informality makes it difficult to assess the effects that international agreements or decisions might have on the legal sphere of private persons as to justify the recognition of possible participation rights.[26]

Third, international rules, even when adopted through formal rulemaking procedures, are often non-binding instruments. In these cases, one could doubt of the need to adapt the domestic rules on participation in the light of a putative effect of international law.[27] In particular from a rule of law perspective, how can one justify displacing participation rights to this regulatory level when it is at all uncertain if they will be adopted by States or by the EU and hence become binding on individuals? In addition, even if international standards may actually have hard law effects, formally they might still be addressed to States, not to individuals. This is notably the case of the standards adopted by the Codex Alimentarius Commission, which filtered through Art. 3 of the WTO Agreement on Sanitary and Phytosanitary Measures, may constraint 'domestic' regulation to the point of effectively determining the content of the acts that are adopted internally.[28] However, at the moment in which they are adopted, it is not certain how they will be domestically received. This difficulty notwithstanding, one should bear in mind that "even though international institutions often do not have direct access to individuals, but only through the interface of states and other entities, this intermediate level hardly has a negative effect on the efficiency of instruments".[29]

[24]von Bogdandy and Dann (2008), p. 2016.

[25]Kingsbury et al. (2005), pp. 53–54.

[26]In general on the methodological difficulties of assessing the impact of international global standards in domestic legal systems, see Livshiz (2007), n. 34.

[27]Alerting in general to the difficulties of instituting "hard" rules at the international level fashioned according to a model of command-and-control administration, Kingsbury et al. (2005), p. 54.

[28]WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), available at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm. Battini (2005), pp. 340–342.

[29]Goldmann (2008), p. 1906.

Fourth, at the international level, largely due to the room left uncovered by public international organizations, private bodies tend to perform functions that are functionally equivalent to public regulation.[30] Therefore, private regulation may impact upon EU regulation in a similar way as do decisions of international organizations or bodies created by States or public entities. As such, participation procedures should also be recognized in relation to decision-making of private organizations or bodies. However, this poses additional problems to participation of interested persons that are left outside private negotiations, since participation might contend with the autonomy and preferences of private actors.[31]

Fifth, and finally, even if these difficulties are overcome and in the cases in which one may conclude that participation should be displaced to the international level, or that its exercise should take into account the different regulatory decisions adopted at different levels that converge into rulemaking or decision-making, accessibility problems might hinder the feasibility or the effectiveness of participation.[32] Interested parties affected by regulation originating in the global arena are likely to have increased difficulties in accessing the decisional procedures that concern them. This is in part due to the fact that "international institutions are operating at considerable distance from the communities concerned", both in geographical and in cognitive terms, that is, interested persons are likely to be less familiar with international procedures and to lack the technical knowledge that would enable them to effectively participate.[33] This raises the problem of representation: at this level, one very likely will need to favour 'imperfect' forms of participation, based on representation by collective bodies, rather than the direct intervention of the persons concerned in the decisional procedures. In fact, NGOs have an important mediating role with regard to participation.[34]

These considerations alert us at least to the fact that, if and to the extent in which one might reach the finding that participation should be recognized at the international level or be shaped as to take into account the multilevel reality of regulation, this needs to be conceptualized and pragmatically conceived in a way that is tailored to the specificities of the segment of the international legal order considered in each case.

The following section illustrates three different types of interaction between international regulatory regimes and the EU legal order: direct reception, reception

[30]Kingsbury et al. (2005), p. 54; von Bogdandy et al. (2008), p. 1384.

[31]Analyzing this problem in the context of the impact that globally defined food standards have had in the notice and comment procedures of US administrative law, see Livshiz (2007), n. 83 and pp. 1009–1010.

[32]On this, Kinney (2002), pp. 429–430.

[33]Kinney mentions geographic and cognitive accessibility problems (idem, ibidem). The quotation is from von Bogdandy et al. (2008), p. 1380.

[34]Alerting to the problems raised by the legitimacy expectations raised by the role that NGOs might play in the global arena, see Schmidt-Assmann (2008), p. 2076.

filtered by EU procedures specifically created for this purpose, reception following existing EU procedures. This range of situations elucidates the different impacts that may occur and how they may be produced.

6.4 Selected Interactions

6.4.1 Food Standards: Codex Alimentarius

Food regulation provides numerous examples of the "managed interaction" between the international, European and national legal systems, through which decisions adopted by the Codex Alimentarius Commission ultimately impact on the legal sphere of private persons. For example, by force of EU rules, guidelines of the Codex must be used by food operators as reference methods in the preparation of test samples, to which they are obliged under the EU hygiene rules.[35] Also as a result of EU law, Member States are under the obligation to require that sampling for the official control of pesticide residues in and on products of plant and animal origin be carried out in accordance with the relevant Commission directive, which incorporates Codex guidelines.[36] Another example is the EU Directive on irradiation facilities used for the treatment of foods, which gives binding force to Codex recommendations by determining that Member States can only approve such facilities if these meet the requirements of the relevant Codex code of practice.[37] However, not all cases of "managed interaction" mentioned raise issues of participation with regard to the hypothesis tested in this chapter. There might simply not be EU rules or practices on participation that could be bypassed by decisions adopted in international or global fora. Still, there are instances of direct reception of Codex standards where such rules apply and where direct reception may eschew the EU procedures that would otherwise be followed, and, as a result, the guarantees that might be associated thereto.

The following analysis will focus on food standards adopted by the Codex Alimentarius Commission (hereinafter, "Codex standards") that are included in

[35]Article 3 (1) and paragraph 3.1 of Annex I of Commission Regulation (EC) No 2073/2005 on microbiological criteria for foodstuffs, as amended (OJ L 338/1, 22.12.2005) and Art. 4 (3) (a) of Regulation (EC) No 852/2004, of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ L 139/1, 30.4.2004).

[36]Article 2 and paragraph 1 of the Annex of the Commission Directive (EC) 2002/63/EC, of 11 July 2002, establishing Community methods of sampling for the official control of pesticide residues in and on products of plant and animal origin and repealing Directive 79/700/EEC (OJ L 187/30, 16.7.2002).

[37]Article 7 (2) of the Directive 1999/2/EC of the European Parliament and of the Council of 22 February 1999 on the approximation of the laws of the Member States concerning foods and food ingredients treated with ionising radiation (OJ L 6/16, 13.3.1999).

the annexes of EU legislation through Commission implementing regulations, using the example of maximum residue levels for certain pesticides in or on food and feed products.[38] This occurs under the general condition that standards do not represent a lower level of protection than the one accepted within the Union.[39] At times, this condition is further specified: the Union delegation must not have presented a reservation or objection to the Codex Commission, and/or the Union delegation must have received the relevant scientific data prior to the decision of the Codex Commission.[40] In these cases of direct reception, one may argue that there has been a displacement of the standard setting activity to the international or global sphere, even though, in the case of the EU, this displacement does not necessarily mean disempowerment. In fact, the change of forum might be partially compensated by the EU's effective influence in the elaboration of the Codex standards.[41]

Concretely, maximum residue levels (MRLs) of pesticides are, as a rule, adopted following the procedures defined in Regulation (EC) 396/2005. These do not include any specific provision on duties to hear interested persons or the public. However, the general EU rules on food law applicable in this instance ensure the openness of the administrative conduct of the entities involved, in particular the European Food and Safety Authority (EFSA). It is noteworthy that, by force of Regulation (EC) 178/2002, the EU institutions and bodies (mostly, the Commission and the EFSA) have the legal duty to undertake public and open consultations in the preparation, evaluation and revision of food law (which includes laws, regulations and administrative provisions).[42] These consultations are mostly intended to ensure the transparency and confidence of the public in EU food regulation. The consultation regime in force in this sector is also a means of gathering expert information and of ensuring that, to the extent possible, the competing interests that are affected by food standards are taken into account, as to facilitate credibility, acceptability

[38]Annexes to Regulation (EC) 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC (OJ L 70/1, 16.03.2005), as amended by Commission Regulation (EU) 459/2010 of 27 May 2010 (OJ L 129/3, 28.05.2010).

[39]See Arts. 5 (3) and 13 (e) of Regulation (EC) 178/2002, of the European Parliament and the Council of 28 January 2020 laying down the general principles and requirements of food law, establishing the European Food and Safety Authority and laying down procedures in matters of food safety (OJ L 31/1, 1.2.2002).

[40]Paragraph 12 of the preamble of Commission Regulation (EU) 459/2010, *cit*. note 38.

[41]A similar consequence may be deduced, with regard to the US, from Livshiz (2007), pp. 975–997, even if "it is not immediately obvious whether international standards have altered the substance of the US regulation" (p. 977). As a member of the Codex Alimentarius Commission, the EU participates in the making of international food standards, being, arguably, one of the most influential actors in this respect, together with the US (Hueller and Maier (2006), pp. 272–273 and studies quoted).

[42]Articles 9 and 3, paragraph 1 of Regulation (EC) 178/2002, *cit*. note 39. Furthermore, the EFSA ought to develop effective contacts with interested persons, in particular with consumer and producer representatives (Art. 42 Regulation (EC) 178/2002, *cit*.).

and compliance (instrumental rationale of participation).[43] In addition, Regulation (EC) 396/2005 envisages the administrative review of the EFSA's decisions or omissions. This allows persons directly and individually concerned (as well as the Commission and Member States) to react during the procedure. This possibility of reviewing the exercise of EFSA's powers is extremely important given the weight that its scientific opinion has in the final decision adopted by the Commission.[44] Depending on how the Commission exercises its powers of control under Art. 13 of Regulation (EC) 396/2005, this can obviate to possible procedural and substantive misconducts of the EFSA that could otherwise be reflected in the final decision.[45] In this sense, the effects of this administrative review can be considered equivalent to the exercise of participation rights. Indeed, in the absence of participation rights proper, this review ensures the procedural protection of the persons (directly and individually) affected.

These rules do not apply in the cases in which MRLs defined by the Codex are directly received in the EU legal order without being subject to the filter of the EFSA. This occurred when the Codex standards were introduced in the EU legal order via the Commission Regulation (EU) 459/2010, which amended the annexes of Regulation (EC) 396/2005.[46] In cases such as these, the EFSA does not intervene. This is justified by the general rule according to which the EU and the Member States contribute to the development of international food standards and must promote consistency between these and EU food law.[47] In theory, the Commission is all the same obliged to undertake public consultations by force of Art. 9 of Regulation (EC) 178/2002, but there are no records of such practice.[48] There are, therefore, strong indications that the participation procedures otherwise applicable

[43]Mendes (2011), Chapter 7, Section 7.2.2.

[44]Chiti (2009), pp. 1405–1406.

[45]There is no indication as to the suspensive effect of this review procedure. However, given its effects (the Commission might ask the EFSA to withdraw its decision or remedy its failure to act), it is fair to assume that the Commission will wait before issuing a final decision on the main procedure.

[46]See recital 12 of the respective preamble. Not all the standards introduced by this Commission Regulation have their origin in Codex standards. However, these were not subject to the EFSA's evaluation within the normal procedure defined in the basic regulation (confront paragraph 6 of the preamble of Commission Regulation (EU) 459/2010, and respective footnote, with the mentioned recital 12).

[47]Article 13 (e) of Regulation (EC) 178/2002 (*cit*., note 39). See also paragraph 21 of the preamble and Art. 14 (3) of Regulation (EC) 470/2009, of the European Parliament and of the Council of 6 May 2009 laying down Community procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin (OJ L 152/11, 16.6.2009). This regulation defines two different procedures for the adoption of MLRs regarding pharmacologically active substances, depending on the existence of a Codex standard that the European Commission has supported in the Codex Alimentarius Commission meetings.

[48]Nor in the yourvoice website http://ec.europa.eu/yourvoice/consultations/links/index_en.htm, nor on EFSA's (http://www.efsa.europa.eu/en/consultations/consultationsclosed.htm). There is also no reference to this in the preamble of the diploma.

are not followed in cases in which the Commission limits itself to transpose a Codex standard to EU law. Certainly, in the case of MRLs of pesticides, the review procedure that, in terms of its effects, may be considered equivalent to the exercise of participation rights is not applicable with regard to the reception of Codex standards.

How much this effectively bypasses participation depends on the functioning of participatory procedures followed by the Codex Commission. Overall, the formal regime of participation fostered by the Codex Commission is rather open.[49] According to the respective Procedural Manual, during the uniform procedure for the elaboration of Codex standards and other texts (guidelines, codes of practice or other recommendations), the proposed draft standard is subject to comments not only from the Commission members but also from interested international organizations (steps 3 and 6). This might require the amendment of the draft proposed (steps 4 and 7).[50] However, relevant for our purposes are the procedural entitlements of international non-governmental organizations with an observer status (i.e. all those that have official relations with the WHO and the FAO, and others that, among other criteria, are active in at least three countries and are representative of the field of interest in which they operate). They are entitled to send an observer without right to vote to the meetings of the Codex Commission or of its subsidiary bodies, to receive the relevant documentation before the meetings, to participate in the discussions when invited by the chairperson and to circulate their views in writing to the Commission or its subsidiary bodies.[51] In addition to these formal rules, the Codex Commission seems to be sensitive to issues of participation.[52]

From the point of view of the decision-makers, participation in the procedures organized by the Codex Commission has similar purposes to participation in EU food procedures.[53] However, from the point of view of participants, the channels of accessing decision-making are different. While the formal rules on participation seem to be rather open, access might effectively be narrower. In particular, less

[49]Hueller and Maier (2006), p. 276.

[50]International intergovernmental organizations may be actively involved in the elaboration of the standards in other ways (e.g. they may be in charge of the initial drafting of the standard). See the *Guidelines on cooperation between the Codex Alimentarius Commission and International Intergovernmental Organizations in the elaboration of standards and related texts*, included in World Health Organization and Food and Agriculture Organization (2010), pp. 172–173.

[51]*Principles concerning the participation of International Non-governmental Organizations in the work of the Codex Alimentarius Commission*, in World Health Organization and Food and Agriculture Organization (2010), pp. 174–175, paragraph 5.1.

[52]World Health Organization, Food and Agriculture Organization of the United Nations (2006), p. 3 and p. 28.

[53]See *Principles concerning the participation of International Non-governmental Organizations in the work of the Codex Alimentarius Commission*, in World Health Organization and Food and Agriculture Organization (2010), World Health Organization, Food and Agriculture Organization of the United Nations (2006), p. 3.

powerful consumer or environmental associations, active in the EU, might not have the resources to operate at the global level, even if, formally, they could qualify as observers. In addition, at the moment in which food standards are adopted by the Codex Commission, it might be unclear what their effective impact will be, reducing therefore the incentives for EU-based associations to act at the global level. As a result, the effective opportunities of participation of interested persons that would otherwise participate through EU channels might be lower. Nevertheless, in general, in the absence of empirical studies, it is difficult to assess the impact that instances of managed interaction between international and EU food law have on participation. Given the existence of parallel channels of participation, only in rare cases this can be deduced directly from the legal texts.[54]

What seems to be certain is that there is no room in the procedure conducted by the Codex Commission to any procedural mechanism that could ensure the formal and substantive soundness of the respective decisions. In other words, there is no room for procedural protection of the persons affected, be it through participation or through administrative review procedures that could have similar effects to the exercise of participation rights. Although EU law is also still rather "immature" in this regard, there are ways of ensuring the procedural protection of the persons whose legal sphere is directly touched by the decisions adopted at the EU level, as is demonstrated by the example of the administrative review procedures regarding the definition of MRLs of pesticides. In this respect, direct reception of international food standards has a negative impact on instances of participation.

6.4.2 Persistent Organic Pollutants: The Stockholm Convention

In EU law, regulation of chemicals is essentially (but not exclusively) based on the REACH regulation.[55] This defines, among others, the procedures following which authorizations may be issued and restrictions may be imposed on the use and trade

[54]In some cases, the direct reception of Codex recommendations seems to pose clear limits to the object of participation carried out at the EU level. For example, according to EU rules, EU and national guides to good practice on feed hygiene, which need to be followed by food business operators, are developed in consultation with representatives of interested persons. However, the relevant Codex codes of practice need to be respected. These are, therefore, a limit to the ability of EU and national decision-makers to define the content of such guides and accommodate the comments of the interested persons. See Art. 4 (see however, Art. 20 (1)), Arts. 21 (1) and 22 (3) of Regulation (EC) 183/2005, of the European Parliament and the Council, of 12 January 2005, laying down requirements for feed hygiene (OJ L 35/1, 8.2.2005).

[55]Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 136/3, 29.5.2007).

of certain chemicals for the protection of human health and the environment. Such decisions have far reaching implications, in particular to manufacturers, traders and consumers. Both procedures are open to comments and information submitted by interested persons, inter alia, on alternative substances or technologies, so affected persons may voice their interests with regard to the envisaged decisions.[56]

Decisions with similar impacts on the legal sphere of private persons may result from the EU's obligations under international conventions to which it is part. This is namely the case of the Stockholm Convention on Persistent Organic Pollutants.[57] The EU legislator has created specific procedures for the implementation of this convention, in particular to allow EU law to adapt to international regulatory action in this area.[58] Admitting that certain chemicals might be regulated either under REACH or under the regime of the Convention, depending on whether regulatory action is triggered at the EU or at the international level, it is interesting to analyze, for our purposes, whether the EU implementation of international decisions adopted in the framework of the Stockholm Convention pre-empts participation procedures in force in the field of chemical regulation.

The Stockholm Convention lists a series of persistent organic pollutants, the uses, intentional and unintentional production of which the Parties to the Convention are obliged to reduce or eliminate.[59] These listings may be amended by the Conference of the Parties (COP), at the initiative of one of the parties, and upon examination by the Persistent Organic Pollutants Committee – a subsidiary body established by the Conference of the Parties, composed of government-designated experts in chemical assessment and management, whose recommendations need to be taken into account in the final decision.[60] The Committee assesses whether the chemical the listing of which has been proposed "is likely, as a result of its long-range environmental transport, to lead to significant adverse human health and/or environmental effects, such that global action is warranted" and prepares a risk management evaluation accordingly.[61] This procedure involves the Parties and the observers to the Convention.[62] Once this decision has been adopted at the international level, this will, in principle, trigger amendments of the Union listings of

[56]Articles 58 (4), 59 (4), 60 (4) (b) and 64 (2) (the different procedures that may culminate in authorizations) and Art. 69 (6) of REACH (restrictions of use).

[57]The Convention was signed in Stockholm, on the 22nd of May of 2001 (full text available at OJ L 209/3, 31.7.2006; see, in general, http://chm.pops.int/Convention/tabid/54/language/en-US/Default.aspx).

[58]Article 14 (1) of Regulation (EC) No 850/2004, of the European Parliament and of the Council, of 29 April 2004, on persistent organic pollutants and amending Directive 79/117/EEC (OJ L 158/7, 30.4.2004).

[59]Articles 3 and 5 of the Convention, as well as its Annexes A, B and C.

[60]See the details of the procedure in Art. 8 of the Convention (see also its Arts. 22 (4) and Art. 21). On the Committee, see Art. 19 (6).

[61]Article 8 (7) and Annex E of the Convention.

[62]Article 8 (7) (a) and 8 of the Convention.

persistent organic pollutants subject to prohibitions, restrictions or release reduction provisions under Regulation 850/2004.[63] For this purpose, the Commission adopts a regulation following a regulatory comitology procedure.[64] This has occurred recently, following amendments agreed at the fourth meeting of the Conference of the Parties to the Convention in May 2009 (COP4), which added nine chemicals to the annexes of the Convention.[65]

Possible effects of this procedure are the definition of the conditions under which the use of certain chemicals may be authorized and the establishment of restrictions to their use.[66] In the absence of international rules in this regard, both aspects would normally be regulated under REACH. However, in contrast to the definition of substances subject to authorizations under the general EU law on chemicals and to the restrictions procedure also defined in REACH (as well as to the authorization procedure of substances listed in one of the annexes of this regulation), the procedure followed for the implementation of a decision of the COP of the Stockholm Convention does not entail any opportunity given to the persons interested to submit comments or information.[67] The duties to provide for participation are, under REACH, assigned to the European Chemicals Agency (ECHA) and include, among other aspects, the need to consider information that can contribute to socio-economic analysis, submitted by interested parties, on the advantages or drawbacks of possible restrictions.[68] The Agency does not play any active formal role with regard to persistent organic pollutants falling within the realm of the Stockholm Convention (at least judging from the design of the procedures established by Regulation 850/2004). In these cases, the role of the Agency is in effect replaced by the evaluation made by the Persistent Organic Pollutants Committee established under the Stockholm Convention, which encompasses assessing the socio-economic impacts of possible control measures.[69] Admittedly, avoiding the doubling of expert committees that assess the risks of the same substances may be justified from the point of view of the efficiency of the procedure. It is also in accordance with the Union's commitment to ensure consistency of EU law with

[63]Article 14 (1) and paragraph 22 of the preamble of Regulation (EC) 850/2004, *cit*. n. 58. Article 14 specifies that amendments will be proposed by the Commission "where appropriate" and Art. 22 (4) of the Convention allows Parties to make declarations with respect to amendments to its annexes, in accordance with the general international rules on Treaty reservations.

[64]Article 16 (2) of Regulation 850/2004. The same procedure applies to modifications resulting from the adaptation of the annexes to scientific and technical progress (Art. 14 (2) of Regulation 850/2004).

[65]Commission Regulation (EU) No 757/2010, of 24 August 2010, amending Regulation (EC) No 850/2004 of the European Parliament and of the Council on persistent organic pollutants as regards Annexes I and III (OJ L 223/29, 25.8.2010).

[66]See current Annex I to Regulation 850/2004, as amended by Commission Regulation 757/2010, *cit*., and Annex II.

[67]Articles 14 (1) and 16 (2) of Regulation 850/2004.

[68]E.g. Arts. 69 (6) (b) and 71 of REACH.

[69]Article 8 (7) and Annex F to the Convention.

international law. However, in this case, and given the difference in the procedures followed at the international and at the EU level, this impedes the pluralism of views regarding in particular the socio-economic impact of control measures that is fostered by EU procedures.

Therefore, where EU restrictions on the use and production of chemicals do originate in international decisions, the implementation of the EU's international obligations under the Stockholm Convention bypasses the participation procedure that would otherwise take place. Also in this case, it is mostly the instrumental advantages of participation that are at stake.

An additional effect may follow from the amendments of the annexes to Regulation 850/2004. In accordance with Art. 61(6) of REACH, if a use of a substance is prohibited or restricted under the persistent organic pollutants regulation (Regulation 850/2004), the Commission "shall withdraw" prior authorizations for that use. This may result (or not) from decisions adopted by the COP to the Stockholm Convention. In EU law, by force of the general principle according to which the right to be heard should be granted before the adoption of adverse measures even in the absence of specific legislative provisions; this requires that the holder of the authorization be heard. In view of this possible effect, the right to be heard should be granted before a decision is adopted under Regulation 850/2004, as the effects to prior authorizations seem to be automatic by force of Art. 61(6) of REACH. This is, however, problematic when specific prohibitions or restrictions result from a decision of the COP to the Stockholm Convention. How can the right to be heard be ensured in these circumstances, and, in particular, at which level should it be exercised? An additional, more general obstacle pertains to the nature of the act through which the prohibitions or restrictions are enacted: these are formally acts of a general nature, with respect to which the *audi alteram partem* principle does not apply in EU law. Arguably, this is one of those cases in which this distinction is not justifiable in view of the effects of the acts at issue.[70]

6.4.3 *Pharmaceuticals: Harmonization of Technical Requirements for Registration*

A more subtle way in which the reception in EU law of decisions or rules adopted by international, global or transnational bodies may impact on EU participation procedures is exemplified by the reception of the guidelines adopted by the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The ICH is an informal transnational body, described as a "joint regulatory/industry project" and analyzed as a regulatory

[70]See, further, Mendes (2011), Chapter 4.

network.[71] It has a mixed public and private composition. While it involves representatives from EU and State regulatory entities (Japan and the US), it is composed also of private associations representing the pharmaceutical industry in these three regions. The international process of harmonization has been driven by the pharmaceutical industry.[72]

The ICH guidelines define the scientific requirements that drug industry may need to follow when requesting a market authorization, in order to ensure and demonstrate the quality, safety and efficacy of pharmaceutical products. They are intended to guide the assessment of the competent authorities and, by reducing the differences between the procedures for approval of medicines, reduce the costs of multinationals operating in the three regions represented in the ICH. ICH guidelines have, in EU law, the same status as other EU scientific guidelines, possibly replacing existing ones.[73] It should be noted that, despite their soft law nature, they have considerable constraining force in EU law. They are used by the European Medicines Agency (EMA) to assess the applications for the authorization of medicines and, on the agency's view, reflect "the best or most appropriate way to fulfil an obligation laid down in the [Union] pharmaceutical legislation". Although the EMA admits that "alternative approaches may be taken", these need to be "appropriately justified".[74] Proper and sufficient demonstration of the quality, safety and efficacy of pharmaceutical products is, according to Art. 12 of Regulation 726/2004, a sine qua non condition for the approval of medicines.[75]

These guidelines are approved by the ICH Steering Committee following a procedure that is grafted onto the existing procedures within the three regions covered by the ICH. In the case of the EU, draft guidelines approved at a first stage of the procedure (Step 2 guidelines) are published as a guideline of the Committee for Medicinal Products for Human Use (CHMP, operating within the EMA). These are then, and as such, subject to consultation within the EU (the same occurs in the other two regions).[76]

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[71]Respectively http://ec.europa.eu/enterprise/sectors/healthcare/international-activities/multilateral-relations/index_en.htm and Alessandro Spina (Chap. 13) in this volume.

[72]On the origins of ICH, see Contrera (1995), pp. 939–940; Vogel (1998), pp. 11–14. See also http://www.ich.org/cache/html/355-272-1.html.

[73]European Medicines Agency (EMA), "Procedure for European Union Guidelines and Related Documents within the Pharmaceutical Legislative Framework", London, 18 March 2009 Doc.Ref. EMEA/P/24143/2004 REV. 1 corr (henceforth EMA Procedural Guidelines), p. 9 (4.1.3).

[74]EMA Procedural Guidelines, p. 4 and p. 5 (2.1 and 2.2).

[75]Regulation (EC) No 726/2004, of the European Parliament and of the Council, of 31 March 2004, laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ L 136/1, 30.4.2004). See also Art. 26 of Directive 2001/83/EC, of the European Parliament and of the Council, of 6 November 2001, on the Community code relating to medicinal products for human use (OJ L 311/67, 28.11.2001).

[76]The formal procedure for the adoption of ICH guidelines is described in http://www.ich.org/cache/html/2830-272-1.html.

Since these consultations are carried out according to the procedures and practices of the European Medicines Agency, the impact on participation seems to be minimal or even virtually inexistent. However, in the case of ICH guidelines, the results of the consultation are assessed, not by the EMA, but by the ICH expert working group that prepared the draft guidelines. The assessment of the comments received, mainly the statement of reasons that reflects the reasons to accept and reject the observations of the participants is a crucial aspect of participation procedures. In this respect, EMA's practices are certainly more transparent than those of the ICH. In particular, EMA prepares a report on its assessment of the comments received and makes this publicly available.[77] On the contrary, there is little information on how comments are treated within the ICH. The ICH website informs us that the expert working group that prepared the draft guideline assesses them with a view to achieving consensus. Indeed, consensus is the basis of the ICH normative activity, throughout the procedure for the approval of guidelines.[78] At this stage, the representatives of the industry and of the regulatory entities that compose the expert working group may decide that the consensus that based the release of the draft guideline should be maintained after the consultation, or that modifications should be made. These need in any event to be agreed by consensus.[79] In contrast to the practices of the EMA, there seems to be no concern regarding the feedback to be given to the participants neither public explanations on the regulatory options finally made. As such, the value of the consultation procedure remains in the shade. It is hardly possible for interested persons to assess how their contribution has impacted on the final decision. Even if the rationales of participation are, again in this case, essentially instrumental, the feedback on consultation is a key aspect of the *effet utile* of such procedures.

Inclusiveness is another aspect the approval of ICH guidelines might hinder. EMA purports to involve in its consultation procedures patients, consumers and health care professionals, mainly through their respective organizations.[80] This concern is not matched by the ICH. Even though, as mentioned, EMA conducts the consultation on the ICH guidelines following its usual practices, the voice of parties outside the pharmaceutical industry – most likely already quite weak on such highly technical matters, however potentially relevant – is likely to fade as the regulatory process moves back to the international arena. Irrespective of how successful EMA's efforts of inclusiveness effectively are, this is a non-negligible effect of the reception of international pharmaceutical standards in EU law.

[77]EMA Procedural Guidelines, p. 17 (4.7).

[78]See link quoted in note 76.

[79]Step 3 of the formal procedure.

[80]EMA Procedural Guidelines, p. 16 (4.6). More generally, see "The EMA Transparency Policy. Draft for Public Consultation" (Doc Ref. EMEA/232037/2009 – rev), London, 19 June 2009, namely p. 10, available at http://www.ema.europa.eu/docs/en_GB/document_library/Other/2009/10/WC500005269.pdf.

6.5 Trumping Participation?

The cases analyzed provide solid indications as to the possible impacts that the "managed interaction" between international regulatory regimes and the EU legal systems may have on EU participation procedures and practices. Four main assertions may be made on the basis of the above analysis. First, where participation occurs both at the EU and at the international or global level, it is difficult to assess the effective impact of the reception of international decisions in the EU legal system without detailed empirical studies. However, it is fair to assume that the distinct channels of access to decision-making at the EU and at the international level will have an impact on participation, potentially narrowing the possibilities of EU-based legal persons of voicing their interests. Second, where the EU has created specific procedures dedicated to the implementation of its international law obligations, ensuring participation of interested persons is likely not a main concern, even where the ensuing decisions may have substantive regulatory effects similar to purely "internal" decisions adopted in participation procedures. Since the EU legislator could have easily created participation procedures also in these instances, this is an indication that the EU may be more active in internal procedures, in what regards participation and what participation entails, than in those that channel the reception of international standards or rules.[81] Third, even where participation seems to be secured by resort to previously established EU procedures followed in practice by EU bodies, these procedures have, in this case, an international function and this is likely to have consequences in terms of participation. In particular, since procedural standards may be less developed in the international or global arena, this might mean that the practices or duties that ensure the fulfilment of the purposes of participation (statement of reasons or, more generally, as in the case of ICH guidelines, informal feedback statements on the results and assessment of consultations) are bypassed by the actual international function of the procedure. Fourth, the example of food regulation indicates that, where existent, mechanisms to control the procedural and substantive correctness of public acts may be trumped by the reception of standards and administrative decisions of international bodies. Indeed, given the immaturity of international law regimes – and the assumption that they do not affect individual legal positions – possible avenues of procedural protection present at the EU level will more often than not be bypassed in the reception of international law by EU law.

These examples demonstrate that the values ensured by participation in the EU setting may effectively be bypassed by the reception of international law. The reception of international law in EU law therefore entails risks to the very purpose of EU participation procedures, since it may devoid them of sense or, at least, hinder their effectiveness. One possible path to prevent trumping participation in

[81] It should in any case be noted that also with regard to purely internal procedures Regulation (EC) 850/2004 does not establish any specific duties of participation (Art. 14 (2)).

these cases would be to create EU filters, as to make the reception of international law subject to compliance with procedural values in force in EU law. This could apply both to cases of direct reception, such as the cases of food standards analyzed in this chapter, but also to the reception of international rules following existent EU procedures, where the international function of procedures might in fact deplete the guarantees of participation. This would have the indirect effect of strengthening the procedural legitimacy of international standards. On the other hand, and as a matter of coherence, the EU procedures specifically created to ensure the Union's compliance with its international obligations would need to ensure a level of procedural protection parallel to that applicable to decision-making of purely internal acts, in particular in view of the production of comparable effects in the legal sphere of individuals.

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Chapter 7
EU Law, Global Law and the Right to Good Administration

Juli Ponce Solé

7.1 A New Paradigm of Administrative Law: Good Administration and Quality Administration

The main conclusions of this chapter are easy to summarize: the case law of the Supreme Court of the United States, the case law of the Court of Justice and the General Court of the European Union (EU), some decisions of national courts and the control exercised by certain international institutions such as the WTO Appellate Body, are gradually deploying an intense control on procedural defects and bad motivation, thus satisfying the control of good administration and contributing, albeit indirectly, to its consolidation. In this sense, although indirect and limited, judicial review of administrative action is an instrument contributing to the quality of the administration. Definitely, the development of various procedural legal principles and obligations related to the emergence of a right to good administration seems to be a feature of the judicial globalization process.

In this chapter, when reference is made specifically to European administrative procedure, it will be in the broad sense. Actually, this label not only refers to EU regulatory and case law developments regarding the administrative procedure but it also includes the work of the Council of Europe and the European Court of Human Rights as well as national legislative and case law developments across Europe. Also, as already stated, we will make reference to the regulation and case law from non-European countries such as the United States, which may be relevant as a source of inspiration for future developments in Europe, whether at the EU level, for the Council of Europe or for national legal systems. Finally, the example chosen to show the globalization of due process and good administration will be, as already mentioned, the functioning of the World Trade Organization.

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Although presented in simple terms, the main conclusions of this chapter and the full understanding of possible judicial development (with far from negligible practical consequences) imply a deep understanding of complex issues, such as those related to the theory of administrative legitimacy, the legal concept of good administration, and the role of judicial control of government in modern societies. This chapter bears a reflection on the connections between law and governance and on the relationship between law and other social sciences with regard to the right to good administration, emphasizing the role that judicial review of administrative behavior has in ensuring it. Indeed, good governance is a legal concept that can be one of the gateways to exciting collaborations between different approaches, such as those of law, economics or political science. Also, as it will be pointed out, the judicial control of government is an important element – although not the only or unlimited one – which helps to avoid bad administration and to provide quality guarantees in the behavior and decisions of government.

7.2 The Role of Courts in US Administrative Law

As noted by various authors, procedural regulation is a latecomer in European administrative law: in the tradition of continental Europe, the guarantee of freedom has not been in the genesis and consolidation of the features of administrative measures, but in the reaction to them through judicial protection. If the American legal tradition has devoted much attention to the administrative procedure and judicial supervision, therefore, it may be worth considering some of its highlights as a reference point. Nothing should be considered unusual in a global context in which the Supreme Court of the United States refers to the jurisprudence of the ECHR (and vice versa) or the Spanish Supreme Court refers to decisions of its American homonym.[1]

Although public law scholarship in the United States does not recognize the legal term "good administration," case law and legal doctrine use a similar concept to understand that administrative procedures are important to ensure the quality of decisions.

At the highest level, the Unites States Constitution has an interesting element with regard to the procedural aspects of administration: the due process clause. What is the reason for this constitutional attention to procedural aspects? Different values at stake (such as democracy, accountability, good governance, effective protection of rights, and judicial review respecting the functional distinction between the various powers) can justify this constitutional interest. Sabino Cassese has highlighted that "the regulation of administrative procedure has been a major turning point in the history

[1]Tsan-Ta Lee (2007).

of various constitutions (such as the US Constitution, for example) and it is considered to be an essential requirement of good administration".[2]

Yet, on the U.S. constitutional level, the due process clause does not have any relation with good administration. This clause, as interpreted by the US Supreme Court, is simply a defence mechanism, designed to protect citizens.[3] To be activated, due process requires entitlement; that is to say, ownership of a subjective legal right granted by law to an individual. As has been emphasized, where administrative discretion exists, there is no entitlement and, therefore, the clause does not come into force.[4]

At a lower level, the Administrative Procedure Act (hereinafter APA) has an important role. In relation to the so-called informal adjudication procedures, however, this standard says almost nothing. This type of procedure accounts for a high percentage of all administrative procedures. In connection with this, the requirements of the due process clause will be activated depending in each case on the existence of entitlement, as we have already noted, of the type of decision (though not applicable in the case of rulemaking procedures) and provided that life, freedom, or property are at stake.[5]

The main player on the American scene, in any case, is the judicial power, because it ultimately defines the standard of review of administrative action. Therefore, it has the last word on the level of demand in relation to the proper development of public functions through the proceedings.

In this sense, the case law of the US Supreme Court has sought to defend the rights of individuals and, at the same time, to promote good public decisions, without exceeding its constitutional limits, through the judicial doctrine known as "hard look" since the 1970s.[6] Especially with regard to the rulemaking (but also with respect to procedures for producing what we would consider to be administrative acts, i.e. adjudication), the Supreme Court has required administrations to act carefully, paying particular attention to the relevant factors and interests involved. Case law has established a duty to listen to citizens, the duty to answer their allegations with explicit justification of the reasons that lead to their rejection, where this is the case, and the duty to study the verdict carefully before adopting it, as a means of ensuring good decisions.

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[2]Cassese (1993).

[3]See *McNabb v. United States*, 318 U.S. 332, 347 (1943), where Justice Frankfurter pointed out that "The history of liberty has largely been the history of observance of procedural safeguards"; in *Shaughnessy v. United States*, 345 U.S. 206, 224 (1953), Justice Jackson underlined that "Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied".

[4]For example, requirements of due process are not applicable to rule-making. See *Bi-Metallic Inv. Co. v. Colorado*, 239 U.S. 441 (1915); and Searchinger (1986).

[5]Accepting the applicability of the due process clause, then the next step is a decision about how much process is due. See general criteria in the decision *Mathews v. Eldridge* (424 U.S 319 (1976)) and Fox (2003).

[6]See Leventhal (1974); Pedersen (1975); Skelly Wright (1977).

Although the term "hard look" originally meant the careful scrutiny that the administration should give to issues, today it more commonly refers to the detailed and intensive analysis that courts often carry out when reviewing cases of administrative discretion. This judicial doctrine, also known as the standard of "reasoned decision making," is widely used in case law and shows how in modern US public law "the emphasis in the review of arbitrariness has moved towards the scrutiny of the quality of administrative reasoning".[7]

Using Art. 706(2)(A) of the APA, American courts apply the arbitrary and capricious standard to all administrative activities. In the realm of adjudication, the leading case is *Citizens to Preserve Overton Park v. Volpe*.[8] In this decision, the Supreme Court sustained that a decision taken by the Secretary of Transportation with regard to highway funding should be based on the consideration of the relevant factors, with the absence of a clear error of judgment. In the area of due process, the key verdict is *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.,*[9] which upheld the appeal of a decision by the National Highway Traffic Safety Administration concerning the amendment of a government regulation that required all motor vehicle manufacturers to include one or two safety devices (air bags or automatic seat belts), in every vehicle manufactured in the United States after a specific date. In this decision, the Supreme Court declared the contents of the test "arbitrary and capricious" in these terms: "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise".

In connection with regulatory proceedings, the doctrine of "hard look" also refers to the adequate consideration test. The lower courts regularly apply it as a basis for concluding that a regulation is arbitrary or capricious because an agency did not consider "adequately" critical comments to their proposed ruling, potential alternatives to such a ruling, and inconsistent studies with the facts on which it is based. Since the 1970s, the courts have required the administration to include in their statement of basis and purpose (the justification for the regulation, indeed) detailed arguments supporting the exercise of discretion and showing the existence of due care, while considering the material introduced into the proceedings and allegations presented during the public hearings provided for in Art. 533 of the APA.

However, judicial pressure has overwhelmed the American system of administrative law, as many authors have highlighted. The regulations seem to have a

[7]Levin and Gellhorn (2007).

[8]401 US 402 (1971).

[9]463 U.S. 29 (1983).

high percentage of legal challenges and rules annulled. The courts are establishing costly procedural burdens and demanding more than a hundred pages of explanations in order to consider a regulation legally binding, thereby contradicting the meaning of Art. 533 APA which requires a "concise general statement of basis and purpose".

Among the negative consequences of the application of hard look, are the effects that the *modus operandi* of the courts has on administrative behavior.

In a string of concatenated elements, it is highlighted that judicial predisposition to overturn regulations due to the absence of a proper mode of exercise of discretion leads to there being a high rate of challenges, since hard look is clearly a powerful weapon for the individual. At the same time, among the challenges a high proportion of them causes the annulment of the regulation, because about 60% of appeals result in the invalidity of the regulation, which is considered by various observers to be a symptom of illegitimate judicial activism.

These high rates of litigation and nullity mean that the agencies tend to surround the regulations with numerous and often expensive studies, some of them at the expense of the private sector, to try to "shield" the standard in anticipation of a hypothetical, yet probable, judicial control.

Since it is impossible to ascertain what the court will consider a sufficient study of the issue, agencies tend to accumulate analyses in the record. Not surprisingly, this results in considerably higher costs for verdicts to be reached, as well as taking longer.

On the other hand, the stifling judicial control means that the government, burdened by demanding resources required to prepare a rule, chooses to concentrate its efforts on certain rules, leaving infraregulated areas of particular complexity, in anticipation of notable difficulties in developing its policies through regulations, occasionally leaving this instrument and resorting to other forms of action.

Some voices in the legal doctrine have emphasized that there is an excess of judicial activism and that the necessary self-restraint, which is required by the principle of separation of powers, has disappeared. Several specialists have emphasized that judicial reviews cause delays and wasted time and money, paralyzing public policies in some sectors and threatening the general interests such as health or environmental protection. This phenomenon is known as ossification or paralysis by analysis.[10]

The American example shows that judicial control is important and necessary to ensure good administration, but, simultaneously and paradoxically, it may be a contributing factor of bad administration. Virtue must lie somewhere in the middle, as we will try to argue at the end of this chapter.

[10]See Davis and Pierce (1994); McGarity (1992, 1995, 1997); Pierce (1991, 1995a, 1995b, 1997); Shapiro and Levy 1995; Shapiro 1997; Strauss 1996; Seidenfeld (1997a, b).

7.3 The Council of Europe's Recommendation on Good Administration and the European Court of Human Rights

The Council of Europe has also been active in the field of good administration. First of all, it is noteworthy to mention the resolution of 28 September 1977 on the Protection of individuals with regard to actions of administrative authorities. Although in its text there is no specific reference to the term "good administration", this idea is implicit. Secondly, the Recommendation R(80)2, adopted by the Committee of Ministers on 11 March 1980, concerning the exercise of discretionary powers by the administrative authorities, does not refer to "good administration" either, but there are a number of principles designed to achieve this end. Finally, the Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration contains a number of interesting references to good governance and its relationship with regulatory quality, social needs, and the weight of the interests of social and individual interests, good governance, other non-legal mechanisms (organizational quality, adequate human resources, and governance), the requirements of the right to good administration (legality, equality, impartiality, proportionality, legal certainty, adopting decisions within a reasonable period, participation, respect of privacy and transparency) and its connections to administrative procedures. This Recommendation also includes several suggestions to Member States to promote good governance. Among them, there is one on the adoption of the standards established in a model code which is attached as an appendix to the Recommendation itself.

On the other hand, we cannot forget the jurisprudence of the ECHR which has built the notion of good governance around Art. 6 of the Convention, applying it to resolve conflicts both in the administrative and in the judicial field.[11]

7.4 The EU: Legal Provisions and Case Law

In principle, one could argue that the impact of EU law in national administrative procedures should be limited. This is the conclusion that could be reached taking into account that the application of EU Law, as we know, is the responsibility of the national public authorities of member states (indirect administrative enforcement) and that they enjoy procedural autonomy to do so (with the well-known exceptions of the principles of equivalence and effectiveness).

However, on a more careful analysis of the situation, we can see how various factors have allowed EU secondary law and case law to exert an influence on

[11]See decision of September 20, 1997, Case *Erstas Aydin and others vs. Turky*, or decision of May 2005, case *Intiba contra Turquía*.

national administrative procedures. On the one hand, the need for a uniform and coherent application of EU law has consistently led secondary EU law, either through general encodings with limited substantial effects[12] or by sectoral codifications, notably with regard to environmental issues,[13] to generate procedural harmonization. Secondly, as we know, EU law influences national law, through the generation of procedural principles, such as, for example, legitimate confidence, first adopted by judicial decisions of the Spanish Supreme Court and later included in Art. 3 of the Spanish Procedural Act (30/1992), after its amendment in 1999.

As evidence of the existence of a common European background in relation to the administrative procedure and good administration, the consecration of the Charter of Fundamental Rights should be noted. The Treaty of Lisbon has recognized the Charter, including its Art. 41, full legal effects. In any case, as it is known, the right to good administration is only applicable in legal relations with EU institutions, irrespective of national authorities, although there are scholars who argue the need to extend it to them, at least when applying EU law.[14] What is unavoidable, however, is that the concept of good administration keeps seeping into national law through the work of domestic courts, as in the Spanish case in judgments by the Constitutional Court,[15] the Supreme Court and the regional courts. All of them allude to Art. 41 of the Charter of Fundamental Rights of the EU in the resolution of strictly internal conflicts.[16]

In addition, as it is known, in 2001 the European Parliament adopted the European Code of Good Administrative Behaviour, a possible embryo of a future European codification of administrative procedure. In July 1999, the European Ombudsman recommended that the Community institutions and bodies should draw up a draft Code of Good Administrative Behaviour. This draft contained 28 Articles. The European Parliament adopted a slightly modified version of the draft on September 6, 2001. During the discussion of the European Parliament on the Code of Good Administrative Conduct (the Code), a member stated that "there are two important issues at stake here. Firstly, to promote the rule of law and secondly, to respect European citizens". The resolution of the European Parliament urged the Commission to submit a legislative proposal containing this Code under Art. 308 of the European Treaty.

[12]We are referring to several regulations, e.g. 1182/71, of the Council, about rules on dates and time limits, or Directives, e.g. 2004/18/CE, of the Parliament and the Council, about adjudication and contracts.

[13]See, for example, the directives on environmental impact assessment.

[14]Nieto-Garrido and Martín (2007), p. 86 ff.

[15]STC 53/2002, February 27.

[16]E.g. Decision of the Higher Court of Valencia, September 14, 2005.

It would not be possible to explain here the entire contents of the Code. As we have noted elsewhere, recognizing its positive aspects, future regulation of the Code, conferring it a binding effect, should provide an opportunity to improve it.[17]

In this sense, both Art. 41 of the Charter and the Code, constituting a kind of procedural coding, can represent, as we mentioned, the starting point for future codification of administrative procedure in Europe. The prospect of a codification of administrative procedure at EU level is already a classic issue, with supporters and detractors.[18]

In our view, here expressed very briefly, there are good reasons to consider seriously the advantages that would give a (flexible) regulation of basic procedural principles and institutions in Europe: for example, legal security, vertical alignment between the EU and Member States, and horizontal alignment between the Member States, which would enhance the application of EU law. In that sense, it seems difficult to deny the possibility for the EU to regulate procedural aspects related to the actions of the administration itself, whereas it may be more debatable that the regulation be extended to the procedural aspects associated with the application of EU law by the States, although we believe that Art. 352 TFEU provides enough coverage for this to happen.

As for the case law of the Court of Justice of the EU and the General Court (former Court of First Instance), several judgments have referred to good administration both implicitly and explicitly. With regard to the Court of Justice of the EU, a number of decisions are remarkable, especially since the seventies,[19] including, for example, the case *Technische Universität München v. Hauptzollamt München-Mitte,*[20] prior to the Charter of Fundamental Rights, in which the existence of a duty of good administration (due care) is connected with the right to be heard and the duty to give reasons.

As noted by the former Court of First Instance in the Case *Max.Mobil Telekommunikation Service GmbH. v. Commission,*[21] already after the adoption of the Charter, the right to good administration is "one of the general principles which are governed by the rule of Law and they are constitutional traditions which Member States have in common" with reference to Art. 41 of the Charter of Fundamental Rights of the EU. The Court has been particularly active in the imposition of a set of principles to guide the behavior of European administration: the right of access to information, the right to a hearing, the principle of caution (or due care or due diligence), and the obligation to state reasons.[22]

[17]Ponce Solé (2002).

[18]Harlow (1996).

[19]See Ponce Solé (2001), p. 143 ff.

[20]C-269/90 [1991] ECR I-05469.

[21]T-54/99 [2002] ECR II-313.

[22]Nehl (1999); Schwarze (2004).

7.5 The World Trade Organization, Global Administrative Law, and the Role of Procedure

As we move forward in time, a feature of the process of the globalization of law is the emergence of various procedural legal principles, or indeed, of real procedural legal obligations related to the emergence of a right to good administration.

An example of this trend can be found in the work of the Appellate Body of the World Trade Organization. This organization, as we know, has almost universal jurisdiction on trade issues among its 151 Member States. Despite its modest name, it can be argued that the Appellate Body serves as a global Supreme Court (since it has the power to virtually cancel or overturn laws issued by Member States that violate world trade law contained in WTO agreements), and, at the same time, it serves as a global Administrative Tribunal (since it controls the regulations and administrative activities of the Member States that violate WTO law).

The Appellate Body has issued a number of interesting resolutions creating a common global law in relation to administrative procedures. Among them is the case of Shrimp products in 1998, in which the appellate court noted that the UnitedStates had not provided any of the States, whose exports of shrimp had been banned by internal administrative regulations, with basic guarantees of administrative procedures, such as the opportunity to be heard, or plead against the charges. It is also noteworthy to refer to the case that pitted Antigua and Barbuda against the United States of America in 2005, in which the Appellate Body upheld that U.S. restrictions against Internet gambling sites that do not operate in their territory are illegal. Among other substantive considerations linked to the principle of proportionality, the resolution states that the United States did not take into consideration, before reaching its decision, the relevant interests of other states concerned (in other words, it violated the duty of objectivity, an integral factor of the wider concept of good administration, as it is well known).[23]

7.6 Conclusions

The effective control of the administrative compliance to administrative due process is crucial. Administrative awareness of the value and importance of the procedure also has to pass through the daily finding that the breach of the duty of good administration has concrete consequences. This study has outlined the various ways in which this control can be achieved, with particular attention to the role that administrative–litigation jurisdiction can exercise.

[23]See Ponce Solé (2010).

In a context of continuous technological change and expansion of areas of technical discretion – the environmental field is an excellent example in this sense – judicial control is going to be doomed to a possible dilemma: either tighten control over the outcome of the exercise of administrative powers by an escalation in the aggressive use of general principles or relinquish all control over the last nucleus of the decisions of Government and Administration. Both ways, as we can imagine, are full of gray areas: either a possible invasion of constitutionally forbidden areas, or a waiver of the necessary judicial role of control of administrative action and defense of the rights and interests of citizens, respectively.

Yet, it is possible to argue that the dichotomy exposed is not true and that a third way exists: the effective control on the exercise of discretion, through procedure and motivation as a judicial means of ensuring that the final discretionary result is reasonable. Reasonability understood as a result of compliance with legal duties connected with the constitutional principles of good administration, the right to due process, to achieve quality management, transparency, democracy and respect of minority interests. This way of judicial review does not, in any case, require the invasion of functional areas corresponding to executive power. The control of administrative procedures, in this sense, can help to offset the inherent limitations of judicial control of administrative discretion, unanimously highlighted by European case law.

This, we believe, is the way that judicial review should take, cautiously and with awareness of the inherent risks already outlined, if it aspires to keep up with the demands that a changing and complex reality and a culturally plural society are going to impose on the rule of law.

On the other hand, the new legal approaches proposed in this chapter should allow administrative law, without ever deviating from its concern about the security of citizens in relation to public administrations, to move in the direction of contributing to achieve administrative decisions of sound quality. In this regard, as we have noted, a feature of the process of judicial globalization seems to be the emergence of various legal procedural principles, real legal procedural obligations related to the right to good administration.

In conclusion, not all administrative evils are remedied by the decision-making process, and this device in itself, like all others, is capable of generating other evils when used inappropriately. Yet, some of these problems could be remedied if, playing with the title of the famous work of Dworkin, the legislator, the administration, the courts and society at large were to take seriously the right to administrative due process.

Only then will public law be able to actively contribute to a gradual historical evolution, which has resulted in the transition from the immunities of power to total judicial control and which has to culminate in a leap from mere avoidance of arbitrariness to the achievement of good administration.

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Part III
Developing Linkages and Networks

Chapter 8
"Interlocutory Coalitions" and Administrative Convergence

Gianluca Sgueo

8.1 The Spill Over of Methods of Administrative Governance Between the European and the Global Legal Spaces. The Role of Global Civil Society

The growing involvement of organized and unorganized groupings, collectively referred to as *global civil society,*[1] in policy-making can be regarded as an important means for the spread of common administrative standards for regulatory decision-making within the European Administrative Space (EAS) and the global legal space.

Arguably, the expanding co-operation between this "transboundary" operating civil society, the European Union (EU), and other Global Regulatory Regimes (GRRs),[2] is likely to: (1) help a core of common procedural values to spread within the global decision-making processes; (2) benefit the integration between the EAS and global administrative law, both in the policy formulation and in the implementation of rules; (3) and, ultimately, reshape governance into a web in which national, supranational and global organisms, the public and the private sphere are all united "under a single logic of rule".[3]

The validity of this hypothesis, however, might be challenged with three distinct, if often inter-related, counterarguments. First, non-state actors' finances, agenda,

[1] *See* Kaldor (2003a), p. 583.

[2] This chapter uses the label of "Global Regulatory Regimes" to include the various forms of cooperative relationship between public and private bodies to fulfil a policy function at the transnational level. *See* Kingsbury et al. (2005), p. 1.

[3] See Hardt and Negri (2000).

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and governance are not legitimate themselves. Neither a representative nor an electoral process makes them accountable. At its heart, the only source of legitimacy of international civil society actors is the factual and diffuse acceptance of their presence and active role in the global arena. Hence, the problems they potentially raise: how can accountability be provided to GRRs by bodies that are not accountable for themselves?

Another challenge that merits closer scrutiny pertains to the practical implications of non-state actors' contribution to decision-making. Regardless of the possible benefits for the "democratization" of the global and European legal spaces, critics submit that a major opening to private parties' interests may distort or delay the decisional workflow. The problem is not merely rhetorical. The massive and direct participation of stakeholders in decision-making processes beyond the state is perceived as counterproductive, rather than beneficial for the effectiveness of decision-making. By contrast, it is argued that a smaller number of participants, working with no influence from the outside, could guarantee faster decisions and would therefore reduce the organizational expenses.

Third, and most significant, while theories on legal globalization have been successful in shedding light on the assumption that increased GRRs' legitimacy would prelude to an engaged and committed global *democratic* public sphere, these theoretical accounts suffer from a lack of empirical evidence. Stakeholders are consulted by GRRs both indirectly (the decisions are made by elected officials who are voted into offices to represent citizens' beliefs) and directly (through procedural mechanisms resembling the typical structure of an administrative process of law). Yet, despite their far reaching implementation of participatory models, GRRs remain *loci* where private interests receive poor or inadequate attention. The main weakness of indirect representation lies in the shift from the representative to the executive experience. The fact that global and European regulatory-makers are acknowledged a power of creativity in developing public policies and managing social conflict means that, in the face of changing circumstances, the results of consultation may not be fully transposed into the final decisions, or may not be correctly implemented. By contrast, procedural representation's drawbacks develop from scarcity in transparency and openness of GRRs' decision-making processes.

The most direct consequence of these shortcomings is that, while the efforts put by civil society representatives into increasing GRRs' transparency and openness might well result in changes relevant to the legitimacy of specific decision-making processes (and perhaps even for the legitimacy of single GRRs' regulatory frameworks), it might not be as significant for influencing the formation of a global system of governance in which principles and values of administrative fashion are shared. The suggestion that civil society's active presence in the global legal space is fostering the harmonious growth of EAS and global administrative law may thus be clashed.

It is these controversies that this chapter wishes to begin to probe. In order to understand whether, and to what extent the presence of civil society's actors in the global legal space brings the EAS and global administrative law closer, this chapter

is organized as follows. To begin with, a conceptual framework through which to identify and to analyze the phenomenon of civil society participation in the global and European decision-making is provided. Sequentially, focus is directed towards the contribution of civil society networks to bolstering principles of administrative governance at the European and the global level. Building on such analysis the final part of this chapter develops a theoretical framework for reflections on the role of international civil society in shaping closer connections between the EAS and global administrative law. To conclude, this chapter details the civil society networks' potential to develop and enlarge in the future.

8.2 Case Studies

The arguments put forth in the previous pages will be illustrated by reference to selected study cases.

The first case is provided by the *Pan-European ECO forum*. The *ECO forum* coalition was originally established in concomitance with the 1993 "Environment for Europe" Ministerial Conference under the name of "*Pan-European NGO Coalition*". The coalition has coordinated civil society's participation and involvement in the political process set out in the final declaration of the Conference, also known as "EFE process", ever since. The current name was adopted in 1998, during the negotiations for the ratification of the Convention on Access to Information, Participation and Access to Justice, signed in Aarhus in 1998 (thereinafter, "the Aarhus Convention"). The government representatives decided that non-governmental interested parties should be given the opportunity to express their opinion and ideas. The invitation to participate in the negotiations was then extended to all the Non-governmental Organizations (NGOs) concerned with environmental issues. In order to be more influential, the NGOs that adhered to the invitation melted into the *ECO Forum*. At present, the *ECO Forum* is in charge of coordinating the civil society interests with the Meeting of the Parties (MOP) of the Aarhus Convention.

Second is the *NGO Forum*, an Asian-led network of civil society organizations whose mission is to enhance the capacity of civil society to negotiate with the Asian Development Bank (ADB). The objectives of the *NGO Forum* include the stimulation of public awareness; the establishment of a cohesive framework supported by other public interest groups to generate strategies on issues related to the ADB's activities; the influence on the ADB to adopt poverty reduction-focused and grassroots-based policies for sustainable development; and, finally, the assistance towards local communities through networks aimed at fighting for equitable, social, and environmental justice, democratic governance, and safeguards in the ADB's projects.

Third is the *Consultative Platform*, which collaborates with the European Food Safety Authority (EFSA). The *Consultative Platform* was established in 2004 by

the EFSA Management Board (MB) pursuing Art. 36 of the Regulation n. 178/2002, which disposes on the EFSA's duty to establish and to promote a network of organizations operating in the field of food security. The aim of such networking is to facilitate scientific cooperation, to exchange information, and to implement future projects. The *Consultative Platform* undertakes the main task of improving the relationships between interested parties and the EFSA.

Fourth is the *Conference of International Non-Governmental Organisations* (CINGO), which provides a venue where all the Non-governmental Organizations (NGOs) that have been awarded the participatory status by the Council of Europe (COE) can make their initiatives considered. The CINGO was created in 2005 and is now recognized as an institution of the COE. In view of this, it constitutes a fundamental pillar in the COE "Quadrilogue" with the Committee of Ministers, the Parliamentary Assembly, and the Congress of Local and Regional Authorities. Among the tasks that are fulfilled by the CINGO, two deserve further attention. First, the CINGO ensures that the participatory status of single NGOs functions correctly. In so doing, the *forum* helps to affirm the political role of civil society at the COE. Second, and more relevantly, the CINGO decides on policy lines and defines and adopts action programs.

8.3 The Global Associational Revolution

Today, non-state actors are increasingly operating on a European or worldwide rather than just a national stage. The most prominent role among the panoply of non-state actors operating at the global level is played by NGOs. Described as the tip of the iceberg of the international civil society,[4] NGOs have widely increased in number over the last 30 years. Accordingly, their leverage on the global stage has gained momentum to the point that scholars make reference to it in terms of *global associational revolution*.[5]

Occasionally – but more relevantly for the purposes of this chapter – NGOs and other non-state actors cooperate through networks constructed by reference to their common interests and needs.

Six chief factors drive the emergence of civil society networks. One factor is the expansion in the number of NGOs that not only are global by means but also deal increasingly with problems of global rather than just local dimensions, such as environmental protection, labour rights, women's rights, or human rights.

[4]See Edwards (2000), p. 8.

[5]See Salamon and Anheier (1996). On the contribution of NGOs to the formation of the international legal order, see Keck and Sikkink (1998); Krut (1997); Held (1995); Shaw (1995); Anheier et al. (2001).

Another factor relates to the diffusion of technology, which has decreased the costs of trans-boundary communications, providing means for NGOs to communicate with greater frequency.

Third, globalization has brought dramatic increase in travel and transportation of goods and people around the globe. Many of the leaders of civil society movements have been educated abroad, and have gained work experience around the world. Building from this background, their visions of advocacy and lobbying base on massive networking carried out on a global scale.

A fourth catalyst of a networked global civil society is higher education. The quantitative and qualitative growth of cross-border partnerships among public and private universities has become the epicentre of a vigorous scientific debate over globalization and civil society. Thousands of conferences, research projects, and teaching programmes gather an increasingly developed network of students and scholars from all over the world.

A fifth factor is related to economic reasons. The increased number and visibility at the global level of NGOs has augmented the accessibility to donations (from both the private and the public sector). This increased accessibility has not, however, been corresponded by a substantial growth in the amount of grants and donations available. On the contrary, it is well acknowledged that chronic under-funding and understaffing affect many NGOs through their lifespan. Networking may be thus explained, on the plus side, in the light of the drive for growth embedded in NGOs' increased entrepreneurship and expanded operating expenditures or, on the minus side, as a pragmatic solution for NGOs to enhance their limited budget to effectively fulfil their social goals.

Sixth, and fundamentally, networks' membership generates substantial benefits. First, by routinizing practices, interactions, and exchange among their participants, networks enhance the possibilities for them to engage in debate and negotiation with GRRs. Second, they increase the opportunities to access relevant information, and to exchange expertise and best possible practices. Third, networks offer to their members increased visibility to the outside world. Finally, they enhance the credibility of their members through the adoption of formal procedures to select participants and to certify their accountability. For all these reasons, networks are increasingly considered ideal sites by NGOs and other non-state actors for developing large-scale strategies to stronger advocate their requests towards GRRs.

The benefits are, however, mutual. Through the synergies with civil society networks, the GRRs aim at, first, increasing their democratic legitimacy in the face of growing political challenges; second and equally important, GRRs aim at adopting more appropriate regulations by relying on genuine grassroots support; and, third, they aim at being perceived as accountable in the development of laws and policies. As networks of civil society actors emerged from the fundamental needs of GRRs to maximize their problem-solving capacity, a utilitarian stance may suggest that GRRs find it easier to negotiate with a single network instead of managing multiple negotiations with a multitude of NGOs.

8.4 The Interlocutory Coalitions and Their Composition

Some of the more problematic aspects addressed in Paragraph 1 will be touched on later. For now, let us posit that ideal civil society networks operate at the global and European level and, for stylistic ease, let us refer to it as *interlocutory coalition*.[6]

Let us begin with the composition. The interlocutory coalitions are prevalently composed of NGOs. Individuals are not admitted as members. In view of that, interlocutory coalitions may be differentiated from, first, the "*social movements*" theorized by Sydney Tarrow. Social movements are informal networks in which a more heterogeneous number of actors are involved, ranging from individuals, groups of people who act together to achieve specific goals, and only to a minor extent, NGOs.

A second critical distinction has to be made between interlocutory coalitions and trans-governmental committees. The latter are in fact entirely composed of national civil servants. The European comitology committees offer the earliest and most developed example of trans-governmental committees.

A technical and a political component are present in each coalition. The technical component may include scientists, academics, jurists, economists, or more generally experts in specific matters. This "epistemic community" provides a source of technical expertise and knowledge to the decisional workflow of the GRRs with whom the coalitions cooperate.

8.5 Accession and Governance of Interlocutory Coalitions

Second, and decisively, support to the interlocutory coalitions' activities is provided on a voluntary basis. Their participants are in fact autonomous NGOs and/or other non-state actors which share a common purpose or a common set of values.

Of course also interlocutory coalitions are devoted to legal arrangements (and some will be discussed in this Paragraph) and use it to regulate their connections. Yet reasons motivating the presence of such legal constrictions do not draw from the necessity of the coalitions' members to be accredited a status of formal legality, or at least not exclusively. While in fact minor NGOs might have an interest to this extent, bigger NGOs already operate on a legal status due to the accreditation by the GRRs. It might be then argued that moving into a coalition denotes a joint undertaking in pursuit of a common substantive objective.

[6]The terms *network* and *networking* have been already, and widely, used in a variety of disciplines, ranging from political, social, and legal studies. *See*, for instance, Compston (2009); Borzel (1998), p. 253; Provan and Milward (2001), p. 4; Aviram (2003), p. 1179; Heckscher (2005–2006), p. 313.

Agreements governing coalitions might have a variety of degrees in depths, from codes of conduct to more nuanced agreements, but usually come in two broad generic types. Agreements of type "A" contain detailed rules and procedures on coalitions' activities and generally adopt collegial methods of decision-making to coordinate members. The best known examples coming under this heading are the *Consultative Platform* and the CINGO. Both these coalitions regulate their overall institutional relations, discipline internal affairs, and provide rules for the formation of their policies with a composite set of by-rules and terms of reference.

Agreements of type "B" are relatively vague and open-ended ones, designed primarily to create a framework for cooperation among NGOs with mutual interests and goals. The *Pan-European ECO Forum* and the *NGO Forum*'s Agreements fall within this second category. It is, however, possible that agreements of type B develop more detailed rules to govern the relations among members. Reasons for bolstering formalization on the part of NGOs generally follow increased interaction and mutual confidence among members, and aim at increasing the political resonance of their activity.

8.6 The Interlocutory Coalitions' Membership

Third, the membership of interlocutory coalitions is not exclusive. The participating NGOs are allowed to conduct their own programs and activities as well as to join other networks. It might be useful, however, to draw a line between the juridical status of single participating NGOs and the interlocutory coalition's juridical status. Broadly speaking, both NGOs and interlocutory coalitions do not have international legal personality. Yet, while the former are governed by the laws of the State in which they are incorporated, the latter are not subjected to national laws but rather gain indirect international legal recognition from their cooperation with GRRs.

From the distinction between the legal personality of single NGOs and interlocutory coalitions, two corollaries stand out conceptually. First, to be discussed below, to the extent of which the participating NGOs operate on a partnership basis with the coalition – and thus become an integral part of it – they temporarily abdicate their autonomy. This explains why interlocutory coalitions often dispose of a secretariat and a lead organization, which provide coordination to the network; and, also, it explains why initiatives and strategies taken by the coalitions are attributed solely to the coalitions' – and not to their members' – responsibility. Nonetheless, an empirical perspective may suggest that through the membership to a coalition, single NGOs receive indirect international legal recognition as participants in international law-making.

The discourse on membership is also useful to distinguish the interlocutory coalitions from the *global networks*, the *transnational issue networks*, and the *parallel summits*.

Global networks generally define informal webs of different civil society actors (such as grass-roots groups, or social movements). But also, and primarily, they identify a geographical rather than a conceptual identity.

Transnational issue networks are gatherings of actors who are bound together by a core of shared values and work together on issues of global relevance exchanging information and services. Not only, however, do these networks lack a defined structure to coordinate accession and membership, but also their existence is in place as long as the issue they aim at opposing subsists.

Finally, parallel summits are events held contextually to inter-governmental summits, the scope of the former being to challenge the legitimacy of the latter. Therefore, parallel summits have a narrower conceptual identity with respect to the interlocutory coalitions, since their activity is hinged on the topic(s) of the official summit.[7]

8.7 The Interlocutory Coalitions' Activities

Finally, the activities in which the interlocutory coalitions are involved are wide in number and vary in scope, ranging from political lobbying, public mobilization, campaigning around particular issues, as well as monitoring the compliance with international treaties, and managing conflict-resolution activities. In broad terms, however, it might be assumed that each coalition undertakes three main tasks. Indeed, these tasks are not mutually exclusive. As a matter of fact, many of the case studies addressed in this chapter reveal interlocutory coalitions performing a number of these activities simultaneously.

At their heart, the interlocutory coalitions mediate. This all-encompassing definition includes both the discussion of the diverging positions carried out by the coalitions' participants and the promotion of policy alternatives to decision-makers. In an early stage, the coalitions mediate "internally" between the diverging stakeholders' interests; later, they mediate between these interests and the GRRs' representatives.

Second, and more specifically, interlocutory coalitions may have "rule-making" powers. Of course, if by rule-making we mean the process that brings to the promulgation of norms and regulations we would conclude that interlocutory coalitions do not qualify. Their non-governmental nature would not permit these *consortia* to perform genuine rule-making activities. Be that as it may, the definition of rule-making appears, nevertheless, as the most appropriate to describe coalitions' advocacy towards GRRs because the constant lobbying pursued by the interlocutory coalitions into GRRs' official negotiations and into the other phases of the

[7]For a number of perspectives on this subject, see Pianta, Parallel Summits of Global Civil Society, in Anheier et al. (2001).

policy cycle has often resulted in influencing GRRs' policies and shaping GRRs' strategic directions.

Third, interlocutory coalitions may have enforcement powers. They may monitor the compliance of specific norms and rules, they may evaluate the degree to which these rules are achieved in fact, and they may report the possible breaches of these rules to the competent bodies.

8.8 Internal Mediation

Having settled on a working definition of the interlocutory coalitions, the following Paragraphs will illustrate the coalitions' activities in more specific detail, beginning with the description of the elaboration of common strategies, then moving on to the analysis of the rule-making activities, and concluding with the examination of the enforcement and implementation functions. Along with the analysis of these tasks, the benefits for the GRRs that collaborate with the coalitions will be discussed.

The first and main function of any interlocutory coalition, as we shall see presently, consists of mediation. This is conceived as a multi-level and multi-directional activity, which not only involves the bargaining between the participants (*internal* mediation), but also encompasses negotiations with governmental representatives and, in a latter stage, implementation (*external* mediation).

Thus understood, both internal and external forms of mediation are crucial to the coalitions' existence. The adoption of uniform approaches to specific matters defines the first key-step in the process of advocacy. Uniformity is achieved through isolating and distinguishing particular constituencies and then promoting among them an aspiration for convergence. Once a uniform strategy has been established, external mediation with GRRs, governments and the domestic and international judiciary translates this strategy into concrete means. It is however important to observe that, albeit internal mediation is crucial to the effectiveness of a coalition, the coalition's efforts to attain genuine reach become visible to the international community only through the activities clumped under the umbrella of external mediation.

Based on the current empirical observations, the cases of the *Pan-European ECO Forum* and the *Consultative Platform* have been selected to illustrate internal mediation in interlocutory coalitions. In the *Pan-European ECO Forum*, accession and membership are subjected to simplified and informal procedures. In contrast to the *Pan-European ECO Forum*, the *Consultative Platform* adopts a more formalized system of rules, which affects – *inter alia* – the mediation among its members.

Every NGO which operates within the United Nations Economic Commission for Europe (UNECE) region, and shares the goal of promoting sustainable development, is a potential eligible member in the *ECO forum*. Acceptance of the coalition's agreement is also requested. Membership can be applied for by a simple

letter to the Secretariat of the coalition or by registration for the Plenary. Accordingly, membership can be cancelled by a letter without need to indicate reasons.

Obviously, while facilitating conditions to access the coalition encourage a large participation, they also bring into existence the necessity to mediate in a fast and efficacious way among the diverging positions of its members, and thus to avoid the coalition's inactivity. To prevent this risk, the *ECO Forum* employs two correctives.

The first corrective relies on the organization of the *Forum*. The coalition is structured hierarchically, with the Plenary on the top of the structure, the Coordination Board and the Secretariat at the centre, and a number of Issue Groups and Focal Points situated at the periphery. The Plenary makes common policy statements and defines the strategies of the *Forum*. Yet, the content of such statements and strategies results in a multi-level process of bargaining between the members held during the working sessions of the Issue Groups. These are subject-related coalitions (also termed "content coalitions") appointed by the Plenary and subjected to the duty to report to it. The process of bargaining is completed by the action of the Focal Points, whose main task is to guarantee the coordination between the members of specific UNECE regions, its key-issues, and the *Forum* itself. Informal coordination between the Focal Points and the Issue Groups is organized on a daily basis. A more formal coordination is guaranteed by the Coordination Board, which is composed of the representatives of the two organs.

The second corrective to avoid the inactivity of the coalition, given the considerable diversity among the members NGOs, entails the rules governing the voting within each organ. Each member gets one vote. The Plenary takes decisions by consensus. When consensus cannot be reached, the rule of majority applies and decisions are taken by the two-third of the participating members. All the other bodies decide by consensus.

As the *ECO Forum* example suggests, the combination between a multi-level bargaining system and consensus rules may be used to overcome competing visions – a byproduct of interest heterogeneity – and to foster compromises. Yet, by leaving the application and enforcement of a strategy entirely to the members' willingness may be risky. This is true especially when highly political problems come into discussion. It is for this reason that in other coalitions more formalized agreements are adopted. Consider the case of the *Consultative Platform*. According to the terms of reference of this coalition, NGOs, stakeholders' organizations representing consumers, and food operators active in the food chain are all admitted to join the coalition.[8] Accession, however, is precluded to organizations which do not comply with geographical, functional, and practical conditions. More specifically, the accessing organizations are requested to set their activity on the European level; they are requested to be competent in the areas of work of the EFSA; they also have to be in frequent contact with the EFSA.

[8]See MB 12/09/2006, No. 6. *See* also Hofmann and Türk (2007), p. 260.

To complement the conditions to access the coalition, the terms of reference introduce two additional criteria. First, members of the MB, the Advisory Forum, the Scientific Committee, and the various Panels of experts of the EFSA participate in the meetings of the *Platform*. They do not, however, take active part in internal mediation. Their role is aimed solely at ensuring a proper exchange of information among participants, and at providing administrative support to the coalition. In order to coordinate the discussion, the *Platform* also designates a Chair and two Vice-chairs from among its members. Second, detailed rules discipline the maximum number of participants to the coalition (never more than 30), the frequency of the *Platform*'s meetings (twice a year), and locations (preferably in Parma, where the EFSA is located).

Differently from the case of the *Pan-European ECO Forum*, the example of the *Consultative Platform* suggests that a higher degree of formalization may be used to the scope of facilitating the coalitions' effectiveness and to avoid their inactivity. This option, however, has its shortcomings from a democracy-theory perspective. Arguably, the stricter the conditions to access the coalition, the lesser are civil society actors which fulfil these criteria. Needless to say, a narrow number of participants may influence the coalitions' specific weight on the global level and thus undermine their chances to obtain successful outcomes. This explains why, in the case of the *Consultative Platform*, associated (or not permanent) members are admitted to join the coalition.

8.9 External Mediation. Rule-Making Through Communication

Once a strategy is settled, an official position is agreed upon, or the contours of an action are defined, the activity of interlocutory coalitions develops into external mediation. This includes, first and foremost, negotiations between the coalition and the GRR. It also includes implementation and conflict-resolution.

When talking about rule-making activities of interlocutory coalitions, one can draw a distinction between two main functions. The first and more general activity reflects the extent to which information and knowledge are fed in the decision-making processes. This chapter posits that information and knowledge are two mutually reinforcing dimensions of communication, which cannot be understood in isolation from one another. *Information* consists of sharing facts and data among the participants of a coalition, and eventually towards the outside of it. *Knowledge* is actually created out of information and overlaps with the usage of reasons to induce or move someone to believe something or perform some action. Thus, in knowledge not only facts, but also experiences, technical expertise and values are shared.[9]

[9]See Allee (2003); Martinez (2002).

Information and knowledge may be indeed regarded as forms of rule-making. As observed by the German Constitutional Court in the 1994 *International Military Operations Case*, concerning the right to participation of the Federal *Bundestag* in decisions on the deployment of German armed forces within the framework of operations undertaken by the North Atlantic Treaty Organization and the Western European Union for the implementation of the United Nations Security Council resolutions, changes in the contents of an international treaty might be well brought about by interpretation (rather than by a formal amendment) of an existing international treaty. This is exactly what happens when information and knowledge are spread through the activity of interlocutory coalitions. Their active presence does not necessarily support radical changes. It rather develops moderate modifications through interpretation of principles of administrative law.

Interlocutory coalitions, for instance, may present written statements during sessions or meetings in order to influence officials and governmental representatives, and to reduce the abstractness of GRRs' officials questioning towards governmental representatives. Information can be fed to decision-making procedures also in a more proactive way, as in the case of agenda setting. This activity consists of raising points to be discussed and analyzed during the meetings with GRRs' bureaucrats. Coalitions are particularly interested in influencing the GRRs' *travaux préparatoires* through pursuing the agenda-setting function because, first, it is during this phase that the founding principles for the final documents are usually agreed upon. Moreover, through agenda-setting, coalitions can contribute to the development of new guiding principles from the GRR with whom they cooperate.

Take the *NGO Forum*. This is actively involved in the annual meeting of the ADB's Board of Governors, during which decisions are made to set the ADB's policies and programs. In 2008, for instance, the coalition insisted upon the substantial revision of the ADB's policies on the environment and resettlement of indigenous peoples.

8.10 Rule-Making Through Standards

Alternatively, coalitions may influence the behaviours of GRRs by formulating and spreading rules autonomously. Although this is not a general condition – coalitions' activity, practically speaking, may not result in any specific outcomes or forms of legal regulation – when it is encountered it may be well considered as the second and more genuine rule-making function.

The most relevant example of this kind is provided by the standards-setting activity. These consist of a wide array of non-binding sources of law, including principles (general statements that allow a great flexibility in their interpretation and implementation), recommendations, official reports, codes of conduct, declarations of intents, and finally methodologies and guidelines, which provide detailed guidance on requirements to be met for their implementation. The importance of such standards at the global and supranational level is great. By developing

and publicizing such standards, interlocutory coalitions seek to: (1) make them more widespread and influential, in order to let them acquire a sort of soft-law value which could eventually bind upon GRR;[10] (2) and, indeed, aim at increasing their leverage at the global level.

To portray the dynamics of autonomous formulation of standards and rules by interlocutory coalitions fully, the case of the CINGO can be considered. One of the main instruments used by the CINGO consists of official recommendations. These are documents following an official decision from one of the COE's institutions in which the CINGO expresses its position and recommends further actions to be taken by the Committee of Ministers. The most recent proposals include suggestions to introduce formal time-limits for decision-making by competent authorities, greater transparency and reasoning in decision-making, and also address general issues such as human rights' protection.

A fundamental point to emphasize is that even in the circumstances when interlocutory coalitions' standards are not intended to directly constrain the behaviour of the underlying GRRs, they may be nonetheless directed to the borrowers of these institutions, who are demanded to take them into account during the implementation of the projects. Such prescriptions are designed to increase fairness, responsiveness, and efficiency in national governments. This is the case, for instance, of the *NGO Forum*, who works in close contact with the governments of the Asian and Pacific areas. By developing uniform standards towards' ADB's borrowers, the *NGO Forum* aims at strengthening the existing standards and increasing their influence.

8.11 The Problem of Effectiveness

The contemplation of the above examples prompts to reflect upon the fact that formal and informal ways of interaction between interlocutory coalitions and GRRs are likely to guarantee a better balance between diverging civil society's and governmental interests at the global and supranational level as well as to improve the quality of GRRs' policy-making. Yet, the finding that a closer number of participants in GRRs' decision-making processes would guarantee faster and less expensive decisions have led some observers to express concerns on the active involvement of civil society groups in GRRs' decision-making. Critics argue that a greater use of human resources would diminish the feasibility of rapid substantive results, and, because of the longer time schedule needed to process the amount of information provided by a large number of participants, would increment the overall costs of decision-making processes. Linked to this problem is a second area of concern. Studies on civil society's participation in global policy-making

[10]See generally Shelton (2000). On the relation between networks of NGOs and the formation of international standards see Hunter (2007–2008), p. 437.

have pointed out the difficulties for smaller NGOs to keep the pace with the huge number of meetings that inevitably characterize dealings in the international community. While the limited finances and staff resources of small NGOs would substantially reduce their influence on the negotiating processes, the organizational costs of these processes would be nonetheless increased, and the time-schedule would be extended as well.[11]

In sum, the core of the above critiques is to suggest that inclusiveness is more a theoretical concept than a realistic one. The participation of civil society's groups to GRR's policy-making should therefore be constrained by more formal rules, and circumscribed to few selected NGOs.

This chapter does not engage this claim directly. It only argues that formalized networks of NGOs, such as the interlocutory coalitions, may offer a viable solution to the issue of the effectiveness as well as to the issues related to smaller NGOs dealing with GRRs. As for the latter concern, the benefits that interlocutory coalitions provide to their members and GRRs have already been discussed. Smaller NGOs which comply with the criteria for accession to the coalitions gain the financial and administrative support of a stronger organization. On the part of the GRRs, dealing with a single coalition facilitates rapidity and reduces costs in decision-making processes. With more specific regard to the concern on effectiveness, one could allege that the agreements governing the interlocutory coalitions, both of type A and B, often contain provisions specifically designed to avoid such issues. In coalitions governed by agreements of type A, the conditions for the accession to the network and for participating to the organization of its activities are aimed – *inter alia* – at favouring an effective dialogue with GRRs' representatives.

The CINGO's rules of procedure, for instance, distribute the coalition's functions among its internal organs having regard to guarantee the greater possible efficacy of its actions. The Conference identifies the general actions needed to organize its participation in the COE Quadrilogue, and ensures the correct functioning of the participatory status. The Bureau implements the internal and external communication policy of the CINGO, particularly at the EU level. Finally, the Committees' and Transversal Groups' purpose is to facilitate the co-ordination between single member NGOs, and also to serve as common interlocutors for all COE bodies. In addition, the rules of procedure regulate the organization, the frequency and the time-schedule of the CINGO's official meetings.

Also in coalitions governed by agreements of type B, a regulatory framework provides for the better co-ordination of coalitions' activities. The *NGO Forum*'s by-laws contain provisions on the organization of the coalition's activities, including the provision of timelines for the organization of a meeting and the adoption of decisions. The *Pan-European ECO Forum* appoints a Coordination Board in order to represent the coalition in the EFSA's official processes.

[11]Martin Kaiser has conceptualized this phenomenon in terms of "*participation overkill*". In Kaiser's opinion, many NGOs choose not to participate in negotiating processes of considerable importance despite being invited to do so. *See* Kaiser (2001).

8.12 Interlocutory Coalitions and Implementation

The second dimension of external mediation by interlocutory coalitions includes the implementation and the enforcement of international norms and rules.

In looking at implementation by interlocutory coalitions, focus needs to be put upon two elements. The first is implementation by means of enforcement. The second is implementation by conflict-resolution. Both forms of implementation may come in formal or informal ways. Interlocutory coalitions' participation in the enforcement of international treaties is particularly established in the environmental and human rights field.[12] The *Pan-European ECO Forum*, for instance, over the years has launched many initiatives aimed at examining whether citizens of the Member States who signed the Aarhus Convention are given the opportunity to adequate and effective access to environmental justice. The findings of these initiatives have been widely published. Recommendations to the concerned governments have followed.

But enforcement may also come informally through simple dissemination of information. Several interlocutory coalitions, for instance, have developed their websites into tools for advertising project-related activities. The *NGO Forum* heightens the public debate on the ADB's development strategies through its website in order to involve its members in monitoring the enforcement and review of ADB's policies. The *Pan-European ECO Forum* distributes a monthly newsletter among its members and the general public. The use of newsletters is aimed at revealing the current state of the negotiating processes with GRRs and at helping to clarify certain diplomatic issues to the public. The *Consultative Platform* publishes the minutes of all the official meetings with the EFSA's representative. Finally, all the official recommendations and the related follow-ups from the CINGO to the COE's institutions are given publication on the coalition's website. Other ways to compel enforcement through information are provided by publications related to specific projects' issues. Both the *NGO Forum* and the *Pan-European ECO Forum* diffuse these kinds of publications on a regular basis.

Conceptualized in terms of conflict-resolution, implementation by interlocutory coalitions relates to formal interventions through which civil society actors participate in complaint proceedings taking place before international jurisdictions, as well as to the informal ways of intervention of civil society actors within international judicial *fora*.

Formal ways of intervention essentially consists of the possibility to present *amicus curiae* briefs. Even if, as a matter of principle, the *amicus curiae* role is not the same as a formal legal right to bring cases to a court, it is nonetheless a way to

[12]Formal implementation has already received significant attention in international legal scholarship. See Alston and Crawford (2000); Jasanoff (1997), p. 579; Charlton and May (1995), p. 2; Smith et al. (1998), p. 379.

engage civil society interests within the judicial proceedings and raise awareness in the public opinion.[13]

Formal ways of intervention are also exemplified by the petition mechanisms that allow civil society actors to bring such cases as complainants. As consistently demonstrated by empirical research, litigation from individuals and groups is often used as a way to change rules and practices in its own favour through court actions.

The collective complaint mechanisms provided by the Aarhus Convention's communications from the public is a case in point. In such hypotheses, actions taken in one governmental jurisdiction give rise to grievance by stakeholders living outside that jurisdiction. Thus individuals, NGOs, and other civil society actors (interlocutory coalitions included) are allowed to bring complaints against states that have ratified the concerned agreement.

Finally, informal ways of intervention may include the act of counselling to parties in a dispute, or pressuring parties to initiate proceedings before a court. Also, the possibility to appoint experts (as it is in the case of the Compliance Committee of the Aarhus Convention) can be considered as an informal source of leverage to influence policy outcome.[14] The same holds true for the relation between coalitions and ombudsmen. The functions of ombudsmen are in fact to provide an independent critical appraisal of the quality of administrative action, and to stimulate its future improvements.

8.13 The Problem of Accountability and Legitimacy

In introducing the benefits of civil society's networks, the previous paragraphs have stressed the opportunities for GRRs lying behind cooperation with transnational civil society, and particularly with coalitions of NGOs. The argument goes as such: cooperation with interlocutory coalitions is particularly profitable for GRRs aiming at being perceived as accountable because it replaces the domestic channels of influence to hold the public powers liable. By bringing otherwise unrepresented (or underrepresented) private interests in policy-making, GRRs intend to produce net gain in terms of distributive fairness and therefore to provide legitimization to their decision-making processes.

The main objection to this position – and more generally to the efforts put by global and European institutions into developing closer contacts with civil society – is that civil society actors operating at the global and supranational level are not

[13]It is for this reason that several NGOs have been continuingly pressing this issue towards the WTO. See Leroux (2006), p. 203.

[14]See Kravchenko (2007), p. 7; Stallworthy (2005), p. 14.

accountable themselves. They cannot therefore provide for the accountability of the institutions with which they collaborate.[15]

This chapter describes NGOs' accountability by pointing at its internal and external aspects. *Functional accountability* relates to internal management practices and financial responsibility towards the members of an organization. *Strategic accountability* relates to the relationship between the organization and its beneficiaries, and more generally to the global community.

When applied to transnational civil society, functional and strategic accountability are countered by a number of key-issues, namely the vast number and the provenience of transnational civil society groups. The elevate number of civil society actors would make the effective cooperation between civil society's groups and GRRs impractical. Besides, the fact that the current global arena is dominated by large, English-language speaking, Northern NGOs would amplify certain political views that are not reflective of the views of developing countries.[16]

While both these objections are truthful and hard to be disagreed with, account should be taken on the fact that, as already pointed out before, a salient characteristic of the interlocutory coalitions is the establishment of accreditation standards. Participating NGOs to a coalition must fulfil specific criteria, including the possession of an executive organization, financial independence from governmental bodies, international standing, independent governance, geographical affiliation, adherence to behavioural standards, and commitment to common goals. Take the case of the *Consultative Platform* as an example. A variant of this possibility is that the GRR itself imposes the accreditation criteria, as in the case of CINGO. Participatory status is granted by the COE to global NGOs that are particularly representative at European level and in the fields of their competence.

Interlocutory coalitions themselves are hinged to the respect of fiscal, peer, and supervisory controls. The donors to the coalitions exercise the fiscal controls. Albeit interlocutory coalitions are not-for-profit networks, it would be incorrect to think that contributions from individuals and public bodies do not play an important role in their operations. In their funding contracts, donors can (and actually do) take steps to make coalitions more accountable. Sponsors and contributors may also decide to interrupt their donations whether the coalitions would not perform efficiently in their activities towards GRRs. The peer controls consist of the possibility that those NGOs which have delegated authority to the coalition may withdraw such authority when the coalition does not respect certain perspectives and values anymore. Once NGOs have become constituents of a network, in fact, they are eager to monitor their colleagues' consideration for the agreed standards,

[15]See Edwards and Hulme (1996); Fowler (1997); Jordan and Van Tuijl (2006); Kaldor (2003b), p. 5; Stephan (1999), p. 1555; McGann and Johnstone (2004–2005), p. 159; Kilby (2004), p. 67.

[16]In academic literature, Northern NGOs are described as organizations based in industrialized countries. As such, they are opposed to Southern NGOs, mainly operating in developing countries.

since their own reputation might be affected by it. Finally, the same GRR with which the coalitions cooperate exercises supervisory control.[17]

Considered as such – that is to say networks that are functionally accountable through the assessment of their members' qualities, and strategically accountable through fiscal, peer, and supervisory controls – interlocutory coalitions move the problem of accountability from the single civil society actors' source of legitimacy to the legitimacy of the political discourse in which they are involved. The challenge, in other words, is no longer whether international civil society may provide accountability to GRRs, but rather which channels are preferred to influence policy outcomes in the institutions.

Hence, linked to the question of accountability is that of legitimacy. In the most common acceptance of the term, legitimacy consists of the diffuse belief in a community of an appropriate use of power by a legally constituted authority following correct decisions on making policies. Legitimacy as depicted in this chapter encompasses both the capacity of rule-makers to engender and maintain the belief that existing political institutions and their policies are the most appropriate (*formal* or *legal* legitimacy), and the ability to assess their rules on stakeholders' needs (*social* legitimacy). Participation is therefore essential to legitimacy, and particularly to social legitimacy, in the sense that people agree on the existence of a particular GRR and participate in its rulemaking, because of their belief to influence its result.[18]

Discourses over GRRs' legitimacy generally state that this may be achieved in two ways: through indirect representation, or through procedural mechanisms resembling the typical structure of an administrative process of law. The first narrative understands GRRs' rule-making as a system of multi-level governance, involving representation of constituents' concerns through non-hierarchical steering and management of networks of public and private actors between the domestic and the global and supranational levels. The second narrative acknowledges and insists on civil society's direct engagement within GRRs' regulatory processes.

As previously stated, both channels of legitimacy lack substance when applied to the domain of governance beyond the state. The main weakness of indirect representation consists of the shift from the representative to the executive experience. Procedural representation's drawbacks develop from scarcity in transparency and participatory rights of GRRs' decision-making processes.

This chapter suggests that interlocutory coalitions may constitute a possibility, if not a solution, to the problem of legitimacy. They would resemble the "Global Reflexive Interactive Democracy" (GRID) model theorized by Dario Bevilacqua

[17]For a comprehensive analysis of such accountability standards see Kehoane and Nye (2001).

[18]For a general discourse on legitimacy in international organizations see Suchman (1995), p. 571; Beck (2003); Sassen (2006).

and Jessica Duncan.[19] GRID seeks to enhance participation by framing an approach based on reflexive democracy and interactivity. In the former regard, focus is directed towards co-operation and mutual understanding. Associative bodies such as NGOs complete the picture. Described as "democracy-enhancing links" between decision-makers and civil society, NGOs are demanded to deliver information to the general public and transform its preferences into propositions to be used to influence GRRs' decision-making processes. Interactivity, as conceptualized in the GRID model, refers to the development of policies through the cooperation of stakeholders' networks. GRID, this line of argument runs, involves a horizontal and a vertical phase. The *horizontal phase* involves cooperative exchange between all the organizations and actors inside a specific regulatory framework. The *vertical phase* includes the action of influencing global regulators through proposals, reports and surveys, and indeed the explanation to the members of the network of how global institutions are acting and responding to networks solicitation.

8.14 Interlocutory Coalitions and Administrative Convergence

After discussing the grounds for developing a new conceptual approach to overlapping governances at the global and supranational level through the presence of organized networks of civil society, two crucial questions need to be answered: (1) how are interlocutory coalitions concretely influencing the interaction between global and European decision-making processes? (2) Is the growing system of civil society networks forming a "bridge" between the global and the European administrative systems?

This chapter suggests that interlocutory coalitions, different from single NGOs, may be considered a significant factor in spreading interaction and convergence between EAS and global administrative law. This claim builds off of two subsidiary arguments, one relating to the very notion of administrative convergence, and the other concerned with future scenarios of civil society networks.

The concept of administrative convergence does not have an agreed core of meaning. Of great importance, however, is the fact that convergence implies, first, a reduction of variance and, second, a uniform enforcement of common principles, rules and regulations. Olsen distinguishes between two hypotheses of administrative convergence.[20] The first hypothesis is described in terms of *attractiveness*. The second hypothesis is traced in terms of *imposition*. Simplifying a complex argument, in Olsen's opinion attractiveness signifies learning and voluntary imitation of

[19]See Bevilacqua and Duncan (2010), Art. 2. Bevilacqua and Duncan applies the GRID to the agri-food regulatory framework, given its sensibility to the problem of public participation. The same model, however, may be easily analyzed in conformity with other sectors of regulation.

[20]See Olsen (2003), p. 506.

a superior model. Organizational forms are copied because of their perceived functionality, utility, or legitimacy. Instead, when no single way of organizing public administration is seen as functionally or normatively superior, convergence by imposition is likely to happen. Different from the previous one, this form of convergence is based on the use of authority and power.

While Olsen suggests that administrative convergence follows from attractiveness *or* imposition, this chapter assumes that, in the conceptual landscape of said EAS/global administrative law relationship, convergence as pursued through the influence of interlocutory coalitions follows from attractiveness *and* imposition. This vision rests on the idea that interlocutory coalitions mobilize good practices and normative standards from different legal arenas by linking various actors and institutions across borders (which can be sketched as convergence through attractiveness), and construct a web of rules by relying on GRRs' leadership and authority (which can be described as convergence through imposition).

More precisely, cross-fertilization among coalitions' activities marshals convergence through attractiveness. Partly because of their global leverage, and partly because of the fact that their members may join more than one coalition at the same time, interlocutory coalitions' experience and knowledge is likely to be shared in advocacy campaigns towards different GRRs. The contextual participation of the coalitions' members in diverse decision-making processes which intersect and overlap, in fact, contribute to ensuring a degree of coherence in GRRs on topics such as participation and transparency. It also limits GRRs' free riding from policies and orientations shared with other GRRs. Furthermore, the use of standards, codes of conduct, or informal agreements in a coalition may constitute the base for the agenda-setting of another coalition towards a different GRR. As argued by David Hunter, "networks are critical for disseminating lessons learned.[21] The implication, accepted in this chapter, is that coordination among the members of a coalition, as well as formal and informal contacts between diverse interlocutory coalitions, play a crucial role in spreading integration in EAS/global administrative law.

Convergence through imposition is more intimately bound up with the institutional aspect. It builds upon the basic assumption that one GRR's leadership position in a specific field of regulation helps its policies and standards to become important benchmarks for other GRRs. In the finance sector, for example, the Performance Standards adopted by the International Finance Corporation have inspired the 2003 "*Equator Principles*" initiative, aimed at developing a set of environmental and social standards among commercial banks. The initiative has spread rapidly among private financial institutions as well as other GRRs and today it covers around 80% of global project finance. The ADB, for instance, introduced several improvements to its policies after having taken inspiration in the World Bank's reform.[22]

[21]See Hunter *supra* note 11.

[22]See Hardenbrook (2007), p. 197; Suzuki and Nanwani (2005), p. 177.

The discourse on setting standards and spreading it through administrative imposition may be crucial for purposes of assessing the influence of transnational civil society to global administrative law /EAS interactions. When it comes to a closer evaluation, however, it emerges that the two forms of convergence stand in a complex relationship to each other: both are important to self-completing.

Put in stark terms, when standards are created, they are mere words or symbolic meanings with few or no effect in need of institutional interpretation. They therefore need to be supported by a well-articulated and organized system of monitoring and enforcement. This is even more crucial in the case of global regulatory regimes, where regulatory and supervisory duties are often embedded in the same body.

It requires little analysis to see that implementation of standards may come in many different ways. Drawing on insights from studies on the implementation of standards produced by the G8, implementation by *reference* can be distinguished by implementation by *incorporation*, and interpretation by *application*.[23] Implementation by reference takes place when the integral text of a decision is referenced in another legal text from a different GRR. Implementation by incorporation is carried out by incorporation of few programmatic lines worked out by a GRR with almost no reference to the activities carried out by this player. Finally, implementation by application consists of the direct application of the standard(s).

To further assess the link between the two forms of convergence, it is useful to recall a perhaps even more apparent example of convergence through imposition: the 1999 Comprehensive Development Framework of the WB. This tool allows the WB to impose "structural adjustments" to the internal legal systems of assisted countries as a condition to access new loans or decrease interest rates on existing ones. These structural adjustments often address issues of administrative governance, such as transparency or accountability of public bodies.

Thus defined, interlocutory coalitions' penetration into global and European governance evokes Margaret Keck's and Kathrin Sikkink's *boomerang effect*, according to which the appeals by external actors towards the international community bounce back and put pressure on GRRs and national governments.[24]

8.15 The Paradigm of Meta-Networks and Its Tensions

Apart from the argument on administrative convergence, set out above, the consistency of interlocutory coalitions to EAS/ global administrative law convergence can also be drawn on the basis of speculation on future scenarios in civil society networking beyond the state.

[23]See Conticelli (2006), Art. 2, para 8.

[24]See Keck and Sikkink (1998), *supra* note 6.

This chapter suggests that an evolutionary process in global and supranational civil society's networking is already under way, at the end of which new organizational forms, or meta-networks, are likely to emerge. The empirical picture confirms this: not only the number of civil society networks that operate in the margins of the GRRs that license them in the first place is increasing, but also existing coalitions are increasingly merging in meta-coalitions in order to stronger advocate their positions in policy-making.

Interlocutory coalitions such as the *Steering Committee for Humanitarian Response*, an alliance of nine of the largest global humanitarian organizations and networks working with the Office of the UN High Commissioner for Refugees, the *NGO Working Group on the World Bank*, the EPLO, or the *Social Platform* – an umbrella organization for Brussels-based social NGOs and networks of national NGOS in the various Member States aimed at facilitating participatory democracy in the EU by promoting the consistent involvement of NGOs within structured civil dialogue with EU institutions – seem to confirm this assumption.

The paradigm of meta-networks demonstrates how transnational civil society is increasingly organized in coalitions to support its activities, and supports the idea that a closer integration between principles of administrative fashion pertaining to different global and supranational legal systems have developed through networks' activity. Yet this assumption remains uncharted by official statistics and is only superficially explored in its counter-effects. Networking in civil society shows a number of tensions.

The most evident one is related to its functioning. Holding NGOs and other civil society's groupings together in a coalition constitutes a complicated enterprise, for it involves clusters. This is especially apparent when networks grow bigger and, in consequence, the likeliness of controversial positions increases. On the one hand, associational forms such as the interlocutory coalitions are the best option to foster a broad range of interests of large constituencies and to contain the increasing number and diversity of their members. At a time in which regulation increasingly concerns objects and situations whose heterogeneity and complexity escape the cognitive capacities of GRRs' decision-making bodies, cooperation with large coalitions of civil society actors becomes fundamental for sound policy-making. On the other hand, however, a bigger network is also a weaker network, due to the wide range of adherents with different views, sizes, and strategies.

A second tension may occur between different coalitions in competition. As noted by Kumi Naidoo, cross-border activism has not yet successfully created a veritable global civil society, due to the fact that no organization can truly claim representation in all of the countries of the world. The current situation, Naidoo argues, is better described as dominated by a large number of civil society cross-border groups who, to a greater or lesser extent coordinate their activities depending upon their interest in similar issues.[25] This situation, it is posited here, creates not

[25]See Naidoo, Claiming Global Power: Transnational civil Society and Global Governance, in Batliwala and Brown (2006), p. 53.

only the basis for cooperation, but also and perhaps more frequently, for competition. This is particularly the case of bigger coalitions, which encompass a great diversity of actors and are not guided by a clear leadership.

A third tension may occur when particular GRRs refuse to co-operate with a coalition on the basis of rules or standards formerly approved of by a different GRR, assuming their uniqueness or the presence of important differences.

Finally, a fourth tension relates to the loss of creativity and experimentation that might occur when the same standards and practices are massively recycled from different coalitions.

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Chapter 9
The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection

Stefano Battini

9.1 Consular Assistance and Diplomatic Protection: Jurisdiction vs Nationality

Consular assistance and diplomatic protection find their origins in the traditional dialectic between the legal principles of territoriality and personhood. This dialectic refers to the opposition between the territorial notion of "jurisdiction" that each state exercises over the population residing within its own borders, and the concept of "nationality" that connects each state with its own citizens.[1]

The territoriality of jurisdiction and the personhood of nationality enter into a relationship of mutual tension when citizens leave the territory of their own state and fall under the jurisdiction of a foreign public authority. When the place of residence of a person is transferred to the territory of a state other than that of their citizenship, then the authority that both states can claim to exercise in relation to that person is limited by the obligation to respect the sovereignty of the other state. The authority of the state of citizenship, based on personal ties, is limited by the duty to respect the territorial jurisdiction of the state of residence. Correspondingly, the authority of the state of residence, based on territorial jurisdiction, is limited by the duty to respect the political ties of belonging of the individual to the other state.

In its relations with foreigners living in its own territory, as in those with its own citizens living abroad, the sovereignty of each state is therefore limited by the potential conflict with the sovereignty of other states. This is the sphere of

[1]See on the topic Borchard (1913), p. 515. According to Borchard, "the principles of territorial jurisdiction and personal sovereignty are mutually corrective forces: an excessive application of the territorial principle is limited by the custom which grants foreign states certain rights over their citizens abroad".

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relationships that legal scholarship, in the early twentieth century, identified as the main subject of "international administrative law". Despite its perhaps misleading reference to the international legal dimension, this label referred to an area of domestic law. Unlike the current concepts of global administrative law or administrative international law (as law governing international civil service and applied by international administrative tribunals) that older label referred to a specific part of domestic administrative law, which – similarly to private international law – applies to cases having a connection with the legal systems of other states.[2]

This chapter deals with the impact of both Europeanization and globalization on some specific aspects of what was once called "international administrative law", namely consular assistance and diplomatic protection. It is structured as follows. First of all, the international conventions on consular assistance and diplomatic protection are briefly summarized, in order to clarify the commonalities as well as the differences between them (Sect. 9.2). Second, the impact of Europeanization is evaluated, taking into account both the horizontal (the right to consular and diplomatic protection from authorities of member states other than those of citizenship) and the vertical dimension (the right to consular and diplomatic protection from European authorities) (Sect. 9.3). Finally, the impact of globalization is considered (Sect. 9.4). It is argued in this respect that the changes observed in these specific sectors could exemplify some more general phenomena. On the one hand, globalization increases the international dimension of domestic administrative law, by widening the part of domestic administrative law that regulates situations having a link with foreign legal systems. On the other hand, globalization decreases the degree of specificity of that part of domestic law, submitting the exercise of "foreign affairs" administrative functions to the general requirements of the rule of law.

9.2 Overlapping, but Distinct Functions

In defining its own rules on diplomatic protection and consular assistance of citizens abroad, each state is generally bound by public international law, which is based on two international conventions: the Vienna Convention on Diplomatic Relations[3] and the Vienna Convention on Consular Relations.[4]

[2]See Borsi (1912); Neumeyer (1910, 1922, 1930, 1936). On "international administrative law" see Battini (2003), p. 30 ff. and, more recently Cossalter (2010). On the contribution of the Italian scholarship to the study of the subject matter, see also Mattarella (2005).

[3]Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. United Nations *Treaty Series*, vol. 500, p. 95.

[4]Done at Vienna on 24 April 1963. Entered into force on 19 March 1967. United Nations *Treaty Series*, vol. 596, p. 261.

These conventions overlap, but remain distinct. One's focus is primarily administrative and domestic. The other has political and international implications.[5] If someone loses his/her passport or travel documents while overseas, or finds himself/herself unexpectedly deprived of financial resources, or gets into an accident, or suffers a sickness, or is involved in a natural disaster, or is the victim of a terrorist attack, that person can turn to the consular authorities of the state of which he/she is a citizen, which will provide him/her with aid and assistance[6] in the situation of "distress".[7] The consular authorities therefore carry out administrative functions that are to be exercised in the interests of their own citizens, although in foreign territory. International law specifies certain of these functions, but the list is

[5]On the distinction between consular assistance and diplomatic protection, see, in particular, Kunzli (2006a). This work emphasizes in particular three differences. The first regards the stricter limits imposed by international law on the functions of consular assistance compared with diplomatic protection: "as a result of the obligation not to interfere in the domestic affairs of the receiving state as provided for in art. 55 of the VCCR, this cannot be interpreted to imply that the consul actually has the power to intervene in a judicial process to prevent a denial of justice... (...Consuls) have a particular role in assisting nationals in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving state or give legal advice or investigate a crime". The second difference concerns the degree of representation: "The Ambassador primarily represents the state and not its single individuals. Similarly, when Ministers of Foreign Affairs or even the Head of State are involved, one should properly speak of diplomatic protection and not of consular assistance. Since states (...) assert their own rights through the exercise of diplomatic protection it is connected to state sovereignty." The third difference, finally, regards the preventive and nonremedial nature of consular assistance: "Consular assistance often has a preventive nature and takes place before local remedies have been exhausted or before a violation of international law has occurred. This allows for consular assistance to be less formal and simultaneously more acceptable to the host state. (...) A diplomatic demarche on the other hand has the intention of bringing the matter to the international, or inter-state, level ultimately capable of resulting in international litigation".

[6]See Vienna Convention on Consular Relations, Art. 5, subsection e): (Consular functions consist in...) "e) helping and assisting nationals, both individuals and bodies corporate, of the sending State".

[7]See Vienna Convention on Consular Relations, Art. 5, subsection i): (Consular functions consist in...) "i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests". See also Art. 36, subsection c): "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action".

not exhaustive,[8] because it regards national law. The task of international law (namely, general public international law) is simply to facilitate the exercise of these administrative functions, in particular by imposing on the "receiving state" the obligation to consent on its own territory to the exercise of these consular functions by the authorities of the "sending state",[9] and on the latter, the obligation to respect the laws and regulations of the "receiving state", and to not interfere in its domestic affairs.[10] In this context, when exercising its consular functions, the state does not act on the plane of international relations, but carries out national administrative functions on foreign soil, according to international law.

However, when the situation of "distress" of the citizen abroad consists in a real "injury" due to an "internationally wrongful act or omission attributable to the receiving State", then various practices of diplomatic protection can supplement consular protection. In providing diplomatic protection, the sending state is not limited to merely furnishing assistance for its own citizen. In taking on her cause, it now does act on the plane of international relations, by means of various forms of action that can turn into an international controversy.

The political and international nature of diplomatic protection, as opposed to mere consular protection, helps explain an aspect that has long been considered essential: the state's absolute discretion over whether or not to exercise diplomatic protection, potentially committing an entire political community to engage in a controversy that regards at first sight only one of its members. Such discretion is traditionally recognized both in international law – as the International Court of Justice has always made clear – and in national administrative law (namely, the domestic international administrative law of each state), which has traditionally qualified the exercise of diplomatic protection as a prerogative of the executive power in matters of international relations, thus withdrawing it from the judicial branch, according to the English doctrine of "royal prerogative power over foreign affairs", or the French doctrine of "acte de gouvernment".[11]

[8]See the Vienna Convention on Consular Relations Art. 5, subsection. m): [Consular functions consist in . . .] "m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State".

[9]To this end, included in the Vienna Convention on Consular Relations are "facilities, privileges and immunities" that regard both the functioning of the consular offices (Chapter II, Section I, in particular v. Art. 28: "The receiving State shall accord full facilities for the performance of the functions of the consular post"), and the holders of such offices (Chapter II, Section II, v. in particular Art. 40: "The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity").

[10]See in particular the Vienna Convention on Consular Relations, Art. 55.1: "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the State".

[11]Cerulli Irelli (2009); Guicciardi (1937); Gaudemet (2001).

9.3 The Impact of EU Law

The body of law traditionally referred to as "international administrative law" – it has been observed – is strictly bound to the status of citizenship. On the one hand, legal relationships between the state and persons living outside its territorial jurisdiction can be ascribed to international administrative law as long as those persons are citizens. On the other hand, legal relationships between the state and persons living inside its borders can be assigned to international administrative law as long as those persons are not citizens (*recte*, they are citizens of another country).

On European soil, however, all this is complicated by the fact that there is a supranational citizenship as well as a national one.

Two consequences derive from that. The first one is the development of a European Union (EU) law conditioning the "international administrative law" of member states. The second consequence is the development of a separate "EU international administrative law". Each of these aspects is to be taken into account.

European citizenship has a double dimension, horizontal and vertical. The horizontal dimension regards the rights that citizens of one Member State may assert before other Member States, under the same conditions as the citizens of those states. This levelling of the playing field regards both the basic right of "internal" citizenship, namely the right to vote and to stand as candidate in elections, and the basic right of "external" citizenship, meaning the right to enjoy the protection of the diplomatic and consular authorities. In both cases, however, this levelling affects the administrative aspects of citizenship rights,[12] rather than those strictly political in nature.

Article 20 of the Treaty on the Functioning of the European Union (TFEU) gives citizens of the Union the right to vote and to stand as candidates in municipal elections in the Member State of residence, but not in general election. There are good arguments that maintain that Art. 20 TFEU also recognizes the right of citizens of the Union to enjoy consular assistance from the authorities of other Member States, which is the administrative aspect of the basic right related to the external dimension of citizenship. This right does not extend to diplomatic protection, since this necessarily assumes political membership in the specific Member State that exercises it.[13]

[12]On this point, see also Cassese (1997), in particular, p. 92, where a comparison is made between the right of European citizens to participate in local elections and their right to have access to public employment in other member States: in both cases, "the national public powers are cut off from their own base (the community), but only partially, in the case of public employment limited to the offices that do not bring with them the exercise of authority and care for the general interest; in the case of electoral rights limited only to minor offices". We could add: as to the protection by diplomatic and consular authorities, limited to consular assistance.

[13]See, for instance, Kunzli (2006a, b): "EU citizenship clearly is not sufficient to fulfill the requirement of nationality of claims for the purpose of diplomatic protection. Considering the fundamental nature of this requirement and its universal acceptance, one wonders then how the right to diplomatic protection was included in the various EU treaty provisions. It is submitted

EU legislation initially aimed in this direction in order to implement the constitutional law noted above. The *acquis communautaire* is basically reflected in Decision 95/553/EC which, clearly enough, refers only to consular assistance.[14] But what is the content of the right to consular assistance that is recognized as pertaining to European citizens in relation to the diplomatic and consular authorities of the other Member States? Under a minimalist reading, the European right is limited to a duty of nondiscrimination.[15] But this reading is not fully convincing,

that the drafters of these provisions either did not intend to include diplomatic protection but failed to use the proper language or confused – and continue to confuse – diplomatic protection and consular assistance. [. . .] The "right" accorded to citizens of the Union may include consular assistance but EU member states cannot be forced to exercise diplomatic protection". *Contra*, Geyer (2007): "granting diplomatic protection to Union citizens through Art. 20 TEC does not as such constitute a violation of international public law. Nevertheless, the exercise of this protection would either require respective negotiations to obtain the consent of third states (as explicitly foreseen in Art. 20, paragraph. 2, TEC) or an understanding of Union citizenship as some form of nationality that would justify the exercise of diplomatic protection by any EU member state in favour of any EU citizen".

[14]Kunzli (2006a, b): "In Decision 95/553/EC the actions for the purpose of diplomatic and consular protection to EU citizens are defined in Art. 5(1): (a) assistance in cases of death; (b) assistance in cases of serious accident or serious illness; (c) assistance in cases of arrest or detention; (d) assistance to victims of violent crime; (e) the relief and repatriation of distressed citizens of the Union. In a Factsheet on consular and diplomatic protection provided through the website of the European Institutions the conditions for protection and the kind of assistance that may be expected are further defined. In order to qualify for protection, an individual is required to: 1) possess the nationality of an EU member state; 2) be "in distress abroad . . . and require consular protection"; and 3) be in a non-EU state where his or her state of nationality is not represented through an embassy or consulate. While the conditions for protection mention the nationality of claims, they are silent on the exhaustion of local remedies and injury resulting from an internationally wrongful act. Prior to the fulfilment of these conditions, diplomatic protection cannot be exercised. What is envisaged here is clearly consular assistance, which does neither require exhaustion of local remedies nor the occurrence of an internationally wrongful act. Only the assistance mentioned under point (c) could under certain circumstances give rise to diplomatic protection. It is curious to note that the wording of the Decision is fairly precise and deviates in this respect from the text provided in the EC Treaty, the EU Charter and the Constitution. While it is stated in the preamble that the decisions concern "protection" without further qualification, Art. 1 provides that "[e]very citizen of the European Union is entitled to the consular protection of any Member State's diplomatic or consular representation" (emphasis added). In the light of the activities defined in Art. 5 of the Decision, cited above, this is correct. While even consular assistance is usually only exercised on behalf of a national, it is not impossible that a consular officer of one state may render assistance to a national of another state. Since consular assistance is not an exercise in the protection of the rights of a state nor an espousal of a claim, the nationality criteria are not required to be applied as strictly as in the case of diplomatic protection. There is no necessity for a legal interest through the bond of nationality".

[15]Such is the position expressed, for example, in response to the Green Paper issued by the European Commission, (*Diplomatic and Consular Protection of Union Citizens in Third Countries*, Brussels, 28-11-2006, COM (2006) 712 final) by the United Kingdom, which has in particular excluded the possibility that the European constitutional norm can create a "legal right" for the European citizen to assistance on the part of the diplomatic and consular authorities of the member States that do not recognize a similar right for their own citizens. The position of the

especially in light of more recent evolutions of European constitutional law, which seem to impose on the Member States something more than a simple obligation of equal treatment.

Consular assistance on the part of the authorities of the Member States, on a basis of equality with the citizens of these states, is today not only a legal right recognized by European constitutional law, but also a fundamental right, sanctioned by the Charter of Fundamental Rights of the European Union, that now has full constitutional and binding force.

That of course does not mean that the diplomatic and consular authorities of the Member States are legally obliged to satisfy all the requests for assistance from European citizens, without being able to exercise any margin of discretion. But it does mean at least that the decisions that they make in dealing with any such requests must be reviewable by national courts, in order to protect a right created by European law. The European citizen who asks for consular assistance from the authorities of another Member State, and receives a refusal that he/she considers discriminatory, must be able to appeal to a national judge capable of exercising judicial review of the contested administrative decision. Therefore, the logic of the "acte de gouvernement", which has long dominated in the sphere of the domestic international administrative law of the States, seems to be now incompatible with the European constitutional law regarding consular assistance.

But EU law can also be understood to harmonize, at least to some degree, the substance of the national laws regarding consular assistance, thus minimizing the differences between the respective "international administrative laws" of the various Member States.

The new EU constitutional law provides, in particular, the legal basis for a Europeanisation of the national laws regarding consular assistance, consisting essentially in a power to carry out actions to support, coordinate or supplement Member States. Through these actions, the EU will be able to both condition the national laws regarding consular assistance, and to ensure that "the diplomatic and consular missions of the Member States and the delegations of the Union in third countries [...] shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries" (Article 35 Treaty on the European Union). It naturally does not (yet) imply the full Europeanisation of the administrative functions of consular assistance, so long as the European law does

British government is referred to by Geyer (2007), p. 2: "British nationals do not have a legal right to consular assistance overseas. The UK Government is under no general obligation under domestic or international law to provide consular assistance (or exercise diplomatic protection). Consular assistance is provided as a matter of policy, which is set out in the public guide, "Support for British Nationals Abroad: A Guide". [...] In relation to EU law, Article 20 TEC sets out an obligation of nondiscrimination. It requires Member States to treat requests for consular assistance by unrepresented nationals of Member States on the same basis as requests by their own nationals. In compliance with this, the UK provides consular assistance to significant numbers of unrepresented Member States' nationals. But Article 20 TEC does not create any right to assistance beyond this".

not create any right to consular assistance from Commission delegations. Commission delegations, however, can become involved with the common exercise (by means of common offices) of an administrative function that remains the responsibility of the member States to carry out.

European citizenship, however, also displays a vertical dimension. European citizens cannot vote and stand as candidates in general elections of a different Member State. But they do have the right to vote and stand as candidates in European elections. Thus, further developing the comparison between rights based on the internal and the external dimension of citizenship, one could ask whether the European citizen has a right not only to enjoy the protection of diplomatic and consular authorities of a different Member State, but also to enjoy the protection of European diplomatic and consular authorities themselves.

The vertical dimension of the right to vote emerged when direct elections to the European Parliament were established. It thus emerged when the function of "internal" political representation of European citizens was assigned to a European institutional body. Analogously, the vertical dimension of the right to consular assistance and diplomatic protection is strictly connected to investing European bodies with the external political representation of European citizens, namely the foreign affairs function.

This function is partly emerging and, partly, has already emerged.

With regard to the former aspect, the Lisbon Treaty assigns such function to the High Representative of the Union for Foreign Affairs and Security Policy,[16] which concerns the implementation of the common foreign policy by means of a "European External Action Service". The action of this diplomatic body[17] could bring about an effective Europeanization of the administrative function of consular assistance, and even open the way to the exercise of the function of diplomatic protection of European citizens on the part of the Union authorities.

With regard to the latter aspect, we must not forget that there are sectors in which the functions of consular assistance and diplomatic protection are already fully Europeanized. I am referring in particular to the common trade policy, in the context of which the Commission is directly concerned with exercising, in favour of European firms present in overseas markets or that intend to penetrate these, a function of interlocutor with the overseas authorities that regulate these markets, which seems to lead to consular assistance, or, even, to diplomatic protection. For example, a European firm, injured by commercial barriers stemming from measures adopted by the authorities of third countries that conflict with the norms of the WTO or other trade agreements, may invoke the Trade Barriers Regulation (TBR),[18]

[16]See Art. 18 TUE.

[17]The diplomatic body has been established by Council Decision of 26 July 2010 (2010/427/EU).

[18]EC Council Regulation n. 3286/94 of 22 December 1994, laying down Community procedures in the field of the common commercial policy in order to censure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 349, 31.12.1994, p. 71, Amended by EC Council Regulation n.

which substantially defines due process requirements to be applied to European Union decisions to exercise diplomatic protection or not in favour of such a firm. The European Union has not a duty to give diplomatic protection: just consider that, even once it has ascertained the existence of a prejudice against the complainant caused by illicit means, it can still refuse to exercise protection if this seems to be in the "community interest". However, all decisions adopted by the Commission in applying the TBR must respect the duty to give reasons and are reviewable by courts in order to verify – as made clear by the Court of First Instance – "that the relevant procedural rules have been complied with, that the facts on which the choice is based have been accurately stated and that there has not been a manifest error of assessment of those facts or a misuse of powers".[19]

Just as it provides for national judicial review over Member States' decisions regarding consular assistance, European law also provides for European judicial review over European decisions concerning the exercise of the functions of consular assistance and diplomatic protection.

In this respect, European law reflects a more general tendency: the progressive subjection of overseas action by national authorities to (general) administrative law requirements. This is a tendency mainly due to globalization, whose impact is now time to address.

9.4 The Impact of Globalization

Globalization multiplies the situations in which the authority of the State is exerted over foreigners, or, seeing the same phenomenon from another perspective, the citizens' rights are exposed to foreign authorities. Thus, it enlarges the sphere of the body of law traditionally referred as "international administrative law".

First of all, due to phenomena related to globalization, such as the increase of tourism, ever more frequently cases arise in which the citizens of a State reside within the territory of another State. Moreover, globalization also multiplies the occasions in which citizens find themselves exposed to foreign regulation independently of their physical presence on foreign soil.

Economic and social integration brings domestic regulations, issued on the basis of territorial jurisdiction, an extraterritorial impact. It produces effects on foreign citizens that have made a financial investment in the territory of the State. Or it impacts foreign firms that sell products and lend services within that territory. So, it is not only the circulation of persons, but also and above all that of capital, of goods

356/95 and n. 125/2008. On this theme, see, among others: Mavroidis and Zdouc (1998); McNelis (1998); MacLean (1999a, b).

[19]Court of First Instance of the European Union, case T-317/02, *Fédération des industries condimentaires de France (FICF) and Others v Commission of the European Communities* [2004] ECR II-4325, para. 94.

and services that link each other national legal orders, in such a way that the authority exercised by each State over its own territory continually involves cases that present a transnational element.

This is no longer an exception, but is rather becoming the general rule. Not only when it issues rules, or makes decisions, that specifically regard foreigners present on its territory, but in almost all cases in which the State performs a legislative or administrative function within its own borders, it must consider the potential effects that its rules and decisions have on foreign citizens and firms. So the formerly specific area of the so-called "international administrative law" is now becoming general administrative law, because domestic administrative law as a whole gains an increasing transnational importance.

This obviously impacts consular assistance and diplomatic protection. On the one hand, the area of situations to which this kind of public functions apply tends to significantly widen. On the other hand, the exercise of diplomatic protection and consular assistance tends to be "reabsorbed" under the rule of (general administrative) law.

As to the first aspect, the more the exposure of citizens to foreign jurisdiction grows, the more important is their need for assistance and protection by their own State, at least in all those situations in which they cannot automatically make use of international remedies.[20] The "demand" for consular assistance and diplomatic protection is growing. And it is becoming more diversified. It does not only regard the more traditional area of assistance provided to the citizens overseas in a condition of distress, which still appears to be greater than in the past, but also the entire sphere of trade diplomacy. As economic interdependence progresses, so does the function of assistance and protection for national economic actors that encounter obstacles in accessing overseas markets or which investments, products or services are impacted by unfavourable rules or by the decisions of the foreign authorities that preside over those markets.

As to the second aspect, consular and diplomatic functions are increasingly subjected, and maybe should be definitely subjected, to the principles and requirements of general administrative law, which they had tended in the past to escape, precisely because of their "international" appearance. We have seen, in fact, that the decisions made in the course of exercising these functions at one time resided in the sphere of political actions, withdrawn from jurisdictional control as they were from the application of the requirements of due process and duty to give

[20]On the persistent relevance of the practice of diplomatic protection, notwithstanding the development of international regimes that, in particular in cases of protection of human rights, accord to the individual already the right to address them self autonomously to international tribunals against illicit acts committed by States against them, see in particular Dugard (2005): "Aliens are still in need of protection. Human rights instruments do not grant them effective remedies except in a minority of cases. [...] Diplomatic protection provides a potential remedy for the protection of millions of aliens who have no access to remedies before international bodies and a more effective remedy to those who have access to the often ineffectual remedies contained in international human rights instruments. It should therefore, be retained".

reasons. But the very idea of the suspension of the rule of law in the sphere of the foreign action of the State, withdrawn as such from the reach of the guarantees of administrative law, is increasingly coming into crisis. The more the exposure of the rights and the interests of citizens to foreign jurisdiction, and thus the more the demand grows for assistance and protection by one's own State for the defence of those rights and interests, the less is it acceptable that the state functions that respond to this demand for defence escape the principles of rights owed to citizens by the State.

In consequence, the complete freedom of action, traditionally recognized by States with respect to requests for consular assistance and diplomatic protection, has undergone a process of erosion. This process is due not only, and not mainly to the development of international law,[21] so much as and above all to the affirmation, in the national regulations of the States, of an international dimension of judicial review exercised by the courts.[22] There are in fact currently a number of decisions by courts of various countries,[23] which affirm the right of citizens to judicial review of the reasonableness and nonarbitrary nature of the decisions made by the executive regarding diplomatic protection and consular assistance.

These decisions, consequently, move from the area of governmental unreviewable acts to that of administrative discretionary acts. The functions and the powers of which they are expressions come under the rule of the general principles of administrative law and of the rights owed by the State to citizens. The exceptional character of international administrative law is reduced as it extends its own field of application.

It is often observed that, as a result of globalization, the domestic action of the State is more intensively regulated by international law. But there is another side of the same reality, which is rarely underlined. For the same reasons, in fact, the overseas action of the State is ever more intensively regulated by national administrative law, that is to say by the old international administrative law, which is increasingly losing its own special and exceptional character.

[21]Although the special advisor to the Commission on International Law had proposed an article that would have imposed on the States the obligation to exercise diplomatic protection for their own citizens, when these were subject to a gross violation of international norms of *jus cogens* that could be attributed to another State ("Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the state of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State") the Commission did not however, agree to this proposal. See Dugard (2005).

[22]Lord Justice Richards (2006).

[23]For a comparative analysis of this jurisprudence, see, among others, Kunzli (2006b); Forcese (2007); Attanasio et al. (2009).

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Part IV
Parallel Regimes

Chapter 10
Public Procurement and Secondary Policies in EU and Global Administrative Law

Simona Morettini

10.1 Introduction

The *primary* objective of a public procurement may be identified in the acquisition of goods or services fulfilling a particular function on the best possible terms.

Yet, governments have frequently used their extensive powers of procurement to pursue different public interests,[1] unconnected with this primary objective. These interests are sometimes referred to as *secondary*[2] or, in US terminology, *collateral* policies. We can distinguish three groups of secondary policies which are industrial, social and environmental.[3]

Regarding the first, procurement has traditionally been an important tool of national industrial policy. Many States have used their purchasing powers to support domestic industry; many States have followed general *buy national* policies (United States), designed to promote employment or a favourable balance of payments, and they have often adopted policies directed at more specific objectives, such as regional development or the promotion of small or medium-sized enterprises. For example, in Brazil, a new legislation which has been in force since January 2007 establishes criteria that are meant to increase participation of smaller businesses in public procurement.[4]

[1] See Arrowsmith et al. (2000), p. 10.

[2] For early use of this term, see, amongst others, Arrowsmith (1995), p. 235.

[3] The concepts of primary and secondary objectives as used here do not have any legal significance, but are merely a convenient method to describe a practical phenomenon. This chapter considers the use of procurement to promote industrial, social and environmental goals in the broadest possible sense.

[4] *Federal Law* 8666/93, Art. 3° & 2°, See Machado Mueller (1998), p. 1.

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National procurement decisions have also frequently been influenced by social concerns.[5] Many countries, both in developed and developing regions, have used public procurement to pursue social goals, to reduce unemployment, raise labour standards, provide employment opportunities for disabled people and promote gender, racial and ethnic equality. In South Africa,[6] for example, the 2000 Preferential Procurement Policy Framework Act[7] provides that a preference points system must be followed in awarding public contracts in order to promote the advancement of people historically disadvantaged by unfair discrimination on the basis of their race. In Malaysia, in order to encourage greater participation of the *bumiputeras* (indigenous Malays), tenders from bumiputera companies receive preferential treatment in government contracts.

A third and increasingly important area of national policy supported by public procurement is the environmental policy. In the mid-1990s, various governments started using public procurement to achieve environmental goals. For example, through its actions in public procurement, the Canadian Government seeks to minimize the environmental damage caused by its own purchases and to promote the development and use of *green* products and technologies.

These national policies, pursued legitimately by national government, could be in contrast with other global or supranational legitimate objectives such as free trade. For example, in the European Union (EU), the first procurement directives, designed to achieve free trade in public markets, have had a substantial impact on the freedom to employ public procurement as a tool of national policy.

To face this unbalance, the last decade of the twentieth century has witnessed the start of a *global revolution*[8] in the regulation of public procurement. International agreements have been reached to provide models for countries reforming their national procurement system; financing institutions beyond the State have established procurement rules for projects financing; and countries have gathered to establish procurement rules that focus on opening up procurement market at a regional or global level.[9]

A common feature of those global and supranational instruments is the objective to open up national procurements to foreign competition. However, these liberalizing efforts met with limited success.

Despite the wide acceptance of the liberal theory, in fact, many countries are still not prepared to completely drop their protectionist policies and want to retain the freedom to use public procurement to promote secondary policies.

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[5]For the definition of linkage, as "the use of government contracting as a tool of social regulation", see McCrudden (2004), p. 257. According to the Author, the linkage allows the State to "participating in the market as purchaser and at the same time regulating it through the use of purchasing power to advance social and ethical goals".

[6]See Bolton (2004), p. 619.

[7]For more information about Target Procurement system, see webpage at http://www.epwp.gov.za/.

[8]The term *Global revolution* or *Global reformation* was used for the first time in Wallace (1995), p. 57 and it was, then, reused in Arrowsmith and Davies (1998), p. 30.

[9]On the implications about the Globalization of public procurement regulation, see: Arrowsmith and Trybus (2003); Auby (2003), p. 5; Caroli Casavola (2006), para 7.

Over the years, additional measures, for the protection of the environment and directed by social concerns, have also gained force and the balance between those concerns and free trade objectives have become an important issue for many supranational and global organizations.

Since the 1990s, the EU has also grappled with the issue of how to balance the realization of the single market with the pursuit of non-economic interests, including, *inter alia*, environmental protection and human rights.

It is then interesting to understand how these interests may be reconciled and to establish what, if anything, global regulatory systems can learn from the EU experience for their pursuit of both economic and non-economic interests.

This chapter aims to analyze the complex way in which the EU and global regulatory regimes of public procurement have dealt with these secondary national concerns and the limits imposed on the adoption of such policies.

Two main aspects will be examined: first, we will verify how EU administrative law and global administrative law have an impact on the use of procurement as an instrument of national policy; second, we will try to identify the different logics, followed by EU and global regulatory bodies, in trying to find a balance between industrial, social and environmental concerns and trade objectives.

10.2 Public Procurement and Secondary Policies in EU Law

The regulatory regime in public procurement from the European perspective is aimed to support greater trade integration among member countries. For this purpose, the EU has drafted specific procurement directives that must be applied by all Member States for central and local government contracts above the defined threshold.

Even so, since the 1990s, the European institutions have also grappled with the issue of how to balance the realization of the single market with the pursuit of non-economic interest, including, *inter alia*, industrial, environmental protection and human rights.

The importance of the need to accommodate these interests becomes evident in the recurrence of the theme in the European Commission procurement documents, in some cases brought to the European Court of Justice and in the 2004 public procurement directives.

10.2.1 Communications by the European Commission

In order to understand the role played by the European Commission, it is necessary to trace a series of soft law acts, where the Commission has addressed the issue of secondary policies in the specific field of public procurement.

Since 1989, with the "Communication on regional and social aspects",[10] this institution has begun to recognize the importance for Member States to reconcile social and environmental protection objectives on the one hand, and those of fair and efficient government procurement in the internal market, on the other.

However, only with the 2001 Interpretative Communications,[11] the European Commission has provided precise guidelines to national contracting authorities, interested in sustainable public procurement, on where and how to insert certain social and environmental considerations in public procedures in accordance with European law (then in force).[12]

In general, the main concern of this institution has always been not to increase the discretion of government authorities through the introduction of non-economic considerations in public procurement, especially during the evaluation of tenders. In fact, at this stage, the Commission allowed maximum openness for national contracting authorities to include secondary aspects among the *additional criteria*, relevant to determine the *most economically advantageous tender* and only if in possession of the following two conditions: connection with the product or service which is the subject-matter of the contract and economic advantage, which directly benefits the contracting authority.

Different from its attitude towards environmental and social secondary policies, the Commission has never allowed Member States to integrate considerations of industrial policy in the procurement process. This possibility has always been considered incompatible with the general principles of the Treaty, with the legislative provisions contained in the European directives and with the international commitments made by the European Union in the GPA context.

However, this does not mean that the Commission has been indifferent to the need felt by Member States to protect small and medium-sized enterprises (SMEs). In fact, since the early 1990s of the last century, the Commission has observed the limited access of SMEs to public procurement[13] and has undertaken a series of initiatives to solve this problem.[14] In particular, through

[10]See, in particular, point 48 of the Communication on Social and regional aspects of public procurement, COM (89) 400 final of 22.9.1989.

[11]See the "Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement", COM (2001) 274 final of 4.7.2001 and the "Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement", COM (2001) 566 final of 15.10.2001.

[12]See the Commission Communication "Public procurement for a better environment", COM (2008) 400 final of 16.7.2008.

[13]See the Communications from the Commission to the Council, "Promoting SME Participation in Public Procurement in the Community", COM (1990) 166 final of 7.5.1990 and "SME Participation in Public Procurement in the Community", SEC (92) 722 final of 1.6.1992.

[14]See Commission Communication "Implementing the Community Lisbon Programme - Modern SME Policy for Growth and Employment", Bruxelles, COM (2005), 551 final of 10.11.2005.

e-procurement[15] and subcontracting[16] the European Commission has advised the Member States how to use public procurement to promote SMEs developments without compromising open trade objectives.

10.2.2 The Role Played by the European Court of Justice

Among all EU institutions, the real driving force in the integration of secondary policies in public procurement law[17] was carried out by the European Court of Justice (ECJ). However, it is not clear what approach the ECJ would take in balancing industrial, social and environmental considerations against trade objectives.

The analysis of the Court's case-law highlights the initial impetus of the ECJ to introduce industrial, social and environmental concerns into public procurement law, however limited by the Commission Interpretative Communications, seen above.

The reasoning, not consistent and sometimes incoherent, followed by the Court reflects the image of a European Union deeply divided about the opportunity to allow national authorities to protect non-economic interests in public procurements.

In the first rulings, the ECJ seems to emphasize that it is possible to limit the internal market legislation to pursue other values, foreseen in the Treaty. Thus, for example, in *Beentjes*[18] case, disagreeing with the Commission, the Court recognized the possibility for contracting authorities to take into account social considerations to ensure an overall benefit to the whole local community. In particular, in the *Beentjes* case, cited above, the Court decided that award criteria are not limited to those of a "purely economic nature" and that in principle, criteria relating to "the employment of long-term unemployed persons" could be used if it complied with all the relevant principles of European law.

However, in subsequent judgments to the 2001 Interpretative Communications, the Court seemed to take a step back. In fact, in the *Concordia Bus Finland* case,[19]

[15]See Communication from the Commission, "i2010 eGovernment Action Plan-Accelerating eGovernment in Europe for the Benefit of All", COM (2006) 173 final of 25.4.2006.

[16]See Communication from the Commission, "Pan European Forum on Sub-Contracting in the Community", Brussels 1993; Mardas (1994), p. 19 and Bovis (1997), Chap. 5.

[17]See Charro (2003), p. 185. According to the Author, "The ECJ has traditionally adopted an active approach regarding integration of secondary considerations in public procurement".

[18]Judgement of 20.9.1988, *Beenjes c. Netherlands State*, in Case 31/87, discussed in Bruun (2001), p. 309. Bovis (2005), p. 615 and Arrowsmith (2004b), p. 1280

[19]Judgement of 17.9.2002, *Concordia Bus Finland* in Case C-513/99, in which the Court indicated that an entity could take into account as award criteria the pollution and noise levels of the buses to be used in providing a transport service. Case discussed in Charro (2003), p. 179; Bovis (2002), p. 1055; Bovis (2006a), p. 31 and Bovis (2006b), p. 91. See, also, the following judgment of 4.12.2003, *EVN AG*, in Case C-448/01.

the Court set some limitations on the discretion granted to contracting authorities. The criteria must relate to the contract's subject matter; they must not give "unrestricted freedom of choice" to the contracting authority, but must be "specific" and "quantifiable"; and they must be expressly mentioned and comply with the fundamental principles of the Treaty. Of course, there are significant limits to the possibilities for using procurement to promote secondary policies.

Despite this inconsistency, we can certainly define the Court of Justice as the first European institution to grant national legislators and contracting authorities relative discretion in using non-economic considerations among the criteria for the award of the contract.

However, the problem that arises at this point is: how may non-economic considerations prevail over economic ones without compromising transparency and open trade objectives? To answer this question, the European Court seems to suggest to contracting authorities a "rule of reason approach".[20] According to the Court, any non-economic factor introduced by the contracting authorities, whether social or environmental, must meet proportional criteria in relation to all the various conflicting interests (first and foremost the principle of non-discrimination).[21]

10.2.3 The EU's Public Procurement Directives

The above-mentioned principles, stated by the Commission and by the Court of Justice, have been incorporated in the 2004 public procurement directives.[22]

Through this intervention, the European legislator has recognized, for the first time, the possibility for Member States to introduce secondary criteria in their public procurement procedures.[23]

Following the guidance of the European Commission, the new directives have set the objective of simplifying and facilitating SMEs participation in tenders, for example, reducing costs and administrative burdens of procedures, making the

[20]See Bovis (2006b), p. 91. According to the Author, "the ECJ promotes a rule of reason approach, which envisions public procurement regulation as an instrument of policymaking at national and European levels, thus providing, contrary to the more restrictive approach of the directives, the necessary flexibility in order to take into account other public policy considerations such as socio-economic objectives and the protection of the environment".

[21]See de Sadeleer (2002), p. 292.

[22]See the Directive 2004/17 of the European Parliament and of the Council of 31.3.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and the Directive 2004/18 of the European Parliament and of the Council of 31.3.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[23]See Arrowsmith and Kunzlik (2009), Chap. 4.

access less complicated and more transparent,[24] encouraging the spread of subcontracting in the award of public contracts.[25]

Moreover, also in accordance with Commission guidelines, the 2004 directives governed the introduction of social and environmental considerations at different stages of the public procurement procedure.[26]

However, according to some authors, the European legislator could do much more,[27] for example, by clarifying, once and for all, "the position of contracting authorities over the legitimacy of pursuing socio-economic and environmental policies through public procurement".[28]

The new legislation certainly failed to clarify whether the environment and/or social criteria should bring economic benefit to the contracting authority or can result in a mere benefit to local community to be legitimate.

The legislator's provision of "the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area", in fact, is then repeatedly contradicted by the need to assess costs and benefits, even those of an ethical and social or environmental nature. It is evident that the most economically advantageous tender for the contracting authority does not necessarily coincide with the most advantageous tender for the local community.

Thus, the 2004 legislation certainly represents a step backwards when compared to the ruling of the European Court of Justice. In fact, the ECJ while stressing the importance of a "rule of reason approach", had recognized a degree of discretion to national contracting authorities in the use of non-economic award criteria aimed at pursuing general non-economic interests. One can conclude that the new directives were limited to incorporate the requirements that only the Commission, and not the Court of Justice, had stated with certainty in its guidelines.[29]

During the long and complex legislative process, the Nordic countries, traditionally more sensitive to environmental issues, and the European Parliament had opposed the Commission's request to connect the most advantageous tender to an economic advantage for the contracting authority. Underlying the opposition, there was the conviction that such wording would prevent contracting authorities to

[24]See recital 12, Directive 2004/18.

[25]See recital 32 and Arts. 25, 60, Directive 2004/18.

[26]See recitals 1, 5, 29, 33 e 46, Directive 2004/18 and recitals 1 e 55, Directive 2004/17. See also Arts. 19, 23, 26, 27, 43, 45, 53 Directive 2004/18.

[27]See Ramsey (2006), p. 284. According to the Author, "The directive tries to take account of the so-called sustainability issues: the environmental and social impacts of public procurement. The only innovation, if that is not too strongly put, is that the directive makes explicit reference to the potential to take sustainability issues into account. This is merely a "codification" of the existing ECJ case law and the Commission's earlier interpretative statements on the compatibility of the rules on public procurements with social and environmental objectives".

[28]See Bovis (2006b), p. 86.

[29]See Ramsey (2006), p. 275.

consider all the environmental and social benefits that do not translate into an economic advantage but protect the environment, life and health of the local community as a whole. Such requests, however, have not been mentioned in the legislative text.

Thus, the European legislator, despite having had the opportunity, declined to aid the Member States in pursuing environmental and social objectives through public procurements.

In the 2004 directives, therefore, the European Union has shown little sensitivity to the need of national authorities to use the public procurement as a means to resolve social and environmental policies (such as pollution, unemployment, marginalization of certain ethnic and religious minorities, and disabled people).

Nevertheless, the choice of the European legislator was predictable. It does nothing more than confirm what has always been the primary objective of EU policy in public procurement, namely the internal market.[30]

10.2.4 The "New" European Approach

The analysis, performed above, shows an increasing trend of European public procurement law to integrate industrial, social and environmental considerations in a regulatory framework traditionally dominated by the principles and rules of open trade. A trend that is, in particular, confirmed by the EU directives of 2004.

From an examination of institutional guidelines on the introduction of the secondary policies in public procurement the following considerations can be drawn.

The choices about the use of public procurement as a tool of industrial policy have proved quite consistent.

As just explained, in fact, both the Commission, the Court of Justice and the legislator have taken a restrictive approach on the practice of Member States to intervene in the rules on public procurement to advantage national or local industry.

Even after the birth of an European industrial policy, the EU has facilitated the access of SMEs to public procurement, only through the dissemination of e-procurement and subcontracting, in accordance with the principles and rules on free competition.

In no case, therefore, EU law has left to the discretion of the Member States the choice of reserving shares of public contracts to local SMEs or entering industrial considerations as criteria for selecting candidates or evaluation of tenders. This would be contrary to general principles of non-discrimination and equal treatment.

[30]See Pourbaix (2004), p. 284.

Among the factors underlying such a choice, we can certainly include: the spreading of the economic theory of *purity principle,*[31] under which the contract must be awarded only to the best financial proposal (without taking into account any other secondary purposes), and the results of economic policy analysis on the benefits achieved at national level by the use of public procurement as a tool of industrial policy. These investigations have, in fact, shown that often these government interventions have proved highly detrimental to the national economy.[32] For example, the small and medium-sized local businesses protected from international competition have not been encouraged to grow.

Instead, the choices about the use of public procurement as a tool of social and environmental policy proved quite mixed. While the Commission and the Council have taken a cautious and restrictive approach, the Court of Justice and the European Parliament have been more sensitive about the desire of Member States to intervene in public procurement to protect non-economic interests and values.

In these specific policies, in fact, a number of influences, both internal and external, have occurred against the *purity principle*, that have prompted some EU institutions to take a positive approach to the presence of secondary policies in public procurement.

Among the internal influences, we can certainly include the evolution of the commitment of the EU in environmental and social protection, and, in particular, the emergence of the concepts of *sustainable development*[33] and the *corporate social responsibility*.[34]

Among the external ones, we can include the initiatives undertaken by some global organizations for the protection of environmental and social policies, and human rights,[35] the *Green Public Procurement* (GPP)[36] and the *Sustainable Public Procurement* (SPP).[37]

In response to these factors and despite the restrictive approach of the European Commission, we can state that since 2004, EU law has also started to recognize the

[31]See McCrudden (2004), p. 257.

[32]See Trionfetti (1997), p. 1.

[33]See webpage at http://ec.europa.eu/sustainable/welcome/index_en.htm.

[34]Corporate social responsibility is companies acting voluntarily and beyond the law to achieve social and environmental objectives during the course of their daily business activities. See Green Paper, "Promoting a European framework for Corporate Social Responsibility", COM (2001) 366 final of 18.7.2001.

[35]For example, UNEP, ICLEI, OECD, ILO and UNICEF.

[36]The Green Public Procurement means that contracting authorities and entities take environmental issues into account when tendering for goods or services. The goal is to reduce the impact of the procurement on human health and the environment. For more information, see webpage at http://ec.europa.eu/environment/gpp/background_en.htm.

[37]The Sustainable procurement is ". . .a process whereby organizations meet their needs for goods, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organization, but also to society and the economy, whilst minimising damage to the environment".

possibility for Member States to integrate social and environmental issues in the award of public procurement.[38]

It is now clear that environmental and social considerations can be included, albeit under certain conditions, in the definition of the subject-matter of the contract. At this stage, contracting authorities have a great deal of opportunities for taking social or environmental considerations into account and choosing a product or service that corresponds to their objectives. A contracting authority can, for example, choose to buy goods with low environmental impact or services, which meet the specific needs of a given category of people, such as the socially disadvantaged or excluded, provided that such a choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States.

Moreover, the 2004 directives expressly allow contracting authorities to include specific techniques for disabled people or the environment. Thus, energy efficiency features of a product may be considered despite the costs involved in such a choice.[39]

However, at this stage of the procurement procedure, the socio-environment technical specifications must be sufficiently precise and must not eliminate or favour a given tenderer.[40] It should be noted that the criteria must relate to the subject matter of the contract, and thus it is not possible to insert criteria relating to the supplier's production method as a whole. When standards are used, contracting authorities should avoid reference to national standards since this might cause limitations to foreign contractors. If reference to a specific characteristic is unavoidable, it must be stated expressly that products which are *equivalent* will be accepted. When there is a European standard for the product being procured, purchasers must refer to it. Moreover, the 2004 directive states clearly that purchasers cannot insist on compliance with European standard but must accept other suitable products.[41]

At the qualification stage, the new directives bring new grounds for exclusion aimed at fighting crime and corruption. Bidders can be excluded on grounds of bankruptcy; if they have been convicted of an offence concerning their professional conduct; if they have committed grave professional misconduct (e.g. participation in a criminal organization, corruption, fraud or money laundering); if they have not fulfilled obligations relating to the payment of social security contributions or to the payments of taxes. This is a prescriptive list, and not an illustrative one. Thus, contracting authorities cannot add any other grounds for exclusion. However, authorities might be able to use this provision to pursue social[42] and

[38]For a deeper examination, see Caranta and Trybus (2010), Chap. 1.

[39]The fact that this might limit the number of suppliers that are able to provide the product is not necessarily regarded as a discriminatory provision. See Concordia Bus Finland, Case below.

[40]Article 26, Directive 2004/18 and Art. 48, Directive 2004/17.

[41]Article 23 and recital 29, Directive 2004/18.

[42]Article 45, Directive 2004/18.

environmental[43] concerns. It is important to note that while under the old directives contracting authorities were free to decide whether or not to include any of the exclusion provisions, under the new directives, Member States are obliged to implement this European policy through the public procurement regulation.

The procurement directives also expressly allow "special conditions relating to the performance of a contract, provided that these are compatible with European law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations".[44] It is important to notice that the words "relating to the performance of a contract" imply that only conditions related to the subject matter of the contract can be included. Thus, policies such as affirmative action policies may not comply with the European procurement directives.

Instead, EU law allows only a limited discretion for national legislators about the choice whether or not to include social or environmental criteria to determine the most economically advantageous tender. The new directives expressly provide that the contracting authority can take environmental or social[45] characteristics into account when awarding a contract under the "most advantageous offer", provided that they are linked to the subject matter of the contract and they generate an economic advantage for the contracting authority. Moreover, they must be expressed in the contract notice and the contracting authority must establish a weighting or a priority system of evaluation.[46] These requirements are very rigid and difficult to meet. To avoid conflict with the rules of the free market, EU law has chosen, then, to take a rigid approach on the request of Member States to benefit the public procurement as a "conveyor belt" of industrial, environmental and social policies.

The EU itself is currently using public procurement as a tool to pursue non-economic objectives indirectly. For example, during the selection process, the EU makes use of public procurement law as a social tool to prevent corruption in this area.

The same is true regarding both initiatives to facilitate SME access to EU procurement and the request for special environmental certification in purchases made by the same European institutions to reduce electricity consumption.[47] However, even in these cases, the European Union has always tried to justify each individual criterion introduced in economic terms.

[43]Article 43, Directive 2004/18 and Art. 54, Directive 2004/17.

[44]Article 26, Directive 2004/18 and Art. 38, Directive 2004/17. See, also, recital 33, Directive 2004/18.

[45]Social criteria are not included among the various criteria given as examples in the public procurement directives. However, if the term "social criterion" is construed as a criterion that makes it possible to evaluate, for example, the quality of a service intended for a given category of disadvantaged persons, such a criterion may legitimately be used if it assists in the choice of the most economically advantageous tender within the meaning of the directives.

[46]Article 53, Directive 2004/18.

[47]For more information about Energy Star, see webpage at http://www.eu-energystar.org/en/400.shtml.

Through this cautious approach, the EU was able to enter secondary policies in public procurement without sacrificing the *primary* objective of any procurement: the acquisition of goods or services on the best terms.

10.3 The Influence of Global Law Instruments on the Application of Secondary Policies

It is apparent from the EU context that the pursuit of both economic and non-economic interests may be reconciled. It is, consequently, interesting to establish what, if anything, the global legal order can learn from the European experience.

As mentioned above, over the years many global regimes have regulated public procurement. Agreements have been reached to provide models for countries reforming their national procurement system; global financial institutions have established procurement rules for financing projects; and countries have gathered to establish procurement rules that focus on opening up procurement market at a global level.

This section aims to briefly discuss how some of those global regimes have dealt with secondary concerns and the limits imposed on the adoption of such policies.

To such end, three main procurement regulations will be analyzed in the following parts: the United Nations Commission for International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services; the World Trade Organization (WTO) Government Procurement Agreement (GPA); the World Bank (WB) Procurement Guidelines.

These global regimes show how different systems have tried to strike a balance between the various procurement objectives. The value of those possible solutions will be evaluated, taking the particular context of the European law into account.

10.3.1 The UNCITRAL Model Law on Procurement of Goods, Construction and Services

The balance between the relevance of secondary policies, especially regarding the promotion of national industries, and the pressure for trade liberalization, was considered by the UNCITRAL Model Law on Government Procurement.

The UNCITRAL Model law is relevant for several reasons.

First, it reflects the wide membership of the United Nations.[48]

[48]The UNCITRAL is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the harmonization and unification of the law of International trade. UNCITRAL texts are adopted in 1993/4 by the United Nations Commission on International Trade Law, a body with 60 elected member States representing a wide range of geographic regions. Developing countries play an active role in both rafting and adoption UNCITRAL texts.

Second, the Model Law was formulated to assist all States, including developing countries and countries with economies in transition. In fact, this agreement has helped mainly transition and developing economies to set national procurement legislation or to reform their existing laws according to a liberal approach.[49]

Third, the Model Law provides for alternative choices in drafting a procurement system. This flexibility means that it is able to reflect differences in regulatory policies deriving from a wide range of legal cultures, and even to take into account some political constraints that other global agreements try to avoid.

In other words, contrary to the EU law, the Model Law can in some cases ensure that secondary policies, especially industrial policies, can be included on procurement proceedings, but with a limited scope.

The Model generally prohibits excluding foreign industry, thus *prima facie* precluding industrial development policies; however, it envisages exceptions to this general rule.

To begin with, under Art. 8(2)[50] suppliers may be excluded on the basis of their nationality provided that the grounds are set out in the law and a reason is included in the record. The Guide to Enactment to UNCITRAL Model Law suggests that this is needed to allow the protection of "vital economic sectors of (States') national industrial capacity against deleterious effects of unbridled competition".[51] However, the Guide specifies that "the imposition of the restriction by the procuring entity should be based only on grounds specified in the procurement regulations or should be pursuant to other provisions of law".[52] That requirement is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation.

Moreover, entities may use industrial preferences at the award stage. Thus, for tendering Art. 34(4)(c)(iii) provides that criteria for determining the lowest evaluated tender may include "the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [. . . (the enacting State may expand subparagraph (iii) by including additional criteria)]; and national defence and security considerations". The provision also contemplates States adding their own additional criteria, which could be, for example, regional or small business development.

[49]For more information see the webpage at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html.

[50]See Art. 8 Participation by suppliers or contractors.

[51]Section I, para 25.

[52]Idem.

These possibilities are subject to the usual control mechanisms for award criteria, such as prior disclosure and (where possible) mathematical weighting.

Finally, the Model Law provides for use of single sourcing for economic reasons (see Art. 22, 2). However, the Guide to Enactment makes it clear that this is intended to be confined only in very limited circumstances.

In all cases, the Model Law suggests that consideration of industrial criteria should be subject to certain procedural requirements designed to promote transparency in the procurement process. In fact, where procurement is used to promote industry, it is obviously desirable that it should be done in a way which is as efficient and transparent as possible, so as not to undermine other objectives of the procurement process.[53]

Neither the Model nor the Guide to Enactment gives clear advice on the use of contract to promote social objectives. In general, the Model Law appears to contemplate only a very limited scope for this use of public procurement. As in EU law, Arts. 6 and 15 allow entities to exclude suppliers for non-payment of tax or social security contributions[54] for "promoting the integrity of and fairness and public confidence in the procurement process".[55] Thus, it is envisaged that to this extent the contract may be used in support of other government policies.

Instead, unlike the European law, in the evaluation of bids through the "lowest evaluated tender" the procurement agency could take into account also "the encouragement of employment".[56] However, the Model Law foresees that such a requirement must be set out in advance and "shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable".[57]

Finally, regulation of policies directed at environmental objectives was largely left out of the Model Law. The lack of such provisions was based on the assumption that Member States should not follow such policies. However, the increased use of procurement as an instrument to pursue such policies has led the commentators to advocate the inclusion of provisions establishing the parameters for such use. It is better to acknowledge the use of those policies and to regulate them in a transparent and effective way than to leave the issue unresolved.[58]

[53]For a deeper examination of the Model Law, see Linarelli (2006), p. 317; Arrowsmith (2004a), p. 17 and Wallace (2006), p. 485.

[54]See Art. 6 (1) (b) (v) and Guide p. 72.

[55]Preamble, para.(c).

[56]See Art. 34.

[57]See Art. 34, 4 (B) (ii).

[58]See Arrowsmith (2009), p. 10.

10.3.2 The WTO Government Procurement Agreement

The GPA[59] is a plurilateral agreement which operates under the WTO[60] system. Signing the GPA is not mandatory for all WTO members and, in fact, the agreement has limited membership[61] if compared to the number of members of the WTO, as most developing countries have not signed it.[62] However, the countries which are part of the GPA account for a significant portion of the world trade. Moreover, since the GPA is an agreement open for the participation of countries with a wide diversity of legal cultures, its content has to accommodate different policy requirements. For those countries that have signed the GPA, the provisions of the Agreement are mandatory. This rule-based approach is an important feature of the agreement since not all global agreements in public procurement have this characteristic. As mentioned above, the UNCITRAL Model Law, for example, provides only a guideline for States that want to reform or establish their procurement system.

As well as the EU Law, the GPA is guided by the rules on *non-discrimination* and *most favoured nation*.[63] Those rules establish a significant limitation for members willing to adopt secondary policies. Moreover, the GPA contains provisions on the prohibition of *offsets*, which are measures used to "encourage local development or improve the balance of payments accounts by means of local content, licensing of technology, investment requirements, counter-trade or similar requirements".[64]

However, the Agreement envisages some exceptions to these general rules.

First, a certain flexibility is allowed for coverage. Unlike the European law, coverage under the GPA is a complex matter since each member negotiates coverage upon accession. Thus each State party might insert specific exceptions to pursue secondary policies. The United States,[65] Canada, Japan and South Korea, for example, have included specific derogations from the general rules in their Annexes to be allowed to pursue specific industrial and social programmers, which might be incompatible with the GPA provisions. These derogations show the difficulties that States have to forgo the use of procurement as an instrument for the pursuit of national public policies.

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[59]For a comprehensive analysis of the GPA, see Arrowsmith (2003).

[60]For a deeper examination of the WTO, see Hoekman and Mavroidis (2007).

[61]The WTO has 148 members, while the GPA has 39 members as of May 30th 2010.

[62]See the webpage at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties.

[63]The Agreement's main objective is to promote the widest possible competition between enterprises during public procurement procedures.

[64]See Art. XVI GPA.

[65]For example, upon accession, the United States states that "the Agreement shall not apply to preferences or restrictions associated with programs promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women" and Canada that "the Agreement does not apply to procurements in respect of set-asides for minority businesses".

Second, the GPA Art. XIII 4(a) does not provide any limitation on the kind of award criteria to be used. Unlike the provisions in other trade agreements such as the EU directives, the GPA does not bring an illustrative list which might impose a limitation to the criteria relating to the delivery of products, works and services. Thus, secondary criteria might probably be used to determine the winning offer. The only limitation imposed by the GPA is that any factors other than price, that are to be considered in the evaluation of tenders, must be published in advance (Art. XII 2(h)).

Third, Art. XXIII (1) states that any party should be prevented from "taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurements of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes". So, it is possible, for example, to justify the set-aside of a portion of the defence procurement to national suppliers, arguing that the maintenance of such suppliers is vital to national security.

Finally, Art. XXIII (2) provides for a departure from the non-discrimination rule in some limited circumstances. This means that States might use the provision set out in Art. XXIII (2) to justify the use of secondary policies under the GPA. The interests covered by the Article are "public morals, order or safety, human animal or plant life or health, intellectual property, or the products or services of handicapped persons, philanthropic institutions or prison labour". It can be noted that industrial objectives designed to protect national industries will not generally be allowed. However, the limits of using this provision to implement other secondary policies, such as social and/or environmental policies, are uncertain.[66] In particular, discussions have been held over the precise definition of the meaning of the expression *public morals* and *public order*. Does this cover human rights and labour issues? Can this provision justify the use of discriminatory conditions directed at readdressing inequalities between individuals? In some countries, for example, tensions between ethnic groups might be an important issue for public order. The governments of these countries might want to use procurement to ease the tensions between those groups. The answer is not clear.

Many of the uncertainties regarding the use of secondary policies in the GPA context have been raised by EU and Japan in a complaint against the United States (the *Myanmar*/*Massachusetts* Case). In this instance, the State of Massachusetts adopted a law that excluded any firm doing business with Myanmar from the procurement procedures. This policy was adopted in protest against Myanmar's record on human rights, but was considered unconstitutional by US Supreme Court and the complaint before the dispute settlement body (DSB) of the WTO allowed to lapse. Therefore no guidance on the precise limits of the provisions has been given so far.

[66]See Petersmann (2003), p. 241.

However, the interpretation of derogation provision in the GPA might be linked to the jurisprudence concerning the derogations provided in the General Agreement on Tariffs and Trade (GATT) Art. XX, which covers similar interests.[67] Moreover, in the preamble, the WTO Agreements, also valid for the GPA, states that the parties "recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment [...] in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".[68]

So, we can say that although there are significant limitations on the use of national secondary policies, the GPA contains some provisions which could be used to implement secondary procurement concerns.

10.3.3 The World Bank Procurement Guidelines

The WB *Guidelines Procurement under the IBRD Loans and IDA Credits*[69] are applicable to all goods, works and services wholly or partly financed by the Bank.

The choice of considering the possibility of using secondary policies under the WB system results from some additional factors.

The analysis of the application of secondary objectives in projects financed by the WB is particularly interesting given the number of client countries[70] and the special relationship that is established with the loan agreement.

There are two main issues that arise in this context. The first is the possibility for borrowing countries to use their procurement as a means to promote their social or other secondary objectives at their own discretion, either based on purely domestic policies or on global agreements to which the borrower is bound. A second issue is the question of whether the World Bank should seek to leverage the procurement powers of borrowing countries to support or promote policies of the Bank itself, through secondary uses of that procurement power. Given the amount of resources involved in financed projects and since some of the issues pursued by secondary policies (such as protection of the environment, development of infant industries or protection of labour rights) are recognized by the Bank as important development

[67]For information about the *necessity test* in the GATT, see McCrudden (1999), p. 3.

[68]About the sustainable development in international trade, see George and Kirpatrick (2004), p. 441.

[69]See also the Standard Bidding Documents and the Bank-Financed Procurement Manual.

[70]For further information about WB Member States, see webpage at http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/0,pagePK:180619~theSitePK:136917,00.html.

targets, there is a question of whether the Bank should use procurement as a means to adopt some standard practices in all its financed projects.[71]

The procurement under financed projects is guided by four main principles: economy and efficiency; access to all eligible bidders; transparency and the development of the industry in the borrowing country. The protection of the domestic industry of the borrowing country is the most striking difference from other major global procurement regulations.

The Bank, however, justifies the inclusion of the development of the national industry as one of its main procurement concerns, based on its Article of Agreement requirement for fostering "the development of the productive resources of members, assisting in raising productivity, the standard of living and conditions of labour in their territories". It is possible, in fact, to foresee that the interpretation of such provision could in theory lead to the adoption of several policies directed to the promotion of industrial and non-industrial objectives in member countries. Since there is no precise definition of the words *development*, *productive* and *resource*, the scope of the provisions is wide enough to embrace policies directed at the promotion of labour standards, environmental standards, human rights, etc. In fact, the provision urges the Bank to pursue policies which will have a direct positive impact on the lives of the people living in its client countries.

However, this primary interpretation should be tempered by the general provision found in Art. IV, Section 10, which forbids interference in the political affairs of any borrowing country and determines that only economic consideration shall be taken into account. Thus, any policy adopted by the Bank throughout its operation must have its economic effects and efficiency carefully considered and must not limit the access of the loan procedures for particular States. Moreover, the Bank may only consider policies if they amount to an *economic consideration*, which is distinguished from political interests.[72]

In order to achieve its objectives, the Bank sets a series or rules which must be followed in all financed projects. A few of those policies are imposed by the lender but others are left to the borrower's discretion. However, the WB reviews and modifies national procurement rules to make them adaptable to what the Bank considers to be the most effective way to procure. Thus, if the borrower wants to pursue a particular policy, such policy will be subjected to the limits imposed by the Guidelines and should be discussed with the lender. On the other hand, the lender may impose policies and methods which do not necessarily coincide with the borrower's usual procurement practice. This behaviour might lead to questions over interference in the national sovereignty of the borrowing country.

During the procurement procedure, there are considerable uncertainties over the possibility of implementing secondary policies. The Bank's broad definition of the criteria which are allowed in each phase of the procurement process leaves unclear

[71]See Hoekman (1998), p. 249.

[72]See Hunja (1997), p. 217.

the precise limits in which such criteria could be applied. This is the case, for example, in the draft of technical specifications; in the use of other factors in addition to price at the award procedure; in the inclusion of conditions for execution of the contract. For example, the WB Guidelines state that environmental benefits may also be taken into consideration for the purpose of determining the lowest evaluated bid. However, according to the guidelines, the factors to be used "shall be expressed in monetary terms, or given a relative weight in the evaluation provisions in the bidding documents".[73]

As seen above, in some instances the Guidelines' provisions are not very precise and there are doubts over the implementation of some policies. In this context, the discretion given to the borrower and the Bank's staff at the negotiation stage might result in a lack of transparency in the application of the Guidelines. Instead, there are areas where the Bank defines specific policies which are allowed to be included in the procurement procedure. This is the case, for example, of the domestic preference mechanism set for each of the procurement products.[74]

Finally, the Bank has established the debarment of firms involved in fraudulent or corrupt practices in the past as a means to implement its own anti-corruption policies for financed projects. In other words, the Bank uses its procurement power as a means to impose its anti-corruption policy and no discretion is given regarding the application of such policy. In fact, the Bank has identified corruption as "the single greatest obstacle to economic and social development" and has instigated many anti-corruption measures and government initiatives to tackle the problem. Those provisions probably reflect the main secondary policy imposed by the Bank upon borrowers.

10.4 Conclusions: The Difficult Balance Between Flexibility and Rules

The complex way in which the EU and the global regulatory regimes of public procurement considered above, have dealt with the secondary national policies, reflects the contrast between the two faces of globalization. One is what we might call *economic globalization*, which is based on market liberalization. The other is what we might call *social or sustainable globalization*, created by a series of initiatives, undertaken by a growing number of global and regional organizations. In fact, while the first has tried to limit the presence of secondary policies in public procurement, the second has encouraged their implementation by States and by national authorities.

[73]See Guidelines, para. 2.52.

[74]See Guidelines, paras. 2.55 and 2.56.

In particular, from the comparison of the relevance of the secondary policies in the European and global public procurement law, the following considerations can be drawn. First of all, in trying to find a balance between industrial national concerns, pursued by Member States, and free market rules, the European legal order and the global regulatory bodies, analyzed above, seem to follow different logics. In fact, EU law has a restrictive approach on the practice of Member States to intervene in the rules on public procurement to advantage national or local industry; the UNCITRAL Model Law, the GPA and the WB Guidelines, on the contrary, recognize the possibility for governments to introduce special derogations or special exceptions in public procurement procedure to promote national industrial development. The different attitudes to industrial national policy reflect the different membership and aims that characterize the EU compared to the other regulatory bodies examined. In fact, while the first wants to develop a common industrial policy in compliance with the principle of non-discrimination, the seconds (particularly UNCITRAL and WB) aim to improve the lifestyle in developing countries and, for this reason, they also justify the inclusion of domestic industrial concerns.

Second, contrary to the UE experience, the regulation of policies directed at environmental objectives was largely left out of the global procurement regimes. European law is the only one to have regulated all the State requirements to protect industry, society and the environment. In fact, while these three common policies in the EU have now equal status, the other legal contexts, which are more sectional, have preferred to give more importance to industrial and social concerns rather than to ecological ones.

Third, all the regulatory regimes considered, at the qualification stage of procurement procedure, bring grounds for exclusion aimed at fighting crime and corruption. Thus, we can say that both EU and the global bodies are currently using public procurement as a means to impose their anti-corruption policy and no discretion is given to Member States regarding the application of such policies.

Fourth, all the legal regimes mentioned allow only a limited discretion for national legislators about the choice of whether or not to include *secondary criteria* to determine the *most economically advantageous* tender. The European directives expressly provide that the contracting authority can take environmental or social characteristics into account when awarding a contract under the most advantageous offer, provided that they are linked to the subject matter of the contract and they generate an economic advantage for the contracting authority. Also, the UNCITRAL Model Law, the GPA and the WB Guidelines provide that secondary criteria must be expressed in the contract notice, expressed in monetary terms and the contracting authority must establish a priority system of evaluation. These requirements are very rigid and difficult to meet.

More generally, we can observe an increasing trend by the EU and the other global regulatory regimes to integrate secondary policies in their public procurement regulations. EU and global procurement regulatory bodies have not yet found a perfect balance between secondary concerns and trade objectives. While EU law is very detailed and strict in protecting free trade, global regulators allow for more

flexibility. As seen above, in some cases, global administrative law is not very precise and there are doubts over the implementation of some policies. In this context, the discretion given to the member countries might result in a lack of transparency. The EU is the only regulator to have provided Member States with precise information on if, how and when to insert secondary considerations at various stages of the procurement process, respecting the general principles of transparency and proportionality. In the EU legal order, the restrictive approach has deprived the national legislators of one of the most important and traditional policy tools. In the global context, on the contrary, the excessive flexibility, which characterizes the GPA, and the uncertainty, which is common to both the UNCITRAL Model Law and the Guidelines of the WB, create the basis for abuse and protectionist measures.

As we have seen, the different EU and global approach towards the secondary policies in public procurement can generate discriminations between EU Member States and the member countries of global regulatory bodies. For example, contrary to some GPA Member States, a European government cannot intervene in the rules on public procurement to advantage national or local industry. Therefore, there is an urgent need to review and coordinate the regulation of all secondary policies on the above mentioned public procurement regimes.

With this in mind, the European Commission has recently published a Green Paper[75] containing its ideas for simplifying and updating the current EU legislative framework for public procurement. Amongst other objectives, it aims to enable public contracts to be put to better use in support of other policies. For this purpose, the Green Paper identifies a number of key areas for possible reform and asks for stakeholders' views on options for legislative changes. For instance: should the EU public procurement rules be modified to allow other policy objectives such as promotion of innovation or environmental or social considerations to be better taken into account? Should there be EU rules establishing obligations to buy only products respecting certain environmental conditions or to set aside a certain percentage of the budget for innovative goods and services? The Commission will draw on the contributions to the consultation in preparing by 2012 the future legislative proposal on the reform of the EU public procurement rules.

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[75]See the Commission "Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market", COM (2011) 15 final of 27.01.2011.

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Chapter 11
The Protection of Cultural Heritage Between the EU Legal Order and the Global Legal Space

Carmen Vitale

11.1 Cultural Heritage in the Age of Globalization

There are important reasons behind the establishment of a regulation[1] of cultural heritage beyond the State. In the first place, there is an evident disproportion between those countries capable to protect their cultural heritage and those unable to do so, notwithstanding their important cultural heritage.[2] Another reason relates to the risks linked with the protection of cultural heritage that governments cannot properly take care of (such as the unlawful trade of cultural heritage and the damages against cultural heritage in case of armed conflict). At the same time, globalization has a significant impact on the use of cultural heritage, extending its concept and enlarging the number and quality of its users.[3]

This chapter aims at exploring cultural heritage's legal regime in the age of globalization.[4] A new concept of cultural heritage, seemingly beyond a material and territorial dimension,[5] is gradually emerging. Both at the global and European Union (EU) level, an attempt to expand the notion of cultural heritage in terms of the object of protection as well as of the new subjects entitled to benefit from cultural heritage, can be sketched. This tendency reflects the open and adjustable

[1] On this issue, See Kingsbury et al. (2005), p. 11.

[2] Francioni (2008), p. 13.

[3] "all of the reasons why people care about cultural objects [...] imply a set of fundamental [...] considerations that seem central to the development of cultural property policy. They can be considered under three headings: Preservation, Truth and Access" (Merryman (2000b), pp. 112–118).

[4] See Allegretti (2004), p. 6.

[5] Giannini (1976), p. 31, singled out the immateriality (cultural value expressed by the artifact) as one of cultural heritage' distinctive traits.

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content of the notion of cultural heritage that depends on the value expressed by the cultural good considered, while the law to be enforced can depend on the specific notion considered.

The following sections will try to examine how different legal systems (and specifically the EU and the global legal systems) deal with the protection of the cultural heritage, in order to understand whether there are conflicts between different legal regimes and how they may be solved.

11.2 The Protection of Cultural Heritage in the Global Legal Space: The World Heritage Convention System

The international system addressed the protection of cultural heritage in localized areas already in the early Fifties. The preamble of the 1954 Hague Convention on the Protection of Cultural heritage in case of armed conflict stated that "the damage caused to the cultural heritage belonging to any people represents damage to the cultural heritage of humanity as a whole, as every people contribute to create the world culture". Yet, cultural heritage was almost exclusively subject to domestic jurisdiction (*domaine reservé*): the very 1970 UNESCO Convention on prohibition and prevention of unlawful trade of cultural heritage, for example, was based on a "national" idea of cultural heritage hinged to sovereignty and the right of property. It is only the 1972 UNESCO Convention concerning the protection of the world cultural and natural heritage (WHC) to explicitly put forward the development of a public and collective value of cultural heritage because of its capability to represent any creative expression acknowledged by local communities as part of their tradition and identity.[6]

The 1972 UNESCO Convention use of the notion of cultural heritage evokes Merryman "cultural internationalism" According to Merryman,[7] cultural internationalism would entail a relative liberalization in the circulation of cultural heritage for educational purposes and would thus promote reciprocal respect among nations, in opposition with the protectionist demands expressed by the cultural nationalism. The 1972 UNESCO Convention's[8] notion of cultural heritage[9] refers to the sites, groups of buildings and monuments that, because of their outstanding value, are relevant to the whole humanity despite their location and ownership. These sites, buildings and monuments indeed require a special protection regime that is laid

[6]Macchia (2010), p. 59.

[7]Merryman (2000a), p. 66.

[8]WHC, Art. 1.

[9]The use of the term heritage instead of property aims at underlining the historical value of the heritage protected for the future generations, as well as the inclusion of immaterial artifacts. On the same subject, Blake (2000), p. 61 and further; Frigo (2004), p. 367 and further; O'Keefe (1999), pp. 25–26.

down in the Convention and in the Operational guidelines for its implementation, and it is based on their inclusion in the WHL.[10] The system of protection provided by the Convention is additional to the ones established by the States in which enlisted cultural sites are. Indeed, the UNESCO Convention does not depart from the concepts of national sovereignty and property. This may also be a consequence of the time in which the Conference itself was adopted, characterized by a latent antinomy between sovereignty and interest of humanity[11] and by the search for a balance between them.[12]

The World Heritage Committee, an intergovernmental body composed of 21 States Parties to the Convention, elected by all States Parties to the Convention is responsible for the administration of the WHL, for the implementation of the Convention and the updating of the operational guidelines. It also provides international assistance, financed by the World Heritage Fund. The Committee has a number of tools capable of affecting the activities of Convention's Member States and aimed at ensuring compliance with global standards. More specifically, the Committee manages the List of World Heritage in Danger, which includes property threatened by serious and specific dangers and represents a classical form of name and shame. Moreover, the Operational Guidelines adopted in the Nineties and their subsequent revision and application show that inscription of a property on the List of World Heritage in Danger may take place without the request of the relevant State Party, and even against its express will, and may be accompanied by a number of suggested measures to be adopted by domestic authorities[13]: an evolution which turns the WHC from a case of international coordination into a system aimed at ensuring member States' compliance with the World Heritage regime.[14]

The UNESCO world cultural heritage regime is also based on a number of advisory bodies. They play a decisive role in ensuring the effectiveness of this regime, because they carry out significant functions in the process of listing through information and advice towards the WHC. Two examples are worth mentioning: the International Council on Monuments and Sites and the International Union for Conservation of Nature. The former is the only international non-governmental organization dedicated to promoting the application of theory, methodology and scientific techniques for the conservation of the world architectural and archaeological heritage. Among its principal objectives, the following are included: (a) to co-operate with national and international authorities on the establishment of documentation centres specializing in conservation; (b) to work for the adoption and implementation of international conventions on the conservation and

[10]WHC, Art. 11.

[11]Gradually and through a reconsideration of the powers of the WHC, by updating the operational guidelines, the point of convergence between national sovereignty and interests of the international community has gradually moved in favour of a second one. See, Macchia (2010), p. 66.

[12]Francioni (2008), p. 5.

[13]von Bogdandy et al. (2008), p. 1375.

[14]Battini (2007), p. 95.

enhancement of cultural heritage; (c) to put the expertise of highly qualified professionals and specialists at the service of the international community. Therefore, ICOMOS is responsible for the evaluation of all nominations of cultural properties made to the WHL by WHC member States. It is also actively involved, through its international secretariat and its national and international committees, in the preparation of reports on the state of conservation of properties inscribed on the WHL.[15] The IUCN, created in France in 1948, supports scientific research and manages projects all over the world. It also provides technical support and advice to governments, NGOs, international conventions, UN organizations, companies and communities on environmental and development issues. Finally, it helps implement laws, policy and best-practice by mobilizing organizations, providing resources and training, and monitoring results.

Although the UNESCO regime for the protection of World Heritage is seemingly afforded with weak instruments, such as the inscription of properties on the World Heritage List or on the List of World Heritage in Danger, its activities increasingly play a role, not least in national administrative procedures.[16]

Through the establishment of the WHC, a multi-layered system for cultural heritage protection comes to emerge. A first level of protection is provided by national regulations on cultural heritage. A second level of protection is provided by the UNESCO WHC. The two levels are interdependent. The development of the notion of world cultural heritage influences the definition of the instruments aimed at ameliorating the preservation and enjoyment of cultural heritage in the domestic legal orders.

11.3 The Protection of Cultural Heritage in the European Legal Space

The increasing relevance of culture within the EU legal order is a consequence of both the impact of such sector on the European economy and the general understanding of culture as a crucial element of the EU strategic objectives.[17] As for its economic impact, one might recall that a 2006 research carried out by a consultant on behalf of the European Commission showed that more than five million people

[15]Meanwhile, ICOMOS has published "Filling the gaps – An action plan for the future", an analysis of the WHL which is seen as a contribution to the further development of the Global Strategy for a credible, representative and balanced World Heritage.

[16]Zacharias (2008), p. 1834.

[17]See the Communication from the Commission to the European Parliament, Counsel, European Economical and Social Committee, and the Committee of regions on the European agenda for the culture in a globalizing world {SEC(2007) 570, of 10 May 2007. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0242:FIN:EN:PDF.

worked at that time in the field of culture.[18] These people represented 3.1% of the employees in the EU and 2.6% of the GDP of the EU in 2003 with a growth significantly superior with respect to the one of economy during the period 1999–2003. As for the importance of culture within the strategic objectives of the EU, the EU's aspiration to be a model of soft power is based on values such as human dignity, solidarity, tolerance, freedom of expression, respect of diversity and the intercultural dialogue.

The recognition of the relevance of culture in the EU, however, has not been translated into a comprehensive and coherent set of legal measures and tools aimed at addressing cultural heritage issues.[19] At the current status of development of the EU, the exigency to protect national cultural diversities prevents the elaboration of sharper European policies.[20] Nevertheless, Art. 167 of the Treaty on the Functioning of the EU commits the EU to respect member States' national and regional diversity while at the same time bringing the common cultural heritage to the fore, and it explicitly refers to the "cultural heritage of European significance". Moreover, Art. 22 of the Charter of the Fundamental Rights of the EU addresses the issue of cultural diversity.

In the different context of the Council of Europe, one should recall the Framework Convention on the Value of Cultural Heritage for Society approved in Faro in October 2005. The Convention stresses the function of cultural heritage in shaping a democratic society, purporting sustainable development, and promoting diversity.[21] It also connects the promotion of cultural heritage protection to the "mutually supporting" objectives of sustainable development, cultural diversity and contemporary creativity.[22]

According to Art. 2 of the Convention, the cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It is for this reason that the framework Convention does not refer to cultural heritage in terms of enjoyment but establishes the right to benefit from the cultural heritage and to contribute towards its enrichment. Member States are called to enforce policies aimed at recognizing, supporting and promoting cultural heritage. Understood as such, the Convention might imply the adoption of further consensual measures. It also leaves to the States a strong power of decision and intervention in order to protect the European cultural heritage.

[18]The document is available on the website http://ec.europa.eu/culture/eac/sources_info/studies/studies_en.html.

[19]A different case is Directive 93/43, which identifies special areas of conservation and sites of European importance. These are peculiar settlements aimed at ensuring the restoration or maintenance of natural habitats of wild species, through the inclusion of sites to be protected in special lists in Annexes to the Directive. On this subject, Greco (1999), p. 1207.

[20]Degrassi (2008), pp. 190–201.

[21]The document is available on the website http://conventions.coe.int.

[22]Fumagalli Meraviglia (2008), pp. 54–58.

11.4 The Circulation of Cultural Goods: The Global and EU Regimes

The circulation of cultural goods[23] particularly needs global regulation, owing to the presence of different and conflicting interests. On the one hand, there is a need for a broad circulation of cultural goods. This, in turn, is instrumental to the performance of a core function of theirs: education. Undoubtedly, the easier is the circulation of cultural goods, the greater is their enjoyment. Free trade concerns should also be taken into account. On the other hand, there is a need to preserve the cultural heritage and a concern that its free circulation could harm its integrity, both material and immaterial (that pertaining to the context in which the cultural good is located).

As one can notice, different needs can give rise to opposite perspectives. At the basis, there is a choice between the two approaches (nationalist or internationalist) to cultural heritage.[24] Moreover, the approaches vary according to the subjects belonging either to the *source nations* (Mexico, India, Greece, Egypt) or to the *market nations* (Germany, United Kingdom, United States).

Within the European legal order, there is still another tension. On the one hand, the system is characterized by a relevant increase of the freedom of movement (of goods and people). On the other hand, the cultural goods have been normally excluded by EU law, because of their traditional connection with the exclusive competence of the domestic governments, and because of the well-known *exception culturelle*. One could argue that cultural goods cannot be assimilated to the simple goods, although the prohibition to put quantitative restrictions between the member States on imports (Art. 34 TFEU) and exports (Art. 35) can only be derogated for reasons related to the protection of the artistic, historical or archaeological national heritage (Art. 36), "as long as it does not represent a wrongful discrimination or a concealed restriction to the trade between member States". Thus, one could infer that the cultural goods considered national artistic, historical, archaeological heritage are *in primis* considered as goods.[25]

Preliminarily, it is helpful to observe that the discipline of the international circulation of cultural goods can be investigated under two different perspectives: (a) the regulation of conditions and devices for the circulation; (b) the remedies for the so-called "unlawful circulation." The European regulation, in particular, addresses two main problems: (a) the eliminations of barriers among member States and therefore the elimination of controls at the national borders; (b) the relationship

[23]On this issue, Frigo (2007).

[24]Merryman (2000a), pp. 66–67.

[25]Lafarge (2009), pp. 3–4. See also the EU Court of Justice's judgement, 10th December 1968, case C 7/68. http://eur-ex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61968J0007. The mentioned UNESCO Convention on the protection and promotion of diversity of cultural expressions adopts a different approach.

with third countries and the asymmetries deriving from different legislations (more or less protectionist) among member States.[26]

There is evidence that the effectiveness of the regulation on the circulation of cultural goods is strongly related with the effectiveness of the procedures for the restitution. With regard to this issue, there are both a European and an international regulation. The first is Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.[27] The second is the UNIDROIT Convention on the international restitution of stolen or unlawfully exported cultural goods signed on 24th June 1995. The Convention regulates in broader terms the same subject of the UNESCO Convention[28]: import, export and transportation of unlawful possession of cultural goods. While both the latter Conventions are still in force for the member States concerning their relationships outside of the EU's boundaries, Council directive 93/7 is applied in the internal market.

The UNIDROIT Convention defines its scope of application in Art. 1 making reference to two hypotheses: (a) restitution of stolen cultural goods; (b) restitution of cultural goods exported in violation of the law of the contacting State. Within the second case also falls the unlawful exportation of cultural goods that have been temporarily exported outside the territory of a State in order to be exhibited, restored, or researched, and have not been returned in accordance with the conditions laid down by the decision authorizing the exportation.

In the second case, the contacting State is entitled to require the restitution of the cultural good, affirming the existence of one of the interests listed in Art. 5 of the Convention (physical integrity of the cultural good, conservation of its context, traditional use by the community, conservation of information and so on). If none of the above hypotheses occur, the cultural goods outside the States' territory are considered as stolen. In such case, the Convention obliges the possessor to return the stolen cultural goods. The restitution is ordered through an international order procedure that corrects the rule *possession is title* in force in the majority of the *civil law* systems: clearly, the enforcement of this rule would provide an incentive to the black market, by amending the unlawful provenance of the cultural goods through the good faith of the buyer. In order to balance the rigidity of such prescription, Art. 4 states that the possessor who ignored (or could not reasonably know) the fact that the cultural good was stolen and who can prove to have acted with due diligence at the moment of the contract is entitled with a right to a fair compensation.

As for the European law, according to directive 93/7, a cultural good is unlawfully conveyed outside the territory of the State in the two following hypotheses: (a) if it is exported in violation of the national law of the State on the protection of

[26]Savino (2010), p. 143.

[27]Article 75 at Para 1 states that "within the European Union the restitution of cultural goods unlawfully conveyed outside the territory of a member State after the 31st December 1992 is regulated by the regulations of this section, which transposes the EU directive".

[28]On the relationship between the two Conventions, *see*, Carducci (2006), p. 93.

cultural heritage, or in violation of the Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods; (b) if it has not been returned after the expiration of the term for the dispatch, or in violation of other conditions provided by the authorization for the temporary shipment. As one can observe, there is no express reference to the hypothesis of stolen cultural goods.

According to Art. 8, the court can order the restitution of the cultural goods on the basis of the requirement of the Member State (and not of a private individual), and unless the action is prescribed (Art. 7). Directive 93/7, thus, only takes into account the hypothesis of a cultural good unlawfully conveyed outside the territory of a State in violation of the national law for the protection of cultural heritage.

Common elements to the two described regulations are the obligation to return the stolen cultural good to the legitimate owner and the compensation to the possessor in a good faith.

Two questions still need to be answered; first: which kind of protection is provided in the case of cultural goods unlawfully conveyed outside the national territory? Second: which kind of protection is provided in the case of cultural goods conveyed outside the territory in violation of the legislation on export's control?[29] In such hypotheses, it is usually affirmed that the State is under no obligation to enforce the public law of another State due to the international law principle of "general equivalence" between States. Yet, while the trend shows a strong willingness towards the recognition of public norms on the matter, efforts towards co-operation at the international level are still non-compulsory, at least to the end of criminal proceedings.

Given such, the different regulations on the subject are still to be considered. The 1970 UNESCO Convention establishes a general principle, according to which all the cultural goods exported in violation of the law of the country of origin are unlawfully circulating (Art. 3). According to Art. 13 of the Convention, all the States are demanded to co-operate in order ensure the return without delay of cultural goods unlawfully exported. The norm actually overturns the basic principle of international law mentioned above. To mitigate its rigidity, the UNIDROIT Convention makes a distinction between return of stolen cultural goods and return of cultural goods unlawfully exported, which is subjected to the existence of certain requirements.

Yet, in the UNIDROIT Convention a number of important problems remain unsolved. First, the scope of application: unlawfully exported are those cultural goods "removed from the territory of a Contracting state contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage" (Art. 1). The problem is that neither the notion of *cultural heritage*, nor the one of *protection* is actually defined within the Convention. The definition

[29]The cultural goods unlawfully exported would be comparable to the one nationalized, the ones declared property of the State, of the nation or of the people, regardless the fact that they have been discovered or not. *See* Savino (2010), pp. 156–157.

is therefore left to the contracting States which can consequently define the Convention's scope.

Moving to the analysis of the European legal order, directive 93/7 states that, first of all, it is the national legislation that defines the cultural goods unlawfully exported (i.e. conveyed outside the territory of a member State in violation of the national law on the protection of cultural heritage). As far as the action for refunding is concerned, the directive extends it to any artistic object unlawfully conveyed outside the territory (Art. 5). It also establishes that any State is entitled to extend the directive application to cultural objects not included within the annex. Being the concept of cultural good adopted not binding, every State is allowed to use its own notion. These provisions are very questionable. They seem contrary to Art. 36 TFEU, regulating the dispensation to the free circulation of goods of cultural relevance. They need a narrow interpretation, because they express a cultural nationalism that goes against the idea of European cultural heritage expressed by Art. 151 of the Treaty.

A common aspect of the international and European regulations is the propensity to give rise to the cultural nationalism which is the most important factor in the growth of a black market of artistic objects.[30] Many issues are still unsolved and many disputes concerning the return of cultural property illegally exported need to be solved by a parties' agreement.[31]

11.5 The Enjoyment of the Cultural Heritage Between the Global and the European Legal Systems

The enjoyment of cultural heritage is increasingly favoured by the broader accessibility to cultural goods, which seems to be one of the most relevant facets of cultural globalization. It also becomes more and more important, in both cultural and economic terms, especially in a time of financial crisis. At the European level, in particular, the acknowledgement of a European cultural heritage and the support towards the "culture of differences" are becoming crucial to the Union policies, both the internal and the international ones.[32]

Globalization supports the implementation of technology which opens new horizons in the definition of the so-called "virtual enjoyment", and significantly broadens the range of cultural heritage's potential users. The spread of cultural contents through IT, however, has its problems, in particular for the protection of

[30]Savino (2010), p. 167.

[31]One may regard at the case of Lisippo's atlete, between Italy and United States, as an example. In January 2010, an Italian judge ordered the confiscation of the Lisippo's atlete, found in the waters of Fano in 1964 and held by the Paul Getty Museum in Malibù. After being illegally exported, the statue is now in the Getty Villa in Los Angeles.

[32]Quadranti (2006), p. 3.

copyright. One might argue, however, that a broader accessibility to cultural contents is indispensable to ensure the disadvantaged groups an easier access to cultural contents. In this sense, the intervention of the European law becomes essential, as far as it pursues the protection of the individual rights, including the right to culture. If this is true, simplified access for the disadvantaged groups becomes an overall guarantee to the right to culture for all European citizens.

The law beyond the state promotes the cultural heritage's enjoyment with the arrangement of measures and devices aimed at supporting the enjoyment.

As for European law, attention has to be put on the measures adopted by the EU to support the cultural sector. Article 167 TFEU gives the Union two different tools: first, the adoption of legal acts (including decisions establishing allowances agreements in support of cultural programs) and, second, the "cultural relevancy" in the action carried by Union on the basis of other dispositions of the Treaties.[33] The different typologies of European programs[34] and funds for the development of global cultural activities belong to this first group. Among them, the program *Culture* 2007 may be included, which aims at "enhancing a cultural space which is shared and based on a common cultural heritage [. . .] to the end of promoting the creation of a European citizenship", through the international circulation of cultural objects as well as artistic and cultural products.[35] The program's general objective is to unite sectoral cultural programs in a single action in order to avoid the complexity of the procedure and the excessive specialization of different programs.[36] The *Raffaello* program (later included in the program *Culture* 2000) had as its main objective[37] the protection, conservation and enhancement of the European cultural heritage through the involvement of the citizens and the improvement of their possibilities of enjoyment.[38]

[33]The same applies for the discipline of the State subsidy established by Art. 107, and for the discipline on the subject of free circulation of goods (Art. 36).

[34]Fantin (2005), p. 1.

[35]See Art. 3 of decision n. 1855/2006/Ce of the European Parliament and Council, 12 December 2006, which sets up Culture program (2007–2013). http://eur-lex.europa.eu/Result.do?T1=V4&T2=2006&T3=1855&RechType=RECH_naturel&Submit=Search.

[36]*See* also the European Commission on the Report to the European Parliament, to the Council and to the Committee of Regions relating to implementation of the Caleidoscopio, Arianna and Raffaello programs 23rd January 2004, Com (2004) 33. http://ec.europa.eu/dgs/education_culture/evalreports/culture/2003/old_culture_xp/cultureoldxpCOM_it.pdf.

[37]These objectives were achieved through: (a) specific actions of innovation or experiment; (b) actions integrated within agreements of cultural co-operation, structured and consolidated; (c) special cultural events with European or international significance.

[38]Through allowances agreements of roughly 30 millions of Euro, between 1997 and 1999, 222 European projects were financed and 18 " European labs of heritage" (technical interventions on monuments and sites of exceptional interest) were directed to both the conservation, protection and enhancement of cultural goods, and to the co-operation, exchange of experience and the development of techniques to be applied to the sector of cultural heritage (innovation and new technologies, mobility and improvement of professionals).

These are important initiatives not exactly because of the Union manners of intervention – mainly financial – but because of their reference to the increasing perception of the convenience to develop more effective strategies of enhancement of the cultural heritage, in order to support the integration process. Once again, it is important to stress that the European order shows the willingness to put individuals at the centre of its policies.[39]

Finally, also global institutions concern themselves about the enjoyment of cultural heritage. They do not intervene directly with regulatory measures to promote, although, as observed before, within the UNESCO regime for the protection of cultural heritage, relevance is put on management plans, which, while ensuring efficient management, may favour the enjoyment of sites.

A site management plan consists of a series of actions chronologically organized, aimed at the identification of available resources and of the necessary tools for the accomplishment of such goals, as well as at the arrangement of control systems, in order to verify the achievement's rate.[40] The cultural site is a place of interaction between the local environment and the cultural work. This interaction, however, can perform efficiently only if supported by adequate institutional co-operation, both vertical and horizontal. The purpose of such co-operation is in turn linked with the implementation of the management of the site, which is organized as follow: integrated programming of protection and enhancement activities; unity and consistency of the activities relating to the management of the site even in the case it is performed in separate ways through outsourcing with privates; participation of communities to decisional processes related with the sites' enhancement. Concerning the content of the management plans, this aims at the union of cultural values, environment and the single cultural good. Therefore, the coordination between management plan and urban planning instruments is essential.

Overall, the plan provides information on the state of cultural goods, identifies the problems to be solved for their conservation and enhancement, and finally selects the ways to enact a sustainable development of the site by evaluating the results on both the strategic and operational level. It is a good example of integrated project (because of its objectives, its aims and the subjects it involves). While the plan is similar to other existing models (as, for instance, in the area of the implementation of urbanistic prescriptions through integrated plans of intervention), at the same time it shows some originality, since it expresses the regulatory systems' interdependency on different levels.

[39]Lazzaro (2002), p. 6.

[40]The Italian guidelines concerned with the UNESCO management plans have been adopted by the Ministry of Culture in 2004. Since 2002, the drafting of the management plans has become a necessary step to propose the site itself as a possible candidate for the list of the world heritage. Some of the sites previously registered have already adopted a plan, basing on the provisions of the law n. 77/2006. For further details, see http://www.unesco.beniculturali.it/index.php?it/16/esperienze-in-corso.

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Chapter 12
The Relationships Between EU and Global Antitrust Regulation

Elisabetta Lanza

12.1 Market Globalization and Local Antitrust Policies

The process of reducing barriers to the flow of goods and services across national boundaries imposes a globalization of antitrust enforcement systems: national competition laws and their extra-territorial application are not adequate to protect competition in the global market.[1]

Whereas trade is about the circulation of productive factors, competition is the process whereby those factors, through their suppliers, struggle with each other to strengthen and extend their position within the market.[2] Generally speaking, competition laws are legal regimes that ban trade conducts restraining the competition process. Competition policy seeks to restrain the anti-competitive behaviour of firms and, thereby, increases consumer welfare.

Globalization lowered barriers and paved the way to the efficiency benefits from markets: liberalization and antitrust should work hand-in-hand to anchor these benefits. The increased interdependence of national or regional regulatory systems allows decisions about anti-competitive practices, made in one jurisdiction, to have substantial cross-border spillovers.[3] Market globalization is a matter of fact.

Nevertheless, not all antitrust regimes are well designed. Moreover, there are still many countries without a domestic antitrust policy, not only in order to attract business and investments, but also because antitrust enforcement is expensive.

[1]Melamed (1998), p. 437. A general and exhaustive overview on the present issue is handled by Gerber (2010).

[2]Rubini (2009), p. 25.

[3]Kovacic (2009), p. 315.

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Furthermore, every antitrust law is different: for instance, the United States (US) law focuses on efficiency aspects of competition, particularly consumer welfare, and it is not concerned with protecting domestic producers from foreign competition;[4] in contrast, the antitrust law of newly democratized nations aims to establish legitimacy of markets by limiting economic power. Especially before 2004, European Union (EU) law mainly sought to achieve free movement of goods and services and opportunity for powerless firms to compete on their merits.

The US Department of Justice - Antitrust Division (AD), the Federal Trade Commission (FTC) and the European Commission regularly deal with antitrust issues of global significance. In the seventies and eighties, IBM's dominant market power had direct effects worldwide, while in the nineties and in the last decade Microsoft experienced a power position in IT global market. Moreover, Boeing/McDonnell Douglas, Exxon/Mobil, Sandos/Ciba-Geigy (Novartis), Gencor/Lonrho, British Oxygen/Air Liquide, WorldCom/Sprint, and GE/Honeywell are all actual or proposed mergers of firms doing business in world markets.

Especially in countries without antitrust systems, the procompetitive functions of World Trade Organization (WTO) could play a key-role. As a matter of fact, the WTO has an inclusive membership combining both developed and developing countries.

Till now the internationalization of antitrust policies focused on bilateral cooperation agreements, proposals for an international antitrust code and suggestions regarding a multilateral antitrust agreement as a mean to develop an international antitrust system. Instead, a pluralist approach towards the internationalization of antitrust policy would strengthen its enforcement.

The coordination of antitrust policies has to be appreciated as a global administrative law topic. Firstly, there is not an exclusive international system of government. Secondly, there is a high level of self-regulation. Thirdly, we should consider the relevance of agreements and decisions of independent committees based on scientific criteria. Finally, the border between private and public is fairly unclear. As it will be argued further, the actual antitrust global system is cooperative and progressive, but not hierarchical: there is no centre, but a strong regulatory inclination.

12.2 The EU Antitrust Administration in a Global Market System

EU plays a key-role for antitrust policies coordination in the global market. From the outset, competition policy and recommendations for international rules on competition were on the agenda of the European integration process.[5]

[4]Especially in the United States, the main aim is to protect *competition*, not *competitors* (as stated in *Brown Shoe Co. v. United States*, 370 US 294, 320, 1962).

[5]Article 65.1, European Coal and Steel Community (ECSC) Treaty, forbade anti-competitive agreements.

In 1957, when the Treaty of Rome was signed, West Germany was the only EEC Member State with a competition law. At that time, there was a considerable pressure to adopt a widespread competitive policy coming from European and American scholars too.[6]

European competition law shows up as a "special" antitrust system, because it protects against competition restraints, but its primary objective is the achievement of European market unity, unlike national antitrust systems, whose primary aim is the attainment of lower prices to consumers or the achievement of technological progress.[7] Lately, the European approach to antitrust law has changed, as confirmed by former EU Competition Commissioner Neelie Kroes, who asserted that "consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies" and that the EU aims "to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources".[8] Competition is not an aim itself, but it allows to achieve certain outcomes that benefit society: economic progress and economic welfare of the people and the organizations that build the society.[9]

The primary goal of EU competition policy is to promote the integration of Member States separate economies into a unified "common market", the very same Treaty objective. Elimination of private practices playing havoc with market integration is the first principle of EU competition law.[10]

European antitrust rules consist of a general cartel prohibition with exceptions (Art. 101 TFEU), an abuse prohibition for market-dominant enterprises (Art. 102 TFEU), control provisions in regard to public enterprises (Art. 106 TFEU) and rules to limit anticompetitive State aids (Art. 107 TFEU). Whereas the Constitutional Treaty would have offered an internal market where competition is free and undistorted to the EU citizens, Protocol no. 27 on the internal market and competition states that the Union shall take action under the provisions of the Treaties, pursuant to Art. 352 TFEU, considering that the internal market includes a system ensuring that competition is not distorted, as set out in Art. 3 TEU.

When the EEC was established it was a common opinion that the political interference from the Member States would have been played down, as a consequence of the Commission executive powers. In fact, notwithstanding Regulation no. 1/2003 reform, the Community antitrust enforcement has a low level of independence, because the Commission is the investigator, prosecutor and judge,

[6]Chalmers et al. (2006), p. 928.

[7]Gerber (1998), p. 334.

[8]Kroes (2005), *passim*.

[9]Goyder and Albors-Llorens (2009), p. 10.

[10]Hawk (1988), p. 54.

and it tries to reconcile national policies with the EU policy.[11] The EU competition rules are mainly applied by the Commission, according to Art. 103 TFUE, by means of the Directorate – General for Competition ("DG Competition", till 1999 DG IV).

The Commission enforcement function is shared with national competition authorities and national courts. Until 2003, the DG Competition mission was essentially defined as "promoting competition, thereby promoting an efficient allocation of resources" and the enforcement was driven largely by notifications and complaints.[12] Lately, efficiency has been enhanced through an internal reorganization of the offices.[13] Moreover, DG Competition is currently adopting a more strategic approach towards international agreements tailoring the instrument to the real needs, the intensity of trade and investment relationship with the country concerned and the degree of maturity of its competition regime.[14] Now the main objectives are, on the one hand, the promotion of convergence of competition policy instruments and practices across jurisdictions and, on the other hand, the fostering of cooperation in enforcement activities with competition authorities in other jurisdictions.[15]

Articles 11–16 of EU Regulation no. 1/2003 deal with the cooperation between the Commission and the National Competition Authorities (NCAs) that shall apply the European competition rules in close cooperation through the exchange of information (Art. 12), the harmonization of the proceedings (Art. 13), the consultation of an Advisory Committee on Restrictive Practices and Dominant Position (Art. 14), the cooperation with national courts (Art. 15), and the effort to reach a uniform application of European competition law (Art. 16).

Indeed, any effective competition law cannot be isolated by other antitrust policies. Even if markets often remain regional or national in terms of competitive assessment, improving global convergence in European legal and economic analysis is essential to ensure effectiveness of enforcement and to establish a playing field for business across European jurisdictions.[16]

In the mid-1990s the European Union advanced a detailed set of motions for global rules on exclusive arrangements. In a 1996 proposal, the European Commission suggested that "[a] common approach to vertical restrictions could be found by concentrating on restrictions that create barriers to market access. The [WTO] could examine to what extent competition authorities could take into account the international dimensions and weigh the effects on domestic competition of market access restrictions".[17] Furthermore, the Commission's "Van Miert Experts Group"

[11]Laudati (1996), p. 235.

[12]Lowe (2009), p. 30.

[13]Van Bael and Bellis (2009), p. 10.

[14]Valle Lagares (2010), *passim*.

[15]Overview on EU international relations on competition. Available at: http://ec.europa.eu/competition/international/overview/index_en.html. Accessed 19 Jan 2011.

[16]Almunia (2010), *passim*.

[17]"Towards an International Framework of Competition Rules", COM (96) 296 Final, 18.6.1996.

recommended that WTO rules should comprise "a list of minimum principles [which] should be incorporated into the national law of the participating countries in much the same way as European Directives: each country would have an obligation as to the result to be achieved, but would not be obliged to amend its current legislation if it already contained these principles or if it was open to similar interpretation".

Since 1995, EU has been a WTO Member in its own right, as its Member States. The attendance of EU and Member States may open the Pandora's box whenever the WTO receives complaints against a Member State and the EU, and wherever the national measures overlap EU measures. The EU Commission participates to the WTO and can test its ability to combine the divergent views of the Member States.[18] Nevertheless, coordination is essential. In view of this purpose, Art. 3 TFEU offers the EU exclusive competence in order to establish "the competition rules necessary for the functioning of the internal market" (letter b) in "common commercial policy" (letter e). Moreover, Arts. 206 and 207 TFUE extend the scope for trade agreements with a view to include direct foreign investments and trade with intellectual property.[19]

Indeed, while the Member States coordinate their positions in Brussels and Geneva, the European Commission speaks alone for the EU and its members at almost all WTO meetings and in almost all WTO affairs.[20]

The WTO is *the* global trading organization, its dispute settlement is binding upon its members, its rulings are potentially normative and it is the only forum in which it could be possible to strike a balance between free trade and protection of not-economic interests.[21] Nevertheless, the WTO agreement contains several provisions encouraging members to enforce competition law, but the relevant provisions do not contain binding obligations and do not define what is anticompetitive.[22]

[18]Antoniadis (2004), p. 322.

[19]According to Art. 47 TEU, EU has legal personality and may enter into any international agreement, pursuant to Arts. 207, 212.3 and 218.8 TFEU. As long as the EU has the internal competence, it can sign any international agreement (Art. 216.1 TFEU). Lisbon Treaty offers to the European Parliament a role in trade agreements, voting with absolute majority for the most important agreements. It is difficult to find areas where EU should not be able to enter into WTO agreements without decision by qualified majority or/and a requirement for co-signatures by Member States. The only unanimity exemption is the trade in transport services, even if all or part of the provisions of Part Three of the TFEU relating to the internal policies and action of the Union can be revised, by means of the method of the simplified revision procedure (Art. 48.6 TEU).

[20]"WTO Member Information. The European Union and the WTO". http://www.WTO.org/english/theWTO_e/countries_e/european_communities_e.htm. Accessed 19 Jan 2011.

[21]Reid (2004), p. 305.

[22]For the WTO rules concerning competition see: Noonan (2008), pp. 405–461.

12.3 A Snapshot on the Global Antitrust Architecture

Besides the WTO, several regulatory systems beyond the State have established comprehensive programmes on antitrust policy. Such regulatory systems include the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade And Development (UNCTAD), and the International Competition Network (ICN). They have been addressed as amorphous but active and influential networks of individuals and organizations having superior knowledge about specific issues.[23]

Firstly, it is worth introducing the international antitrust code project. In 1993, the "Draft International Antitrust Code" (DIAC) was published within the frame of GATT and mainly elaborated by European scholars (the so-called "Munich group"). It was the result of a collective action coming from a transnational network based on the assumption that a global economy calls for global rules on competition.[24] The DIAC aimed to oblige contracting parties to adopt into national law, while remaining free to retain and exert and implement their national antitrust laws. Beyond the classical trade law approach, on the one hand DIAC proposed to combine national and international procedures, and on the other hand it promoted the institution of an International Antitrust Authority, in order to sue a contracting party failing to enforce its law in violation of the code obligations.[25] The DIAC would not produce supranational law and directly applicable law and, consequently, it would not jeopardize national sovereignty. Nevertheless, the DIAC was criticized for its unrealistic assumption that States would accept interference in their competition policy by international authorities.[26] Indeed, its collapse testifies that it was an academic blueprint for an international antitrust regime.[27] Rather than adopting a code impossible to be entirely binding, in virtue of the substantive differences of the several legal systems, it could be more useful to rely on an approach based on minimal common standards. This is what other organizations have proposed.

The OECD is an international organization of countries that already have established, or are going to establish, an antitrust system:[28] it encourages a soft convergence through the spreading of substantial and procedural best practices. In fact, the OECD's recommendations on cooperation provided a solid ground for bilateral agreements. The main shortcoming of the OECD is its own nature of organization assembling States with advanced economies. It has been originally established as part of US plan to assist European economic development in the post-war period: now its thirty member countries share a "commitment to a market

[23]Noonan (2008), p. 56.
[24]Gerber (2010), p. 101.
[25]Fox (1992), p. 230.
[26]Amato (2001), p. 465.
[27]Budzinski (2008), p. 137.
[28]Dabbah (2003), p. 252. For a historical background of the OECD see: Salzman (2000), p. 774.

economy and pluralism democracy". Indeed, it is a "club" of developed countries or a policy "think tank".[29] The OECD is not characterized by inclusiveness nor a venue for competition policies and, consequently, it could not be the appropriate host for global antitrust issues.

Likewise the OECD, competition law is just one of the UNCTAD objectives.[30] The UNCTAD, as United Nations commission, is an international administration. It is formed by more members than the OECD and it is open to developing countries, providing them assistance in the formulation and implementation of economic policies: it does not impose any binding provision, but it is a forum for intergovernmental deliberations. After 27 years of negotiations, in 2000 the UN conference adopted the "UN Set of Principles and Rules on Competition",[31] concerning the cooperation between antitrust authorities. It encourages States to adopt antitrust measures and firms to embrace competitive principles, but in the United States and Europe the Set played a marginal role among business leaders and lawyers.[32] According to its nature, UNCTAD could not be the proper and effective *arena* where a global antitrust regulation can be adopted and, as the OECD, it cannot achieve substantive results in order to improve competition.

As a result of a US and EU initiative for a multilateral system of cooperation among antitrust authorities, the ICN, established in 2001, is an independent body with no structural links to any international organization dealing with antitrust policy.[33] As a global administration, the ICN is a transnational organization based on horizontal form of administration, where there is no binding formal decision-making structure and the dominance of informal cooperation among State regulators.[34] Moreover, ICN is a global administrative institution set up by national competition authorities (currently 107), not by States.[35] The EU Commission, as a founding member, is part of ICN. The ICN aims are the merger control in a multi-jurisdictional context, the competition advocacy and the elimination of unnecessary or duplicative procedural burdens in order to benefit consumers and business all over the world. The ICN is the only global body devoted exclusively to competition law enforcement through the development of a set of basic general principles. It is characterized by inclusiveness and openness, composed by national competition authorities and non-governmental representatives: it is the most

[29]Gerber (2010), p. 112.

[30]Gerber (2010), p. 113.

[31]UN Set of Principles and Rules on Competition (2000).

[32]Gerber (2010), p. 114.

[33]At the beginning of 2001, the initiative was named "Global Competition Forum" or "Global Competition Initiative". The idea of establishing a new deliberative forum for competition experts and officials was advanced by the International Competition Policy Advisory Committee (ICPAC) to the U.S. Attorney General and the Assistant Attorney General for Antitrust in the 2000 ICPAC Final Report: http://www.usdoj.gov/atr/icpac/icpac.htm.

[34]According to the definition given by Kingsbury et al. (2005), p. 21.

[35]Cassese (2006), p. 46.

comprehensive example of the "horizontalist" approach to the issue of market globalization, a variant of network governance, aiming to enhance cooperation among antitrust agencies in order to improve the effectiveness of their actions and reduce the cost of parallel enforcement. As stated by William Kolasky: "the philosophy underlying ICN is that regular and focused interaction among the ever-growing number of competition authorities will serve to promote the spread of sound enforcement policies and procedures around the globe".[36]

The ICN practices are not binding and depend on governments and agencies to adopt them in their own legal system. The ICN focuses on identifying best practices used around the world, rather than protecting or legitimizing existing domestic systems. It is not a rule-making body: members are not under any obligation to ensure their domestic laws with these practices. It is up to each agency to decide whether and how to implement the recommendations. The ICN is the answer to the need of greater communication and cooperation in the realm of antitrust enforcement, not a result of some treaty obligation.

The ICN Unilateral Conduct Working Group, established in 2006, targets to examine the challenges involved in addressing anticompetitive unilateral conduct of dominant firms, to facilitate understanding of the unilateral conducts issues, and to promote greater convergence and sound enforcement of laws governing unilateral conduct.[37] Thus, the ICN represents the leading informal approach to design a coherent international regime of competition governance without enacting binding supranational rules or a forceful supranational authority.[38] Nevertheless, the ICN recommendations become increasingly the yardstick of antitrust worldwide.[39]

Globally considered, the activities of international and transnational organizations in global competition field have been criticized by State authorities. In fact, procedural initiatives beyond the State, although respecting national sovereignty, reduce the power of State agencies to define self-sufficiently national competition policy.[40] In fact, the main reasons for the opposition of the States are the above-mentioned reading of the international organizations purposes and the identification of the DIAC with a reduction of national sovereignty. The strong convergence founded on international law agreements does not appear worthwhile, considering the deeply different economic and legal backgrounds of the participating member States. On the other side, as an informal network built by national competition agencies, the ICN has been able to reach relevant results through the development of projects framed by authorities delegates. In fact, the

[36]Kolasky (2002).

[37]Unilateral Conduct Working Group (2011).

[38]Budzinski (2008), p. 143.

[39]Heimler (2009), p. 92. The Author highlights the increasing relevance of ICN practices through the examples of South Korea, India and China, considering their growing solicitude in adopting antitrust policies, based on ICN recommendations as legal instruments apt to control the mergers.

[40]Drexl (2003), p. 341.

ICN structure lets its members attain a proper international cooperation by means of gradual and soft convergence steps.

12.4 Interactions Between EU and US

The globalization of antitrust policies is strongly linked with EU and US antitrust systems. In fact, the interaction of EU and US competition policy systems thoroughly influences convergence processes within all the multi-national and regional networks.[41] Last decade, for example, recorded a considerable interaction between the EU and US competition agencies that achieved greater convergence in their approaches to agreements and mergers.[42] Thus, the EU and the US played a pivotal role in the International Competition Network establishment.

For reasons unique to their respective histories, cultures, and politics, EU and US jurisdictions adopted different strategies in order to deal with the reaction to the increasing globalization in antitrust field.[43] In fact, while US antitrust laws were enacted at the State level and, later, at the Federal level, in EU there was not any national antitrust law before the establishment of the 1957 Treaty of Rome, as already explained above.[44]

Generally speaking, EU competition law protects small and medium-sized firms from a dominant firm. The US is more willing to leave the matter to market forces and to focus on protecting consumers rather than producers. In case of mergers, while the EU focuses on the increase of the market share of merged enterprises, the US system does not care of market share increase in the absence of market concentration. US target concerns whether economies of scale are likely to outweigh the effect on prices of a reduction in competition.[45]

The US was historically against multilateral disciplines: when in the forties such rules had been proposed, the US Congress refused to endorse them, out of a fear that multilateral rules would lead to water down US standards.[46]

In order to avoid policy conflicts and considering the worldwide consequences of their competition statements, the EU Commission and the Department of Justice

[41]Kovacic (2009), p. 315.

[42]Jones (2006), p. 236.

[43]For an economic explanation of the US-EU divergences, see Bradford (2007), p. 415.

[44]Pace (2007), p. 6. The Scholar underlines that in the 1870s there was already a common market in the United States, while in Europe there were just national markets. Therefore, the general objective of the US antitrust policy was to prohibit conduct by undertakings harmful to consumers and liable to impede the right of other undertakings to carry out their own activities. Instead, in the late XIX century the objective of European countries was not to create a European market, but to compete each other in order to control the European economy.

[45]Weintraub (1999), p. 35.

[46]Goyder and Albors-Llorens (2009), p. 597.

and Federal Trade Commission (FTC) use to cooperate.[47] Notwithstanding these efforts, there were several divergences, such as in the Boeing/McDonnell Douglas, GE/Honeywell, and Microsoft cases. These conflicts provide examples of the negative consequences that inhere in a global competition law regime exclusively based on sovereignty.[48]

Firstly, the eldest conspicuous case of strong different decisions reached by the US and EU authorities is the merger of two US airplane manufacturers, Boeing and McDonnell Douglas. In fact, the FTC decided to concur with the concentration, while the EU Commission opposed it. The FTC approved the merger finding that there would be trivial or without any anticompetitive effect on the sales of civil aircraft because McDonnell Douglas was swiftly losing the fight to remain a player on that field. The EU Commission differently appraised the merger, asserting that the concentration would have strengthened a dominant position through which effective competition would have been significantly impeded in the common market.[49] Indeed, the Commission approved the merger, but imposed conditions that would have made it easier for the European Airbus to compete with the American Boeing. Accordingly, Boeing company adopted some structural and behavioural remedies, granting also the Commission access to Boeing's internal data to monitor compliance with the commitments.[50]

In General Electric/Honeywell case, General Electric, the world's biggest jet engines producer for commercial and military aircraft, announced in 2000 the attempt to acquire Honeywell, a leading producer of aerospace products. Once again, the FTC approved the merger, while the EU Commission objected it.[51] According to the FTC opinion, the merger could have caused positive effects for the consumers benefit; in the opinion of the EU Commission, instead, the merger could have harmed the other market competitors.

Due to the different policy objectives, US and EU reached opposite decisions, even if they similarly evaluated market conditions.

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[47]In 1991 the EU Commission and the US Government signed an agreement in order to apply reciprocal rules in antitrust regulation. In *France v. Commission*, C- 327/91 (9 August 1994), the European Court of Justice declared that the Commission did not have the competence to sign such an agreement and, accordingly, the EU Council and Commission signed jointly the agreement. Generally speaking the agreement establishes that the antitrust authorities have to cooperate in order to avoid possible divergences. Its contents have been implemented by an US/EU Agreement on the *comitas gentium* principles in competition law, by the 1999 Administrative Agreement on Attendance and by the 2003 Treaty on the mutual judiciary assistance between EU an US. Case available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991J0327:EN:NOT#SM. See: Van Bael and Bellis (2009), p. 165.

[48]Gerber (2010), p. 95.

[49]Boeing/McDonnell Douglas, case M.877, E.C.O.J.1997, L-336/16.

[50]Weintraub (1999), p. 34.

[51]General Electric/Honeywell, case M.220, E.C.O.J. 2004 L48/1. Appeal decision: General Electric company v. Commission, 2005, II-5575.

Finally, the last decade's Microsoft case attests the divergences of approach and enforcement adopted by the US and EU authorities. While in the 1993 Microsoft case, the authorities cooperated in order to impose to Microsoft the change of its licence procedure, in the most recent case this cooperation did not work. In fact, in 2001 the FTC decided just to demand to the company to modify its behaviour and in 2004 the EU Commission, pursuant to Art. 82 TEC, also imposed to Microsoft a very high financial penalty.[52] In 2008 the European Commission fined again Microsoft, because the company had not respected the provisions of the European decision. In fact, the company continued to bar the dialogue between its own operating system Windows and the competitors' operating systems.

Considering the worldwide relevance of the information technology and the consequences that these decisions had on global economy, the last Microsoft case proves how urgent is a global coordination of antitrust policies.

On this purpose, it could be useful to analyze the path stepped by the EU and USA in order to reach the harmonization.

The US, fearing to lose its own sovereignty on competition policies, hesitated to agree on harmonized or supranational rules that might be enforced by some international antitrust authority.[53] For a long time the US was a reluctant participant in many multilateral legal regimes, considering the wideness and richness of the country and, accordingly, that it is less dependent on export and import commerce than the smaller countries.[54] The USA sustained that it is not desirable to pursue any pluralist approach leading to an international antitrust system at present time.

The US offered two distinct visions of antitrust enforcement as part of a conscious opposition to the creation of international antitrust rules or true international enforcement. Indeed, US embarked on a 50-year strategy premised on the extraterritorial application of its antitrust laws. Notwithstanding, US recently sought to embrace international cooperation as an alternative to aggressive unilateral enforcement. The US preferred existing laws and enforcement mechanisms and a vision of each country having an antitrust law, enforcing it in a non-discriminatory way, and cooperating with other countries upon request. The main element of US international antitrust policy has been the conclusion of bilateral agreements between different domestic antitrust authorities. In fact, the USA stressed that countries need to develop a culture of sound and effective antitrust enforcement to be based on shared experience, bilateral cooperation and the provision of technical assistance to countries that are going to develop antitrust law and policy within their domestic legal systems.[55] Nonetheless, the bilateral approach to

[52]Microsoft, COMP/37.792, March 24, 2004; Appeal decision: Microsoft v. Commission, 2007, II-3601.

[53]Drexl (2003), p. 312.

[54]Grimes (2003), p. 56.

[55]Dabbah (2003) p. 259.

cooperation and coordination lost its appeal when markets became increasingly global, because enforcement cooperation needs a multilateral framework.[56]

On the contrary, the EU supported an internationalized antitrust policy. In fact, for many years the EU Commission sustained the achievement of a multilateral agreement within antitrust policy. EU used competition law to cement and build up the single internal market, and then sought to spread the influence of its competition law through the EU expansion, the negotiation of new trading arrangements requiring the adoption of EU competition law as a condition of preferential access to the European market, and the promotion of competition law coordination at the international level. Eventually, the EU is favourable to seek harmonization of international rules under the auspices of the WTO.[57] Moreover EU, as a founding member of the ICN, brings at global level own experience on coordination. EU fosters, also in the transnational networks such as ICN, objectives such as the promotion of convergence of competition policy instruments and the cooperation in enforcement activities.

Indeed, EU competition law has a potential and powerful importance for global competition law development. Furthermore, European countries could be able to view global competition through a broader lens than US experience could provide. In fact, after the Second World War European Member States faced obstacles similar to those faced in any country attempting to develop competition law today. US path has been at the centre of competition law history, but its development appears narrow from a global perspective, whereas European competition law provides an experience of coordination under a broader point of view useful for global competition development.[58]

12.5 Can the WTO Play a Stronger Role?

Since 1947, the primary goals of the GATT-WTO system, a legal order aimed to guarantee free trade, were the removal of government and private barriers to international trade. The competition policy issues on a supranational level have not been undertaken because there was not even a basic consensus on the economic effects of cartels till the last decade.[59]

The WTO sets rules binding both rich and poor countries alike and, according to its preamble, economic and social welfare are pursued essentially by promoting economic growth through free trade. The WTO, which does not focus on the behaviour of private firms, adopted a comprehensive set of rules obliging member

[56]Drexl (2003) , p. 327.
[57]Waller (1996), p. 1111.
[58]Gerber (2010), pp. 202–204.
[59]Budzinski (2008), p. 135.

governments to observe common non-discrimination principles and market-opening commitments included in different schedules.[60] Before the WTO, the GATT cases came to light where countries claimed that other States supported or fostered restrictive practices by firms foreclosing access to markets. Nevertheless, neither the GATT nor the WTO have been a primary forum for resolving such disputes,[61] and many negative criticisms coming from the US were opposed to a WTO solution, mainly because it was considered too heterogeneous to produce sound competition rules through consensus-oriented negotiations.[62]

During the last years, the WTO became more progressive in requiring lower tariffs and open markets, thus easing global competition and a more integrated world.[63] Notwithstanding, about one hundred countries in the WTO do not have competition laws. Upon a EU proposal and on the purpose to reach a more and more efficient integration, in 1996 a Working Group on the Interaction Between Trade and Competition Policy (WGTCP) was born,[64] but it has never taken off from the grounds of the not implemented statements.

Nevertheless, the WTO is still a particularly attractive organization in order to harmonize the global antitrust regulation, due to some unique institutional properties, such as its ability to enforce commitments, its broad membership and the value of "hard law" of its provisions. Furthermore, within the WTO, the development of strategic linkages across different areas are often perceived as necessary to overcome distributional inequalities, arising from the adoption of international norms effective in order to overcome domestic resistance for possible liberalization reforms.[65]

There is a need to fix the appropriate role for the WTO over the longer term on antitrust policy matters.[66] As already above highlighted, considering the actual structure of the international and transnational organizations, could the WTO be the governing forum for global antitrust issues?

The WTO is an advantageous venue not only for the presence of trade and competition representatives, but also because it features universal membership. Furthermore, the WTO has relatively transparent procedures, and has experienced the negotiation and implementation of international agreements.[67]

[60]Dabbah (2003), p. 251.

[61]Dabbah (2003), p. 251.

[62]ICPAC Final Report (2000).

[63]Fox (2000), p. 1781.

[64]"Communication from the European Community and Its Member States", WT/WGTCP/W/184 (Apr. 22, 2002). In the spirit of the EU proposal, developed countries with mature antitrust laws can and should help developing countries, especially when the firms of the developed countries are the violators of clear and shared principles of antitrust (see Fox (2007), p. 123).

[65]Bradford (2007), p. 435.

[66]Dabbah (2003), p. 258.

[67]Guzman (2001), p. 142.

Albeit the WTO plays a crucial role in developing international antitrust policy, it seems to be subject to certain limitations, considering that the organization is basically concerned with governmental trade-restraining practices.[68] Nevertheless, the WTO expressed a consensus through the introduction of global antitrust rules able to enhance the welfare and interests of consumers in global markets. The WTO called on countries to make antitrust and trade policy more responsive to the consumers' interests and to consider those interests, especially when consumers are located beyond national boundaries.[69] In spite of this, a reason against the success of a WTO international competition policy concerns the matter of fact that firms engaging business practices and consumers needing an improvement of their own welfare, are unequally distributed among countries.[70]

Several WTO members, led by the EU, championed a WTO framework agreement on competition policy, while the others expressed reluctance to step forward a multilateral agreement on competition policy.[71] At the WTO Ministerial Conference in Doha, the governments struck a compromise in a non-negotiating (so-called "educational") mode.

Properly, the Doha WTO Ministerial Declaration commences: "in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development, we therefore strongly reaffirm the principles and objectives set out in the "Marrakesh Agreement Establishing the World Trade Organization", and pledge to reject the use of protectionism [. . .]. We stress our commitment to the WTO as the unique forum for global trade rule-making and liberalization, while also recognizing that regional trade agreements can play an important role in promoting the liberalization and expansion of trade and in fostering development".[72]

Indeed, the Doha Declaration adhered to the EU initiative with a three-track approach: in the first place, the definition of core principles of domestic competition law and policy, including enough enforcement powers of domestic antitrust authorities, transparency, non-discrimination, procedural fairness and provisions on hard-core cartels; in the second place, provisions for enhanced transnational cooperation between the domestic antitrust authorities of WTO members; finally, support for competition institutions in developing countries through capacity building.[73] The effective worldwide competition law enforcement cannot just rely on effective domestic enforcement, because it also depends on the quality of

[68]Dabbah (2003), p. 264.

[69]WTO Annual Report 1997, p. 75.

[70]Kennedy (2001), p. 21.

[71]Kennedy (2001), p. 14.

[72]Doha WTO Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1: http://www.WTO.org/english/theWTO_e/minist_e/min01_e/mindecl_e.htm.

[73]Doha WTO Ministerial Declaration of 14.11.2001.

substantive legal standards. On this purpose, the EU proposed an international ban of hard-core cartels.[74]

However, developing countries expressed doubts about the value of negotiations on a competition policy agreement when many of them had not any national competition legislation. In 2003, Cancun WTO Ministerial Conference the developing countries blocked the negotiations on antitrust. If they would be the greatest beneficiaries of a global antitrust policy, why did they oppose to a WTO convergence?

The answer concerns, on the one hand, the increased regulatory burden and the associate compliance costs, and, on the other hand, the political costs. In fact, the domestic industries refrain from giving up government protection, such as the one granted to import-competing industries or former State monopolies. Indeed, without legal and economic expertise or adequate resources and experience in enforcing antitrust laws, the developing countries concluded that they were not ready for a WTO agreement.[75]

On the other side, the absence of competition law in many WTO Member countries is not necessarily a sticking point to a WTO agreement on competition policy, just as the lack of legislation on intellectual property protection in many WTO members did not prevent the conclusion of the Treaty Related Aspects of Intellectual Property Rights (TRIPS).[76] Therefore, the TRIPS success suggests that there is a chance for an antitrust agreement as well.[77]

Eventually, as highlighted by the mentioned European Commission "Van Miert Group", there are some advantages which could derive from a WTO multilateral agreement on competition policy. In fact, there is no multilateral mechanism for policing anti-competitive practices having an adverse impact both on international trade and on investment. Considering that private anti-competitive practices have more and more an international dimension, there is a need for multilateral cooperation among national enforcement authorities. On these purposes, such an agreement would foster a competition culture, enhancing the GATT-WTO system. A WTO competition policy agreement would provide a more predictable legal environment in which multinational firms could operate. Moreover, the dispute settlement under the frame of the WTO would reduce duplication of implementation efforts by national enforcement authorities. Furthermore, harmonization of national competition laws would avoid conflicting jurisdictional disputes and potential conflicting decision by national enforcement authorities. By the way of conclusion, a multilateral agreement on competition policy could reduce transaction costs for cross-border business.[78]

[74]Drexl (2003), p. 325.

[75]Bradford (2007), p. 411.

[76]Kennedy (2001), *passim*.

[77]Guzman (2001), p. 1161. About the TRIPS as model and example for international antitrust policy see further: Guzman (2003), p. 933.

[78]Kennedy (2001), *passim*.

Notwithstanding, the developing countries position and all the other raised and unresolved disputes among the WTO Member States do not allow today to plan a short-term agreement with the above-mentioned tasks. The adoption of specific rules dealing with competition and the proposal of a separate competition law regime within the WTO could help to fill this gap, in order to transform the WTO in a *locus* for global competition law development. On this purpose, the EU antitrust history could enlighten the right path. Until 2004 national competition law systems in Europe were formally independent and the interactions between EU and Member States were limited. The "modernization" of Regulation no. 1/2003 led the EU to a more and more advanced antitrust law system, through the reduction of competition law goals and the concentration on consumer welfare and the adoption of "the more economic approach". *Mutatis mutandis*, the European modernization could represent a successful example for the WTO in order to focus and narrow its objectives on competition policy and to pursue a detailed ruling system. As a matter of fact, the Van Miert Report recommended a WTO agreement to "define minimum standards for national rules of reason and rules of conduct of jurisdiction". Such an international agreement could provide instruments capable to reach a global antitrust policy or, at least, a global harmonization of local policies.

12.6 The Possible Tasks of Regulatory Agencies Inside and Outside the WTO

The wideness of the attempts for competition policies coordination and the failures of WTO agreements in the antitrust field have to be considered in order to shape a possible coordination for EU and global antitrust regulation systems. Bork wrote in 1978: "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: what is the point of law – what are the goals? Everything else follows from the answer we give".[79] On this purpose, we could consider as possible guiding principles for the harmonization of competition policies: global economic welfare and global consumer welfare.

The maximization of global economic welfare, as a leading principle for competition law, may contribute to reduce international competition law problems, which arise from countries pursuing non-efficiency objectives through their competition laws. However, the implementation of the global welfare principles in national law may restrict domestic policy choices unnecessarily where there is not any international competition law or trade problems.[80]

[79]Bork (1993), p. 50.

[80]Noonan (2008), p. 95.

Instead, despite the diversity of competition laws, the protection of consumer welfare is common to all systems, albeit in some countries subject to the need to protect the international competitiveness or efficiency of domestic industries.[81] Indeed, the overall objective is maximizing global consumer welfare.

In order to reach these targets, an alternative to a forceful role of the WTO within the global antitrust system could be the collaboration between the Regulatory Agencies in order to achieve a global federalism of the antitrust regulation, based on a multilevel system approach and investigation for a common law of competition.

Under the procedural perspective, a positive feedback to this thesis could be reached. In fact, in order to enforce their antitrust laws, the competition agencies need evidence from the home state of the cartel members. Moreover, nations whose exporters are blocked from markets abroad may desire to induce "sister agencies" to enforce their own laws. These interests and incentives have produced a new generation of cooperation agreements, already existing between EU and United States, EU and Canada, and the United States and, respectively, Australia, Brazil, Canada, Israel, Japan, and Mexico.

Truly, the enforcement of these agreements and the transition from bilateral to multiple agreements could be the next step for a global antitrust regulation federalism. In this sense, the WTO could play a strategic and connective function.

Certainly, the convergence of the national competition rules in a global common policy, supplying a global competition authority and a corresponding court, is not a realistic solution. On this purpose, Wolfgang Kerber proposed an international multi-level system of competition characterized by the decentralization of antitrust laws and enforcement agencies.[82] Notwithstanding, decentralizing enforcement of competition law in the EU seems a rather incoherent policy.[83]

As a matter of fact, the importation of goods sold in imperfectly competitive markets generates an incentive to tighten antitrust rules: imports and exports demonstrate how international trade affects the substantive antitrust policies of any country. Indeed, despite countries have divergent views regarding the goals of competition policy, and despite trade flows lead to divergent national interests, the negotiation of a substantive international antitrust agreement is difficult, but still necessary.

Considering the efforts spent in the frame of the WTO and the failure of the WGTCP, a kind of "Regulatory Agencies Federalism" could be sketched within the WTO. Correspondingly, a common antitrust policy could coordinate the competition policies of the countries having an antitrust law system with those WTO member States not already supplied with an antitrust policy. Moreover, the feared risk of invasion of national sovereignty could be avoided, considering that the

[81]Noonan (2008), p. 97.

[82]See Kerber (2003), p. 269.

[83]Drexl (2003), p. 314.

national antitrust authority could not be replaced. It could be the *locus* where common antitrust could be elaborated. Such a global horizontal control needs to be placed under the supervision of the WTO, because the primary advantage of the WTO is its potential to overcome the differing national incentives caused by international trade and local regulatory objectives.[84]

Dispute settlement within the WTO is certainly imperfect, but it is the best available mechanism to ensure compliance with a competition agreement that could harmonize the relationships between local and global antitrust regulations, through an active role of all the Regulatory Agencies.

Nevertheless, the need to foster regulatory federalism could be reached through the improvement of the cooperation between competition authorities in the frame of ICN and its mechanism of soft convergence. In fact, ICN, as an informal network of many competition agencies, does not provide for "negotiations" or "binding agreements", but rather for development of "principles" and "best practices" in order to obtain a greater degree of convergence, information sharing, and cooperation.[85] Whereas the ICN is a deliberative, consultative "soft convergence" forum, a horizontally interwoven network, the WTO is a forum for negotiation of mostly binding rules. In 2009, ICN established the "Agency Effectiveness Working Group", addressing a wide range of institutional and organizational subjects, including strategic planning and prioritization, effective project delivery, effective knowledge management, ex-post evaluation, human resources management, communication and accountability.[86] The Agency is the exchange centre of best practices information, another step forward to the interaction among Regulatory Agencies, actually the most fruitful strategy for competition policies harmonization.

On the purpose to reach a Regulatory Agencies Federalism, the experience of the European Competition Network (ECN) is useful. ECN aims to build an effective legal framework to enforce EU competition law against companies who engage in cross-border business practices which restrict competition, and therefore they act against consumer interests. ECN is a network among the EU National Competition Authorities (NCAs) and the DG-Competition that operate on common principles and in close collaboration. At present, the ECN is pursuing its objectives through the sharing of information among the European national authorities. Undoubtedly, it is a "soft", but successful, system because it is able to improve the information knowledge of the several antitrust authorities. Thence, considering the international antitrust organizations experience and the unsuccessful attempts, the exchange of information and the communication among authorities, could be the lowest common denominator for global antitrust policies, pursuant to the ECN model.

In fact, as stated by Giandomenico Majone, "an agency that sees itself as part of a transnational network of institutions pursuing similar objectives and facing

[84]Guzman (2003), *passim*.

[85]Janow (2003), p. 57.

[86]ICN, A Statement of Achievements through April 2010: http://www.internationalcompetitionnetwork.org/uploads/library/doc630.pdf. Accessed 19 Jan 2011.

analogous problems, rather than as a marginal addition to an established bureaucracy pursuing a variety of objectives, is more motivated to defend policy commitments and/or professional standards against external influences".[87]

The ECN model proved how it could be promoted the development of a common competition culture, reached certain standard forms and enhanced a mutual trust between the network members. ECN clears the hurdle of the exchange of evidence and information among NCAs through a high degree of flexibility and pragmatism.[88] Unlike the above-mentioned WTO reform, a global model of authorities network could be probably reached through a reorganization of ICN powers.

Therefore, the path stepped by ECN, as a unique form of joint administrative execution, could be the right one in order to reach a Regulatory Agencies Federalism among national antitrust authorities, where the horizontal control could be played by the ICN, as the Commission in the ECN: from European administrative level to global administrative level.

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[87]Majone (1997), p. 272.

[88]Brammer (2009), p. 464.

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Part V
Converging Harmonizations

Chapter 13
The Regulation of Pharmaceuticals Beyond the State: EU and Global Administrative Systems

Alessandro Spina

13.1 Introduction

The outbreak of the H1N1 virus in the spring of 2009 has catalyzed attention on the global governance of public health. Emerging health threats cannot be confined within States' borders. The increased transboundary mobility of persons, goods and information has highlighted the global nature of diseases and of medicines. The approval and subsequent safety monitoring of medicinal products against the pandemic virus has tested and stressed the collaboration mechanisms between States in the regulation of medicines. Pharmaceutical law, then, offers an opportunity to analyse actors, institutions and processes of the globalization of administrative law.

States have in place institutions and procedures to authorize and supervise pharmaceutical products in their territory. The exercise of public authority over pharmaceuticals is justified by the need of protecting public health and ensuring the availability of therapeutic remedies against diseases for their citizens and to control the risks of these products.[1] National regimes of risk regulation are determined by

[1]The etymology of pharmaceuticals comes from the Greek word *farmakón* which means both poison and medicine. Since the early works of Galen on pharmacology, it is an established principle that depending on the dose, a substance could be "useless, toxic or therapeutic". The effectiveness of the pharmacological properties of a substance is also the main reason why public powers control the marketing of these products both to ensure the validity of the therapeutic claims and the possible harmful consequences of their use.

The views expressed in this article are the personal views of the author and should not be quoted as being made on behalf of the European Medicines Agency.

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the historical background and technicalities of each administrative system[2] and by contingent socio-economic factors. However, pharmaceutical industry, likewise similar science-driven innovative sectors, has a global dimension, the research and development of new products taking place through the collaboration of public and private organizations around the world. An underlying conflict seems to exist between, on the one hand, the politics and, on the other hand, the science behind new technologies. The former is shaped by the equilibrium of territorially limited public powers, the latter being universal and borderless by definition.

Within these theoretical lines lies the emergence of transnational regulatory networks of public administrations. The convergence and interconnectedness of administrative legal systems beyond the State is a phenomenon that affects a wide variety of economic and social areas and it is not certainly limited to the field of pharmaceutical regulation.[3] Public administrations, government ministers, independent authorities and technical agencies are linking together with foreign public and private organizations in multiple *fora* to create co-operative problem-solving networks.[4] The proliferation of transnational regulatory networks accompanies the alleged disaggregation of the sovereign order of the westphalian Nation State[5] and the re-articulation of power in more complex systemic regimes.[6]

This chapter aims at analysing the EU and global administrative regimes of pharmaceutical regulation in order to single out their fundamental elements and demonstrate their convergent patterns.[7] EU and global regulatory networks privilege consensus as a deliberation mechanism, rely on peer-review as a golden standard to ensure the quality of outputs and tend, politically, to encourage a sort of science-based diplomatic settlement of regulatory controversies and trade blockades. While the analysis is based on the examination of the current regimes, its final reach is forward-looking. It devises not only the theoretical foundations of network-based models of government but also their possible evolution.

Section 13.2 will examine the EU administrative law context. It is submitted that the harmonization of pharmaceutical regulation rests on two mutually reinforcing elements: the establishment of an EU-wide network-based institution and the European Medicines Agency. This is an expert body of the European Union, responsible for providing scientific advice to the "executive" power: the European Commission. The EU level of pharmaceutical regulation does not eliminate but is overlaid on top of a national level composed of public administrations networked in procedures related to the evaluation and supervision of medicinal products.

[2]For a complete account on how the regimes of risk regulation are embedded into different "legal cultures": Fisher (2007).

[3]I have already made this point on regulatory networks: Spina (2010), p. 198

[4]For the most comprehensive analysis of government networks, see: Slaughter (2004).

[5]Van Staden and Vollaard (2002), p. 174.

[6]Huysmans (2003), p. 226.

[7]The literature on the emergence of global administrative law is extensive. The classical contributions on this subject are Krisch and Kingsbury (2006), p. 1; and Cassese (2006).

The functioning of the European Regulatory Network, with the complex interactions of its institutional actors, is mostly visible in the context of referral procedures and pharmacovigilance.

Section 13.3 of the chapter will look at the global level where, even in the absence of a global "executive" organization, a public-private project, called the International Conference on Harmonization (ICH) of Technical Requirements for Registration of Pharmaceuticals for Human Use has brought about a global informal network responsible for the harmonization of pharmaceutical regulation through the adoption of "soft law" instruments: guidelines and standards applicable in the development of new pharmaceutical products and accepted by the main regulatory bodies around the world.

Finally, the last section will present some comments on the possible evolution of the regulatory harmonization processes, and it will discuss its limits. Having outlined the centrality of the deliberation mechanisms in transnational regulatory networks and the obstacles posed by the absence of a global executive power in the field of medicines, it will present a proposal for a *wiki* government of medicines, making use of interactive applications in order to aggregate and leverage on disperse and collective expertise and stimulate a more open and public participation in the preparation of both scientific guidelines and the assessment evaluation of new pharmaceutical products.

13.2 The European Regulatory Network and the EMA

13.2.1 A Network-Powered Agency

The network-model has enjoyed a great success at the European level.[8] The networking of Member States' administrations has been seen as a second-best and politically feasible[9] way to create a more integrated and harmonized regulatory framework in Europe. While a direct delegation of powers to supranational institutions is limited by the constitutional structure of the European Union,[10] the supranational regulatory gap can be filled by a form of soft harmonization of

[8]A commentator has used figuratively the image of network to represent the unique supra-national polity represented by the European Union, which transcends the conventional paradigms of both the Nation State and the Federal State: Ladeur (1997), p. 33.

[9]Thatcher and Coen (2008), p. 56: noting that in the case of European Union the creation of regulatory networks can be seen as a sort of second best solution to coordinate public compared to the creation of centralized and politically unfeasible "Euro-regulators".

[10]This is a principle of law that, established in the case-law of the Court of Justice of the European Union since the early "Meroni" judgment (Case 9/56), has always been upheld to negate the possibility to establish bodies with direct delegated powers. Cfr. Vos (2000); Scott (2005), p. 69.

regulatory activities.[11] Regulatory networks become the institutional model to achieve "coordination without hierarchy" in the European Union.

The creation of European-wide agencies with technical and scientific expertise is the tangible institutional outcome of a process of networking Member States' public administrations that operate in the same fields.[12] This sort of networked administration has been particularly important in areas of risk regulation where the protection of human health and the environment are at stake. It would have been controversial, and likely to fail, had the harmonization of rules on chemicals, railway and aviation safety, and other highly technical issues been left to a mere "negative" integration among Member States.[13]

The European Medicines Agency (EMA) plays a key role in the European legal administrative system for pharmaceutical products. It is, in fact, responsible for providing scientific opinions to the European Commission on the EU-wide or "centralized" authorization of medicinal products and it is the steering infrastructure of the European regulatory network in the pharmaceutical field. The EMA interfaces and coordinates the functionally equivalent bodies at national level[14] and it acts to guarantee a harmonized regulatory approach towards pharmaceutical products authorized in more than one Member State. Moreover, the Agency has an internal structure mostly *externally integrated* as its organs are composed of individuals that reflect the scientific expertise in the area of medicines present in national agencies, scientific institutions or stakeholders' groups. The production of scientific opinions on the evaluation of medicines, the core business of the Agency, is carried out through the use of network of experts appointed by national administrations.

The centralized procedure for the approval of pharmaceutical products administered by the European Medicines Agency can be seen as the result of a long process that has led to the creation of a networked European administration in the pharmaceutical sector.[15]

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[11]Eberlein and Grande (2005), p. 89.

[12]For a thorough discussion of the issue: Chiti (2004), p. 402. The role of harmonization and networking of European Agencies has been taken into account in the ruling of the European Court of Justice regarding the European Network and Information Security Agency (ENISA) cfr. Case C-217/*04 United Kingdom v. European Parliament and Council of the European Union* above all at paras 30–38.

[13]Dehousse (1997), p. 246; Vos (2003), p. 113.

[14]Demortain (2008), p. 8: the Author highlights that in the preparatory discussions for the establishment of the EFSA, the model of the EMA was taken into account as an agency that had demonstrated the effectiveness of the network model.

[15]In the Commission *Communication on the Single Market for Pharmaceuticals* (1995) 588 fin., it was clearly indicated that in the case of authorization of medicines, *through the appropriate use of new information technologies and the pooling of the best available expertise provided by the National Agencies, this new system – perhaps the first example of an effective "networking administration" – is already setting the international benchmark for pharmaceutical evaluation and monitoring (pharmacovigilance)* p. 6.

Historically, each State was competent to approve the release of new drugs into their own market. While the first European directive on the authorization of medicinal products dates back to the aftermath of the Thalidomide tragedy, only in 1975, did the directive 75/319/EEC create a Multi-State Procedure to co-ordinate the evaluation of medicinal products carried on at a national level and establish the Committee for Proprietary Medicinal Products (CPMP), a body that comprised representatives of the Member States and of the Commission. The CPMP's mandate was to facilitate the mutual recognition of the market authorization for a new drug issued by national competent authorities. However, the multi-State procedure was not compulsory – manufacturers could still apply for marketing authorization in each individual State – and its outcome was not binding as national authorities could reject a marketing authorization application for a drug that was already approved in another country. The original system did not work as expected, but it did set the path ahead for the regulatory harmonization achieved in the following years. In 1987, in fact, a new regime for approval of a special class of pharmaceutical products – those derived from biotechnology and other "high technology" was established by Directive 87/22/EC. A manufacturer willing to have a biotech drug approved was required to submit the authorization application to the CPMP and to one national competent authority. The national competent authority acted as a rapporteur to the CPMP, and both the organizations produced a report that was circulated among all the national competent authorities. The CPMP oversaw and facilitated the communication between national organizations on the application and finally issued an opinion of approval or disapproval that could be followed by the Member States.[16]

With the establishment of the Agency in 1995, the regulatory integration of pharmaceuticals in Europe took a substantial step forward.[17] The centralized procedure now in force, still mandatory for biotechnology and anti-cancer drugs as well as for other classes of products, results in scientific opinions adopted by a specialized body, the Committee for Medicinal Products for Human Use (CHMP), which is composed of representatives nominated by each Member State that however operate independently from the Member States and of co-opted members. The Agency is responsible for *coordinating the scientific resources put at its disposal by the Member States*.[18] According to the rules of procedures, the Agency's Secretariat provides support to the CHMP, but the CHMP organizes itself and has monthly meeting with the participation of experts appointed by Member States. Once adopted by the CHMP, the scientific opinion on a new marketing authorization application is transmitted to the Commission, which takes a final decision on the granting of an EU-wide authorization. During the

[16]Even though in fact the opinion of the CPMP was obligatory and the centralized procedure overseen by the CPMP was compulsory for biotechnological medicines, the conclusions of the centralized procedure were not binding on Member States.

[17]Hankin (1996), pp. 11–12.

[18]Article 55 of Regulation 726/2004.

assessment steps, the CHMP can collaborate with Member States and other institutions in order to check the product quality and to inspect the premises in which the product is going to be manufactured. If the opinion is favourable, the Commission, assisted by the Standing Committee on Medicinal Products for Human Use, should take a draft decision on the request. The draft opinion should be forwarded to the Member States, which can send their written observations. In case the Member States' written observations raise important new questions of scientific or technical nature that the CHMP's opinion had not addressed, the procedure will be suspended and the application will be referred back to the Agency for further consideration.[19] If there are no objections on the draft opinion, the Commission can take the final decision.

The Agency has been defined a "virtual" agency[20] because it does not carry out the scientific assessment of products internally but it rather coordinates network of thousands of national experts that are responsible for a mechanism of peer-reviewed evaluation. Article 62 of Regulation 726/2004 states that "Member States shall transmit to the Agency the names of national experts with proven experience in the evaluation of medicinal products who would be available to serve on working parties or scientific advisory groups" together "with an indication of their expertise". This list of accredited experts is maintained and updated by the Agency, which also nominates experts depending on specific expertise needed in the evaluation of a product.

These arrangements create an institutional structure that operates through the interactions of self-standing organizations. More specifically, the activity of the CHMP within the European Medicines Agency shows the landmark characteristics of the network-model: the sharing of responsibilities and the gradual and the incremental formation of the final decision. The opinion is in fact materially prepared as a draft by one or two members (the Rapporteur and the Co-rapporteur) that lead a team of experts. It is subsequently presented and discussed by all the other members of the CHMP. This peer-review process within the network allows for the modification of the draft opinion. The different steps on which this process is based offer several occasions in which the opinion itself can be reformulated in order to win the approval of as many members of the network as possible. The expected result of this process is as it has been recalled an opinion adopted by the scientific committee of the EMA by consensus.[21]

[19]Article 10 para. 4 of Reg. 726/2004.

[20]Cuvillier (2000), p. 146.

[21]The rules of procedure of the CHMP explicitly give preference for decisions adopted by consensus: *Whenever possible, scientific opinions or recommendations of the Committee shall be taken by consensus. If such a consensus cannot be reached, the scientific opinion or recommendation will be adopted if supported by an absolute majority of the members of the Committee (i.e. favourable votes by at least half of the total number of Committee members eligible to vote plus one)*. Article 8.2 Rules of Procedure Committee for Medicinal Products for Human Use Doc. ref. EMEA/45110/2007 available at http://www.ema.europa.eu/pdfs/human/regaffair/4511007en.pdf (accessed on 20 January 2011).

13.2.2 Pharmacovigilance

A relevant part of the regulation of pharmaceuticals is the pharmacovigilance system[22]which is tasked with the monitoring of the safety of products. The authorization for a new drug is granted when certain standards related of quality, efficacy and safety can be demonstrated. However, the data supporting an application for marketing authorization would never rule out the possibility that adverse reactions may occur when the product is already on the market.[23] The institutional arrangements necessary to gather this information and to take coordinated actions at European level is a regulatory network. This system is coordinated at a central level by the European Medicines Agency[24] but is not hierarchically organized structure.[25] Pharmacovigilance activities are based on safety information arising from the use of drugs from patients and from further clinical studies conducted by independent researchers or pharmaceutical companies. The reporting of this information makes it possible to identify risks for human health or the environment that could not be identified at the time of granting the marketing authorization,[26] but would emerge with the use of the product.

The network-model of the pharmacovigilance administration enables not only the collection of dispersed information but also the sharing of the results of analysis of such data among various stakeholders. The network receives information on adverse reactions from different "sources": from the marketing authorization holders, from doctors and health care professionals who are encouraged to report suspected adverse reactions to competent authorities, and under the new rules, from patients who will be able to report directly to the regulatory authorities suspected adverse reactions.

Each Member State is required to set up a national pharmacovigilance system for the fulfilment of their pharmacovigilance tasks and for the "participation in the

[22]Pharmacovigilance is defined by the WHO as *the science and the activities relating to the detection, assessment, understanding and prevention of adverse effects or any other possible drug-related problems* Cfr. WHO, *The importance of Pharmacovigilance* (2002) p. 7.

[23]Hodges (2008), p. 381.

[24]The role of the European Medicines Agency in the coordination of the European pharmacovigilance system has been further strengthened by two recent legislative acts: Directive 2010/84/EU, amending as regards pharmacovigilance, Directive 2001/83/EC and Regulation (EU) 1235/2010 amending as regards pharmacovigilance, Regulation (EC) 726/2004.

[25]Pascual (2009). The Author examines in-depth the structure of pharmacovigilance, underlining how it could be taken as a leading case of the complexity of globalization, the information society and the network society. *La farmacovigilancia constituye una especie de aleph borgiano, un microcosmos en el que se manifiestan práticamente todos los problemas juridícos característicos de la globalización, la sociedad del riesgo, la sociedad de la informacíon, la sociedad-red, la wiki-economía*: at p. 25.

[26]Trontell (2004), p. 1386.

Union pharmacovigilance activities"[27] and that this system "shall be used to collect information on the risks of medicinal products as regards patients' or public health". The information collected will be used as a basis for national measures of risk minimization but it will be also transferred to the European database and data-processing network ("Eudravigilance database") maintained by the European Medicines Agency[28] in order to be shared within the network for further regulatory actions.

To summarize, both the institutional structure and the procedural elements of the pharmacovigilance activities are based on the functioning of a European-wide regulatory network.

13.2.3 Referrals of National Administrative Procedures to the European Medicines Agency

Another growth-factor of European administrative law in the pharmaceutical sector is the establishment of a system of "referral" procedures from national administrations to the European Medicines Agency. With the exclusion of marketing authorization applications filed to the European Medicines Agency for receiving an EU-wide authorization,[29] pharmaceutical companies can obtain national marketing authorizations. However, when the same medicinal product is authorized in more than one Member State or an authorization is sought after in more than one Member State, the applicant for marketing authorization has to comply with the provisions of the Mutual Recognition Procedure (MRP) or Decentralised Procedure (DCP) that are established by Arts. 27–39 of the Directive 2001/83/EC. The difference between the MRP and the DCP is that in the former the applicant is seeking to have recognized by other Member State a marketing authorization already obtained in one Member State, while in the latter the applicant submits in parallel marketing authorization applications in more than one Member State. In both cases, the "administrative life" of the medicinal product is moved from the national to the supra-national level. The applicant has to submit to the different national competent authorities where the application is pending an identical

[27]The legislation states that the establishment of a national pharmacovigilance system is functional to the operation of the European network: Cfr. the new wording of Art. 101 of Directive 2001/83/EC as amended by Art. 20 of Directive 2010/84/EU.

[28]Article 105 para. 1 of the Directive 2001/83, cfr. also Arts. 25 and 27 of Regulation 726/2004.

[29]Article 3(1) and Annex of Regulation 726/2004 sets the *mandatory* scope, i.e. the categories of prodcuts that have to be authorized according to the centralized procedure for marketing authorization. Medicines that do not belong to these categories can be authorized under the centralized procedure only if they are covered by the *optional* scope foreseen by Art. 3 (2) of Regulation 726/2004, for example if they contain a new active substance not previously authorized or they constitute a significant therapeutic or scientific innovation or is in the interests of patients health at EU level.

technical dossier (Art. 28). In the DCP, the applicant can then choose one of the requested MS to act as a Reference Member State (in the cases of MRP, the Reference Member State will be the one that has already authorized the product). For ensuring the consistency of decisions made by the different national administrations requested to issue a marketing authorization to the same medicinal product, a coordination group composed of one representative for Member State is established (Art. 27). The coordination group for mutual recognition and decentralized procedure (CMDh) holds monthly meetings at the European Medicines Agency; while it receives secretarial support from the Agency, the CMDh is not formally an organ of the EMA. When an agreement cannot be reached within the coordination group within a set period of time, the matter is "referred" to the scientific committee (CHMP) of the EMA that issues an opinion according to art 32–34 of Directive 2001/83/EC. Referral procedures can also be started by pharmaceutical companies in case there are in the EU territory outstanding divergent decisions concerning the same product (Art. 30) that have not been harmonized *ex officio* by national administrations. Finally, a Member State, the European Commission or a pharmaceutical company can refer the matter to the CHMP of the EMA "when the interests of the Community are involved" (Art. 31). In a "referral" procedure, the opinion of the EMA is then forwarded to the European Commission that will adopt a decision in the comitology procedure. The final decision is then addressed to all Member States and is binding as Member States have to comply with its terms.[30] The exercise of administrative discretion from national authorities is then limited by the harmonization mechanism of referrals. The "saga" that ensued with the request for marketing authorization in Italy of the "abortion pill" (Mifegyne or RU 486) can be taken as an example.[31] This pharmaceutical product was not authorized following a centralized procedure, but it had been subject to a "referral" procedure triggered by a Member State where the product was authorized. Therefore, there was a European-wide evaluation of the risk-benefit of the product conducted by the scientific committee of the EMA in the framework of a referral procedure. The CHMP's positive opinion had then resulted in a Commission Decision.[32] Once such a decision is taken at EU level, the competences with regard to the evaluation of the therapeutic or safety aspects of the same medicinal products cannot be subsequently re-opened at national level.

[30]In case C-452/06 *Synthon*, the European Court of Justice has ruled that the failure of a Member State to recognize the marketing authorization granted by another Member State in a Mutual Recognition Procedure according to Arts. 28–29 of Directive 2001/83/EC amounts to a breach of EU law: cfr. paras 32–33.

[31]Interestingly, the decision on the authorization of the RU-486 caused a similar political controversy in US in 2003, where since the FDA's approval in 2000, a mix of ethical concerns and alleged safety risks of the product has been fiercely discussed and used as justification for bills of law to withdraw and to restrict the use of the drug.

[32]Commission Decision (2007) n. 3029 of the 14th June 2007 available also on the website of the European Commission: http://ec.europa.eu/health/documents/community-register/html/refh_others.htm (accessed 9 September 2010).

The Italian national competent authority (AIFA) could not have refused the marketing authorization application without triggering a new referral procedure and on the basis of new scientific information.

The administrative machinery of the referral procedures is paradigmatic of the network regime of pharmaceutical regulation in Europe.

13.3 The Global Regulation of Pharmaceuticals

13.3.1 The International Conference on Harmonization

The globalization of pharmaceutical regulation has taken place in parallel but with some differences with the above described pattern of EU regulatory harmonization. The International Conference on Harmonization on Technical Requirements for Registration of Medicines for Human Use[33] is a forum which comprises the three regulatory bodies of the EU, the United States and Japan and the three regional representatives of the associations of the pharmaceutical industry.[34] It was established in the nineties as public/private platform. This project does not create a formal legal entity but confines itself to the establishment of a platform for a structured interaction between interested parties. A document containing the terms of reference of the ICH describes the commitment to achieve greater harmonization of the technical requirements requested by regulatory authorities of the three regions to pharmaceutical companies in the framework of authorization of medicinal products.[35] The global regulatory harmonization is directed at eliminating unnecessary regulatory requirements and is functional to speed up the time from development to the marketing of new drugs. However, the scope of this forum is not to harmonize the drug approval procedures in the three different regions neither to intervene in the evaluation of specific pharmaceutical products but to set up common scientific definitions and to encourage the adoption and the implementation of common guidelines and standards on which regional partners would set up their regulations. The ICH envisages four categories of harmonization activities, the most prominent being the *Development of Guidelines*; the other three, *Maintenance*, *Revision* and *Q&A* procedures, are directed at enabling the up-dating and modification of existing guidelines and providing assistance in their implementation. The philosophy behind the ICH is that the harmonization of data required by

[33]For more information consult directly the organization's website: www.ich.org (accessed 9 September 2010).

[34]The Six parties are the European Commission/EMEA, FDA, MHLW, JPMA, PhRMA, EFPIA. Other international and non-governmental organizations can participate as observers.

[35]ICH's *Terms of Reference* are available at the ICH's website: http://www.ich.org/cache/html/581-272-1.html (accessed 9 September 2010).

regulatory authorities reduces burdens for the industry and encourages innovation and safety in the pharmaceutical sector.[36]

13.3.2 The Procedure for the Adoption of ICH Guidelines

The procedure for harmonization actions within ICH is indicative of the peculiar operative aspects of regulatory networks in science-based domains: first a Concept Paper containing an outline of the problems caused by lack of harmonization is prepared and submitted by an ICH party or an observer to the Steering Committee for consideration (1), the Steering Committee discusses objectives and expected outcomes, and can add further points; it finally endorses the Concept Paper and a Business Plan (2), nominating an Expert Working Group (EWG) that is composed by members nominated by the ICH Parties, designating one of the Member as Rapporteur and in some cases a Co-Rapporteur (3), the Rapporteur prepares a draft that is circulated among EWG members, when consensus is reached among all six party EWG members (4), the EWG presents its conclusions to the Steering Committee; the formal phase of Step 2 is reached when the Steering Committee agrees that there is sufficient scientific consensus on the issue for the draft guidelines to reach the next stage of regulatory consultation (5). At this point, the draft guideline leaves the ICH process and becomes the subject of normal wide ranging consultation in the three regulatory fora of the United States, the EU and Japan (6). The results of consultation activities is then brought back to the initial EWG that can confirm that the proposal is unaltered by comments and can proceed (7), at this point the document reaches the final stage – or what is called Step 4 – with the Steering Committee agreeing that there is sufficient scientifical consensus on the issue and recommending the Guideline for adoption by the regulatory authorities of the three regions (8). As the ICH guidelines are to be implemented in each "regulatory region" through different acts and modalities, a final phase of the ICH process is the report on the implementation of the Guideline that takes place in the different regions.

It is interesting to note that the global administrative systems for the harmonization of pharmaceutical regulation has been "engineered" on the basis of the model for deliberation by consensus and the cumulative and gradual formation of shared positions that has been the procedural mechanism used in the European administrative system.

[36]The absence of a formal broader stakeholder representation in the ICH's closed dialogue between regulators and regulated industry strikes as a difference in respect to institutional patterns of other global science-based *fora* like the Codex Alimentarius Commission. For a critique of the accountability regime of the ICH: Wirtz (2010).

13.3.3 The Role of Guidelines in Global Administrative Law

Although not legally binding, the guidelines and recommendations of the ICH have an important impact on world-wide regulatory regimes. They are implemented through guidelines adopted by the regulatory authorities of the three different regions but their *de facto* reach goes well beyond the borders of the three regions.[37] In this context, the European Medicines Agency is mandated by its founding legislation to provide technical and scientific support in order to improve cooperation between the European Union, Member States and international organizations, in particular, in the framework of the "discussions organized in the context of international conferences on harmonization".[38] The soft law *acquis* elaborated within the ICH is "implemented" in the three regions of the EU, the United States and Japan in general through the elaboration of guidelines addressed to the various stakeholders of the pharmaceutical sector.[39]

The importance of guidelines in administrative law has been often underestimated.[40] As already noted, the value of these *soft law* instruments in pharmaceutical law is emphasized by the fact that, given the evolving scientific and technical nature of the products that are regulated, the provisions of the legislative acts (directives, regulations etc.) are generally broadly worded and relatively unspecific, therefore the implementation of the principles and obligations affirmed in the legislative texts are to be found in numerous technical administrative guidelines. Also in the European administrative system, the "bulk" of pharmaceutical law is in fact composed of an extensive amount of guidelines issued by the Commission[41] or the CHMP, and other scientific committees. The procedures in place to issue guidelines are fast and flexible compared to the ones necessary to issue legislation or binding regulatory acts of different nature. Guidelines help to

[37]Japan, the United States and Europe represent the territories where, historically, the key players of global pharmaceutical industry have been located. Evidence of the transnational effect of the harmonization activities of the ICH could be found in the establishment of the *Global Cooperation Group* with the active involvement of countries belonging to other regional organisations such APEC, ASEAN, PANDRH, SADC and other big countries such as Brazil, India or Russia. For further information: http://www.ich.org/about/organisation-of-ich/coopgroup.html (accessed 21 January 2011).

[38]Article 57(1) lett. j) of Reg. 726/2004. This provision is the main reference in the European legislation for the activities of the international conferences on harmonization.

[39]The website of the ICH presents in a user-friendly mode the status of "implementation" of the guidelines in the three regions, by means of a dedicated section at the bottom of the web-page containing the relative document.

[40]Zaring (2006), pp. 294–350. The A. notes that one of the reason for this lack of attention of "soft law" instruments may be the obsession of administrative law scholarship to examine only acts that could be subject to "judicial review".

[41]We refer here to the extensive amount of guidelines issued by the European Commission in the Eudralex system, referred to as *Notice to Applicants*: Cfr. http://ec.europa.eu/health/documents/eudralex/index_en.htm (accessed 9 September 2010).

create legal certainty in highly complex technical fields where economic actors require guidance on how to develop their products.

Guidelines, though not legally binding, are powerful legal instruments[42] of regulatory networks as they are able to exert influence to change behaviour by setting out "default" rules which agents tend to accept[43] and this explains also why the authoritative force of guidelines is more visible, the bigger the size of the regulatory network in which they are established.[44]

13.4 Concluding Remarks

The preceding two sections have highlighted the convergence of the EU and global systems of pharmaceutical regulation. Regardless of the highlighted differences in their nature and powers, regulatory networks are emerging structures of administrative cooperation. The first observation is that the network modifies *actively* and *passively* the way activities are carried out by its components, without replacing their institutional remit. They are institutional "choice architecture".[45] The result is that networking works as a "soft" mechanism to create harmonization. It works as an *exchange of information*: networks facilitate the fast and continuous flow of data, analysis and feedback. In this sense, networks are able to gather technical information that will impact on the decision-making of the networked institution. Second, networks are functional to the *sharing of regulatory models* and best practices among public bodies dispersed in different jurisdictions and therefore encourage coordination of activities and harmonization of technical and legal measures. Networks can thus represent both *resources* and *constraints* on behaviour.[46] Moreover, the networking of public administrations does not require a radical transformation of the administrative bodies forming the network. Presented as non-binding mechanism for establishing a dialogue between similar organizations or organizations having the same "interest", their existence generally does not call into question a formal transfer of powers from the national level to the supranational level.

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[42]It is way beyond the scope of this chapter to engage in a thorough analysis of the role of guidelines in global administrative law. Reference is made to the classic contribution on this topic: Kingsbury et al. (2005); Esty (2006), p. 1490.

[43]"Choice architecture" describes the way in which decisions are influenced by the way in which choices are presented: Thaler and Sunstein (2009).

[44]This introduces also a recognition of a relative "weight" of rules, which tends to overcome the dichotomy validity/invalidity of rules in positivist legal theory: Kingsbury (2009), pp. 23–57.

[45]The active/passive involvement refers to the capability of one network component to influence the actions of the other network components and to be influenced by them.

[46]Ansell (2006), p. 76: *As resources, they are channels of information and aid mobilized in the pursuit of certain gains; as constraints, they are structures of social influence and control that limit action.*

"Dialogue" and consensus become the key aspects to understand how this model of administrative cooperation operates. Compared to hierarchical institutions, networks are venues of collective dialogue where the opinions of the participants are bound to gradually converge and become uniform. The opinion of the network is in fact neither the linear sum of individual opinions nor the opinion prevailing in terms of relative majority, but it is the result of incremental formation through procedures in which the final outcome is produced by the gradual adjustments of a proposed draft opinion further discussed and extensively modified by the members of the network. The procedural decision making of regulatory networks resembles, on the one hand, the production model of "crowdsourcing" in the "Web 2.0" harnessing the collective knowledge of users – a comparison could be made with the way open-source software is elaborated or to the assemblance of bits of information into Wikipedia – and on the other hand the model of deliberation model adopted by international organizations .[47] Consensus is a concept and a deliberation model resorted to in the procedural law of international conferences. It can be seen as a procedure for adopting a decision or a statement without proceeding to a formal vote when there are no formal objections – as to manifest support for a decision, participants in the deliberation are not requested to vote, consensus could be understood as "a general agreement"[48]; a concept close, but not necessarily representing, "unanimity".[49]

The fundamental characteristic of consensus is its dynamic decision-making process which has profound consequences of substantive, and not merely procedural, nature.[50] The final outputs of decisions by consensus generally reflect a higher degree of compromise than decisions of collegial bodies where vote majority is the rule for adoption.[51] This implies, however, that consensus promotes a higher degree of active participation from actors involved in the decision-making process. It creates an obligation for each party to understand and respect divergent views and to work towards a flexible and more open-textured agreement. Of course, it is not claimed that consensus is used as a deceptive mechanism to marginalize minority positions, given the fact that often vote by majority is often provided for as a last resort in case consensus fails.

[47]For a general overview of the consensus in international law: Wolfrum and Pichon (2010). See Art. 161 (8) (e) *United Nations Convention on the Law of the Sea*. Buzan (1981), p. 326.

[48]Sabel (1997), p. 312.

[49]Wang (2010), p. 719.

[50]Consensus has been described in a UN legal opinion as *a practice under which every effort is made to achieve unanimous agreement; but that if it could not be done, those dissenting from the general trend were prepared simply to make their position or reservations known and placed on the record*: Statement by the Director of the General Legal Division, UN Office of Legal Affairs, Official Records of ECOSOC, 56th Session, Supp. No. 3°, UN DOC. E.5462 (1972) para. 64, summarized in the section entitled *Use of the term 'consensus' in United Nations practice* in Chapter VI. A12 UNJYB 1974.

[51]D'amato (1970), p. 104.

If, however, a meaningful lesson can be drawn from the experience of consensus in political international organizations to the adoption of consensus-based procedures within regulatory networks is that the dialogue that serves the formation of the final position has then an important function in science-based, highly technical contexts such as pharmaceutical regulation.[52] Arrangements governing networks let members share opinions before the adoption of a decision or a common opinion in order to reduce potentially conflictual or inconsistent scientific advices circulated among regulatory frameworks. They can be seen as administrative mechanisms that leverage the expertise sources dispersed in different organizations and reconcile them under a commonly agreed position. In this way, science-based regulatory networks help to reduce the risk of inconsistent scientific advices resulting in the pre-emption of conflicting regulatory decisions that would be taken on the basis of divergent scientific opinions. Evidence can be seen, for example, in the provisions that require the scientific committees belonging to the European Medicines Agency to individuate potentially divergent scientific opinions and to cooperate with the other bodies performing similar tasks in order to resolve the conflict.[53] In conclusion, science-based regulatory networks establish a higher level of technical accountability against which the actions of national public administrations can be evaluated.

In this light, the existence of internationally agreed standards or guidelines governing a technical domain or an EU-wide scientific assessment of certain risks represents *de facto* a limitation of the discretionary power of administrative bodies at national level to deviate from the standards or to present a different assessment without a sound justification. The instrumental, or non-binding, nature

[52]Both the European Medicines Agency and the ICH rely upon the consensus deliberation as a mechanism to adopt decision. Cfr. Art. 61 of the Regulation 726/2004 with regard to the EMA states that *When preparing the opinion, each committee shall use its best endeavours to reach a scientific consensus. If such a consensus cannot be reached, the opinion shall consist of the position of the majority of members and divergent positions, with the grounds on which they are based*; the ICH operates with *consensus* among participants as the only decision-making mechanism. The adoption of a guideline in Step 4 of the procedure is sealed by the report from the regulatory Rapporteur that *there is sufficient consensus on the technical issue*. Cfr. the ICH's website: http://www.ich.org/cache/compo/276-254-1.html (accessed 9 September 2010). It is of note given the remark made above at fn. 15 that *consensus* is also the fundamental Wikipedia's model for editorial decision-making: Cfr. the website http://en.wikipedia.org/wiki/Wikipedia:Consensus (accessed 9 September 2010).

[53]For example in the case of the European Medicines Agency (EMA), the legislative reference is Art. 59 of reg. 726/2004 that takes into consideration only conflicts between scientific opinions between the Agency *and other bodies established under Community law*. The provision requires the conflicting bodies to share all the relevant information and to *work together either to resolve the conflict or to submit a joint document to the Commission clarifying the scientific points of conflict*. For EFSA, Art. 30 of Regulation 178/2002 has a partially similar clause that obliges the Authority to detect potential conflicts between its scientific opinion and those of *other bodies carrying out similar tasks*, while requiring mandatorily to cooperate in order to resolve the conflict or present a joint document clarifying the underling scientific issue only when other bodies established by EU law are involved.

of certain acts could be held to be a fictitious, or at least a fictitiously understated, representation of the reality.[54]

On the other hand, the participation in a global or supranational network is justified when the goal is to ensure that in the regulation of pharmaceuticals and modern technologies, administrative bodies decide with more responsive, adaptive and accountable mechanisms. This is beneficial to public health not only because it avoids the concerns that scientific complexity could be used strategically as a justification for arbitrary decisions but also because it assists bureaucracies with the pooling of resources and expertise made possible by the network. As we have seen with the pharmacovigilance activities, the networking becomes a necessary tool for public administrations involved in monitoring the safety of medicinal products where dispersed data have to be aggregated and analyzed to become relevant and significant for taking effective regulatory decisions. However, as networks operate by consensual decision-making steps, it is to be further explored the suitability of regulatory networks with regard to the adoption of urgent decisions in time of crisis.[55] It is evident that platforms such as ICH which rely upon lengthy and burdensome consultations cannot really take up the task of evaluating pharmaceutical products as the marketing authorization of a pharmaceutical product involves a constant oversight on the development of the scientific knowledge on that product.

On the basis of the above reflections, and taking into account the similar characteristics and the converging patterns of the ICH and the European Regulatory Network, we can claim that regulatory networks at both global and EU level reinforce each other. Not only do they operate with the same procedural mechanism but they also appear to be functionally complementary. Would it be possible to reach global standards without the harmonization of standards across the 27 Member States of the European Union? Could the ICH platform operate without a single regulatory "voice" that could speak on behalf of Europe through the network-powered EMA? And, on the other hand, would it be possible for the European Regulatory Network, in the absence of harmonized standards recognized internationally, to deliver consistent and uniform regulatory expertise on medicinal products across Europe? The relationship between the global and EU legal system in the pharmaceutical field is in our opinion more than a simple coincidence. It reflects the convergence of the same *modus operandi* of regulatory networks at different level. Global and EU regulatory regimes are in a symbiotic relationship: they act with the authoritative power of *soft law* instruments (recommendations, detailed technical guidelines) and similar procedural mechanisms for deliberation (the use of consensus, peer-review).

The global and EU legal administrative systems find a marked limitation in the possibility to envisage a viable process to perform a single global evaluation of the

[54]For similar considerations and a more in-depth analysis of this point, with regard to technical and instrumental acts of European Agencies: Chiti (2009), pp. 1405–1406.

[55]Verdier (2009), pp. 114–172.

risk-benefit of pharmaceutical products. While the ICH has achieved harmonization of scientific standards, it is not equipped in its current form to perform a harmonized evaluation of pharmaceutical products. A scientific evaluation of the risk-benefit of a pharmaceutical product takes into account intrinsic and extrinsic factors[56] that are dependent on the territory in which the products, after the granting of the authorization, have to be put into the market. Moreover, the risk-benefit evaluation represents a preventive form of assessment that is indissolubly linked, even if only in principle and theoretically distinguished, with the risk management phase that is the remit of politically accountable governments. The acceptance of supranational decisions that could have such an impact on the public health of millions of citizens cannot be reached by a mere transfer of sovereign powers to technocratic bodies that are independent from elected parliaments and detached from national governments.[57]

These findings confirm the opinion that, beyond the similarities with the institutions of the EU administrative law system, the legitimacy *vacuum* caused by the absence of a supranational "executive" component (comparable to the European Commission) limits the regulatory authority of global administrations.[58]

Given the political constraints in the direct delegation of powers on critical health-related decisions such as the authorization of medicines, the challenge of a global evaluation of medicines remains currently unsettled. In this context, while the possibility of a global regulatory regime seems to be obstructed by the absence of a global executive power, there does not seem to be any compelling reason to keep fragmented at a global level the institutional competence to carry out the allegedly neutral *scientific* assessment of general issues or of the public health issues of medicinal products.[59]

[56] An ICH Guideline tackles the issue of ethnic factors that should be taken into consideration when the results of clinical trials conducted in foreign countries have to be assessed by a different regulatory authority: Cfr. the document *Ethnic factors in the acceptability of foreign clinical trials* http://www.ich.org/cache/compo/276-254-1.html (accessed 9 September 2010).

[57] Looking at the "political sensitivities" that regulatory bodies in the pharmaceutical field could face, when confronted with ethical controversies arising from new therapies (stem cells), a sceptical view of the ICH's role as global platform for pharmaceutical regulation has already been presented: Lee (2005), pp. 187–191.

[58] Chiti, in this book.

[59] A dialogue between export bodies competent for evaluating new pharmaceutical products already exists *de facto*. The fact that a medicinal product has been authorized in a different jurisdiction is taken into consideration within the scientific assessment of applications for marketing authorization. It is noteworthy that with regard to the regulation of veterinary medicinal products, new legislation on the establishment of maximum residue limits (MRLs) of pharmacologically active substances states that when a scientific opinion on the MRL value has been established by the Codex Alimentarius Commission without objection from the Commission delegation "an additional assessment by the EMA shall not be required"; Art. 14 (3) (b) of Regulation 470/2009.

Finally, this reflection brings us to remark the role that networks have in the collection and transmission of relevant information for regulatory regimes.[60] It also urges us to reflect upon the possibility of new virtual venues and modalities for global regulatory networks that could be made possible by the application of Web 2.0 Information and Communication Technologies (ICT) to regulatory procedures. We have already seen that one of the strengths of science-based regulatory networks is the positive "network externality" represented by the broadening of the expertise capacity of institutions. Wiki-based platforms, blogs, and the interacting tools of the Web 2.0[61] society have already challenged the traditional Weberian assumption that centralized administrations have access to the best scientific advice and that bureaucratic experts produce the most dispassionate decisions.[62] Online collaboration can be organized in order to open up the governmental decision-making. This would be a measure not only to increase transparency but also to accumulate disperse and collective knowledge. The expertise currently steered by regulatory networks could go up "to scale" if the assessment of the risks/benefits of medicines could be open to the participation of the global scientific community and of other interested parties rather than a pool of "trusted" experts formally appointed in virtue of governmental authority.

Like a bloodless revolution, the input of expert information from the networked virtual society has the potential to transform existing public administrations and improve the quality and responsiveness of their regulatory decisions,[63] more than any formal shift of power between organizations. This is a great opportunity for improving pharmaceutical regulation and public health beyond the State.

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[60]Wagner (2010), p. 1321.

[61]Osimo (2008).

[62]Noveck (2009). The Author, currently appointed deputy Chief Technology Officer for Open Government in the Obama administration, proposed the use of a wiki-based platform open to the public participation for the assessment of the claims made by patent applications. The project called "Peer to Patent" has been adopted by the United States Patent and Trademark Office (USPTO). More information are available on the official website: www.peertopatent.org (accessed 6 January 2011).

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Chapter 14
EU and Global Private Regulatory Regimes: The Accounting and Auditing Sectors

Maurizia De Bellis

14.1 Global Private Financial Standards and the EU

The setting of global standards has become increasingly significant due to globalization. On the one hand, standards have become one of the most important non-tariff barriers to trade, effectively replacing tariffs and quotas.[1] According to the Organization for Economic Cooperation and Development (OECD), 80% of world trade is affected by global standards.[2] On the other hand, standards are considered to be an effective tool of regulation in global governance and an alternative to hard law.[3] They constitute an example of an emerging body of Global Administrative Law.[4]

The EU could react to this emerging phenomenon in different ways: it could compete with global standards or it could use them. In the latter case, it could simply enforce global standards – lending its binding legal force to standards and rules first established voluntarily – or it could act as a filter. This chapter examines EU interaction with two sets of standards: international accounting standards (IAS), which are increasingly replaced by international financial reporting standards (IFRS); and international standards for auditing (ISA). While other enquiries[5] have investigated EU relations with standards for banking, securities, and insurance coming from transnational regulatory networks such as the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities

[1]Mattli and Büthe (2003), p. 1.

[2]OECD (1999), p. 4.

[3]Abbott and Snidal (2000), p. 421; Shelton (1999), p. 1.

[4]Kingsbury et al. (2005a), p. 15. Kingsbury and Krisch (2006)

[5]Bertezzolo (2009), p. 257.

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Commissioners (IOSCO), and the International Association of Insurance Supervisors (IAIS),[6] this chapter focuses on standards coming from private bodies.

Data from the accounting and auditing sectors suggest that the EU tried to put in place a common model for private global regulatory regimes, based, on the one hand, on controlling the access of international standards within the EU legal order, and, on the other hand, on attempting to influence the international standard setting process.

Regulation CE n. 1606/2002 (the so-called IAS Regulation) requires all publicly traded EU companies to prepare their consolidated accounts using international accounting standards established by a private body – the International Accounting Standard Board (IASB) – , *as endorsed in the EU*. This means that the regulation does not call for a simple incorporation of globally recognized accounting standards, but requires an endorsement procedure, which is extremely complex.[7]

According to the EU, its strategy for the accountancy sector – involving the enforcement of global private standards – does not constitute a public body's retreat from regulation. On the contrary, the goal of such a procedure is twofold: instead of simply lending its legal force to standards at first established purely voluntarily, the EU aims first to act as a filter, recognizing only standards that are conducive to the European public good, and, second, to influence the international standard setting process. But does the EU strategy succeed?

A closer look at implementation of the endorsement process gives significant insights: in particular, the endorsement of IAS 39 – the standard about financial instruments, based on the now controversial fair value principle – and its review after the spread of the financial crisis of 2008 are two cases in point. These examples show that the European model of endorsement can indeed act as a filter, but that there are growing pressures, due to the increasing globalization of the financial markets that threaten to impair its functioning. Moreover, changes in the structure of the IASB following to the global financial crisis challenge the EU's efforts to influence global private regulators.

In the auditing sector, the EU strategy looks similar. The international standards on auditing (ISA) are first established by the International Auditing and Assurance Standards Board (IAASB), one of the committees of the International Federation of Accountants (IFAC), a private global organization. According to Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, member states shall require statutory auditors and audit firms to carry out statutory audits in compliance with international auditing standards adopted by the European Commission. Also in this case, the Commission decides on the applicability of international auditing standards within the EU. In doing so, it takes into account the criteria

[6]Transnational regulatory networks (TRN) are "patterns of regular and purposive relations among like government units working across the borders that divide countries from one another": Slaughter (2004), p. 14. See also Zaring (1998), p. 285, and Raustiala (2002), pp. 4–5.

[7]For a general overview about the EU approach to international accounting harmonization, see Luthardt and Zimmermann (2008) and Schaub (2004–2005), p. 609.

set forth in the Directive, as with those established for the accounting sector. Yet, one element here is new and looks pivotal: auditing standards shall be adopted in the Community only if they have been developed with proper due process, public oversight, and transparency. In this way, the EU tries to force the global private regulator to improve its transparency.

This chapter is divided into three parts. Section 14.2 examines the EU approach to the international harmonization of accounting standards: after a general presentation of the global standard setter (the IASB), the EU endorsement procedure is analyzed in depth, taking into account the bodies intervening within it and the implementation of the procedure. In particular, the cases in which the EU tried to depart from global standards and the possible modifications of the model after the unfolding of the global financial crisis will be pointed out. Section 14.3 analyzes the auditing sector and its similarities to the accounting sector. The final section presents overall conclusions.

14.2 EU and Global Standards for Accounting

14.2.1 The IASB Structure and the IAS/IFRs

The International Accounting Standards Board (IASB) is a global organization made up of private entities establishing accounting standards. It is the successor of the International Accounting Standards Committee (IASC), established in June 1973 in London.[8] Its structure and functioning are outlined in the Constitution, first approved in 2000 and subject to review every five years. The most recent review started in the aftermath of the global financial crisis; the last changes, approved in January 2010, include the renaming of most of its bodies.[9]

The structure of the global regulator for accounting – modeled after the American standard setter for accounting, the Financial Accounting Standards Board (FASB)[10] – is composed of four main bodies: the Trustees of the International Financial Reporting Standards (IFRS) Foundation (until 2010 the International Accounting Standards Committee Foundation, or IASCF), which appoints the members of all three other bodies; the IASB, which is the standard-setting body; the IFRS Interpretations Committee (formerly the International Financial Reporting Interpretation Committee, or IFRIC), which interprets the application of the standards; and the IFRS Advisory Council (formerly called the Standards Advisory Council, or SAC), which comments on major standards projects.[11]

[8]About the IASC, see Hallström (2004).

[9]See http://www.ifrs.org/The+organisation/Governance+and+accountability/Constitution/Constitution.htm.

[10]See Mattli and Büthe (2005), p. 225.

[11]Constitution, paras. 43 (a) and 44.

The composition of both the Trustees and the IASB has evolved over time, with the aim of ensuring balanced representation in terms of both professional background and geography. Members are drawn from user groups, preparers, financial analysts, and academic auditors.[12] Membership guidelines have been amended several times in order to diminish the previous Euro-American dominance.[13] The Advisory Council is made up of fifty members, including a variety of organizations and individuals who have an interest in accounting. In this way, a number of stakeholders can make their voices heard within the standard setting process.[14]

A crucial element in the governance of the global standard setter for accounting is the establishment, in the aftermath of the global financial crisis, of the Monitoring Body (MB). Bringing together representatives of the European Commission, the American Securities and Exchange Commission (SEC), and the Japan Financial Services Agency, together with two representatives of the IOSCO,[15] the MB is responsible for the appointment of the Trustees, reviewing the fulfillment of their responsibilities and providing them with advice. The aim of the new body is to foster the "public accountability" of the global standard setter, "seeking to replicate, on an international basis, the link between accounting standard-setters and those public authorities that have generally overseen accounting standard setters".[16] This is obviously a difficult task, as the IASB is not a national standard setter, and there is no global government with which a link can be established.[17] The current

[12]Constitution, paras. 7 and 25.

[13]Constitution, paras. 6 and 26. The Trustees comprise 22 individuals: six from the Asia/Oceania region, from Europe and from North America, respectively; one from Africa and from South America, respectively, and two members appointed from any area, subject to maintaining overall geographical balance. IASB comprise fourteen members: four from the Asia/Oceania region, from Europe and from North America respectively; one from Africa and one from South America; and two members appointed from any area, subject to maintaining overall geographical balance.

[14]Members comprise the so-called *Big Four* (*Deloitte Touche*, *Ernst & Young*, *KPMG* e *PricewaterhouseCoopers*), national regulatory authorities (ECB, the Chinese Ministry of Finance, the CESR); international organizations (IMF and World Bank) and transnational regulatory networks (BCBS, IAIS and IOSCO). Finally, the European Commission and the American and Japanese financial regulatory authorities are granted *observer status*. See http://www.ifrs.org/The+organisation/Advisory+bodies/The+SAC/SAC+members.htm.

[15]Constitution, para. 21. The two representatives of the IOSCO are the chair of its Emerging Markets Committee and the chair of its Technical Committee (the latter being the committee of advanced economies).

[16]Constitution, paras. 18–19.

[17]The difficulties in finding new models of accountability are clearly recognized in the proposals preceding the Constitution review: "the Trustees recognize the unique nature of the organization when compared with other international organizations and with national accounting standard-setters. Unlike traditional national standard-setting bodies, the IASB has no authority to impose its standards on countries and does not have a direct reporting mechanism to governments or other public officials. [. . .] The Trustees understand that the IASC Foundation's unique structure makes demonstrating public accountability more challenging than it would be for a national standard-setter, which normally reports to national regulators, governments, or parliaments": see IASCF (2008a), para. 16.

composition of the MB is troublesome: while the first proposals for the MB also included representatives from international organizations such as the IMF and the World Bank,[18] in its current incarnation this body includes only two representatives from a transnational public regulator (the IOSCO), while the majority of members come from domestic authorities (the SEC and the Financial Services Agency of Japan (JFSA)) and from a supranational regional body (the EU Commission). The risk is that the MB will not guarantee the accountability of the IASB to the widespread financial community, but that domestic interests will bias it.

The IASB develops and publishes the International Financial Reporting Standards (IFRS), following a due process that recognizes the principles of transparency, accessibility, extensive consultation, responsiveness and accountability.[19] Standards established prior to 2001, by the IASC, are called International Accounting Standards, or IAS. Interested parties can participate not only through the Advisory Council but also through this due process.[20]

It is now a common claim that both the IAS and the IFRS have gained more and more prominence during the last decade.[21] This is the result of a specific strategy the global standard setter for accounting (at the time called IASC) put in place during the 1990s, with the aim of gaining global public regulators' endorsement of its standards.

In 2000, the IOSCO adopted a resolution recommending that "IOSCO members permit incoming multinational issuers to use the 30 IASC 2000 standards to prepare their financial statements for cross-border offerings and listings".[22] Such formal endorsement came at the end of a decade-long dialogue between the transnational regulatory network for securities and the global private regulator for accounting. The IOSCO clearly subordinated its support to relevant changes in the standards' content and in the IASC structure and standard setting process.[23] Hence, the private standard setter changed its decision-making process and became more transparent according to a public global regulator's guidance.

In the last decades, a number of other mechanisms different from IOSCO endorsement have pushed towards a widespread implementation of IASB standards.

First, the Financial Stability Forum (FSF), now Financial Stability Board (FSB), included IAS/IFRs within twelve "key standards" of its Compendium, bringing together financial standards internationally recognized as "important for sound, stable and well functioning financial systems".[24] The Reports on the Observance

[18]See IASCF (2008a), paras. 20–21.

[19]See IASCF (2008b).

[20]About due process requirements in global regulatory regimes, see Cassese (2006).

[21]See Botzem (2007), p. 44.

[22]See IOSCO (2000a).

[23]See IOSCO (2000b), p. 10. See also Hallström (2004), pp. 94–95 and 120–121.

[24]See http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html.

of Standards and Codes (ROSCs),[25] which are reports on countries' degree of compliance with a set of global financial standards, comprise a second mechanism fostering the implementation of IFRs. The reports' standards for assessment coincide with the FSB Compendium's twelve key standards, which are part of the IMF and the World Bank's Financial Sector Assessment Program (FSAP). Current proposals within the FSB initiative to strengthen compliance with international standards include higher reliance on FSAPs.[26]

A third mechanism contributing to a growing recognition of IASB standards is the incorporation of these rules within a different legal order due to the implementation of EC Regulation n. 1606/2002 (the so-called IAS Regulation), detailed below.

14.2.2 The EU Objectives: Endorsement as a Filter and the Bottom-Up Influence Over the IASB

The roots of the EU's approach to accounting are clearly pointed out in the 1995 Communication of the EU Commission *Accounting Harmonisation: A New Strategy vis à vis International Harmonisation*.[27] Accounts prepared by European companies according to EU accounting Directives were no longer accepted for international capital market purposes: companies were obliged to prepare two sets of accounts, the first one according to EU rules and the second one complying with US accounting standards, the GAPP.[28] The shortcomings were twofold. As the Commission put it, "The co-existence of different reporting frameworks is both confusing and costly. It makes effective supervision and enforcement of financial reporting requirements of publicly traded companies even more difficult. Investors are deprived of comparable accounts and therefore essential information. Cross border trade is hampered. In short, the result is market fragmentation that puts EU securities markets globally at a severe competitive disadvantage".[29]

Several options were taken into account at the time. The first one was obtaining an agreement with the US on the mutual recognition of accounts. The Commission attempted to initiate such discussion, but this solution failed because the United States had little interest in it.[30] Another option that had been considered was the creation of a European Accounting Standard Body, but it was abandoned because it

[25]See http://www.imf.org/external/standards/scnew.htm.

[26]FSB (2010).

[27]See European Commission (1995).

[28]European Commission (1995), para. 3.3. For an international political economy perspective on European approach on accounting, see Leblond (2005) and Cairns (1998), p. 306.

[29]European Commission (2000), paras. 10–11.

[30]European Commission (1995), para. 4.3.

would have taken a long time, and because "Member States had expressed misgivings about creating an additional layer of standards".[31]

The 1995 Communication argued for an approach moving away from the Accounting Directives to a more "flexible framework". This choice originated from the observance of the time-consuming process for updating the accounting directives and their rapid obsolescence, compared to the greater flexibility of standards produced by private regulators.[32] For the first time, the EU explicitly referred to the International Accounting Standards (IAS), at the time established by the IASC. At that stage, though, what type of recognition international accounting standards would be given within the European legal order was not clear.[33] The aim of requiring European companies to prepare their consolidated accounts in accordance with IAS from 2005 onwards is mentioned from the first time in the 2000 Communication about the EU Financial Reporting Strategy.

It must be pointed out that even in these two preliminary documents, the Commission explicitly denies that the New Approach to Accounting could be interpreted as a delegation of regulatory functions to a private body.[34]

The aim of the endorsement mechanism is, first of all, to avoid such delegation. According to the 2000 Communication, "The central task of this mechanism should be to confirm that IAS are in full conformity with the Union's overall approach".[35] At the same time, though, the role of that mechanism "is not to reformulate or replace IAS, but to oversee the adoption of new standards and interpretations, intervening only when these contain material deficiencies or have failed to cater for features specific to the EU environment".[36] There will be a "presumption that IAS meet these needs: the mechanism would confirm that this presumption is right".[37] Yet, in trying to ensure that a global harmonization process is consistent with EU aims, contradictions can arise, as it will be shown when examining implementation of the procedure.

According to the EU, delegation of regulatory functions is also avoided by strengthening the Union's commitment and contribution to the international standard-setting process.[38]

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[31]European Commission (1995), para. 4.6.

[32]European Commission (1995), paras. 4.5 and 5.1.

[33]As a first step, the Commission mandated the Contact Committee to check the conformity of existing IAS with the Accounting Directives: European Commission (1995), paras. 5.2 and 5.5.

[34]European Commission (1995), para. 6: "the Community is not abandoning the field of accounting harmonization"; European Commission (2000), 359, para. 19: "The EU cannot delegate responsibility for setting financial reporting requirements for listed EU companies to a non-governmental third party".

[35]European Commission (2000), para. 21.

[36]European Commission (2000), para. 20.

[37]European Commission (2000), para. 21.

[38]European Commission (1995), para. 5.4: "in order to ensure an appropriate European input into the continuing work of the IASC, the Contact committee will examine and seek to establish an

Hence, when deciding to take advantage of the ongoing private standard setting process – given the pressure of globalization, the US refusal to enter in a mutual agreement, the advantages of a flexible standard setting process, and the difficulties of putting in place a European standard setter – the EU intended to avoid a simple delegation of power in favor of the (then-called) IASC through two means. On the one hand, it intended to retain control of the incorporation of private standards into the European legal order: this is precisely the goal of the endorsement procedure. On the other hand, the EU aimed to influence the decision making process within the global private standard setter. But does this strategy succeed? Looking at the functioning of the endorsement procedure over almost a decade, this is a key question to keep in mind.

14.2.3 Regulation EC 1606/2002: The Procedure and the Bodies Intervening

Regulation EC n. 1606/2002 requires all publicly traded EU companies to prepare their consolidated accounts starting in 2005 using IFRS endorsed by the EU.[39] IAS Regulation provides the criteria that must be taken into account during the endorsement procedure and identifies the institutions involved.

According to the Communication of 2000, mentioned above, endorsement is intended to oversee the adoption of standards and intervene if they contain "material deficiencies".[40] IAS Regulation identifies the criteria according to which the decision on the applicability of IAS/IFRS must be made: standards can be endorsed only if they meet the criteria of understandability, relevance, reliability and comparability. Moreover, a more substantial requirement is set forth: standards must be conducive to the European public good.[41]

According to the Communication of 2000, a two-tiered structure, comprised of political and technical levels, would be in charge endorsing the accounting standards.[42] The current structure looks more complex, even though the interaction of "political" and "technical" bodies is one of its main features.

When deciding on the adoption of the standards, two committees assist the European Commission. The Accounting Regulatory Committee (ARC) is a comitology committee: made up of representatives from the Member States, it

agreed position on future Exposure Drafts [. . .]. This will allow the Union progressively to gain a position of greater influence on the IASC's work, including the determination of its agenda, so that its output will increasingly reflect the EU viewpoint".

[39]European Parliament and Council (2002), Art. 4.

[40]European Commission (2000), para. 20.

[41]European Parliament and Council (2002), Art. 3.2.

[42]European Commission (2000), p. 2.

gives an opinion as to whether IAS are to be adopted.[43] While the ARC can be identified as the "political" level of the structure, making Member States' opinions heard in the assessment of international standards, the European Financial Reporting Advisory Group (EFRAG) provides technical support and expertise to assess IAS compatibility with the criteria set forth in the Regulation and advises the Commission on whether or not to adopt the standards.

The EFRAG is an experts committee, made up of representatives from the private sectors of several Member States. This includes the European Federation of Accountants (FEE), the European Insurance Organisation (CEA), the European Banking Federation (EBF), the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), the European Federation of Accountants and Auditor (EFAA).[44] IAS Regulation does not mention EFRAG, but simply requires support by a technical committee.[45] Later, however, cooperation with the EFRAG was strengthened by the *Working Arrangement* between it and the European Commission.[46] Moreover, after the global financial crisis the EU decided to start financing this committee on a regular basis.[47] EFRAG plays a crucial role in the endorsement procedure, as will be apparent when looking at its implementation over the past years. According to some commentators, it serves "as a bridge between the Commission as a public standard setter and the IASB as a private one".[48]

Two other bodies must be mentioned when examining the structure involved in the endorsement of IAS/IFRS. In 2006, the Standards Advice Review Group (SARG) was established with the task of advising the Commission on the objectivity and neutrality of EFRAG's opinions.[49] The goal of this new body was to foster the transparency and credibility of the endorsement process, given the private nature of the EFRAG.[50] Yet its functioning is highly problematic. According to the Decision of 2006, when the SARG identifies a particular concern in EFRAG's opinion, the chairman of the group shall enter into a dialog with EFRAG in order to resolve the matter, before the group issues its final advice.[51] To date, no negative advice has been released.

In addition, the Committee of European Securities Regulators (CESR) is charged with assisting the Commission in implementing the IAS.[52] In this regard, the role of the CESR has not been very clear over the past years. The establishment

[43]European Parliament and Council (2002), Art. 6. About the ARC, see http://ec.europa.eu/internal_market/accounting/committees_en.htm#arc.

[44]See http://www.efrag.org/content/default.asp?id=4096.

[45]European Parliament and Council (2002), *recital* 10.

[46]European Commission and EFRAG (2006).

[47]European Parliament and Council (2009).

[48]Botzem and Quack (2006), p. 281.

[49]European Commission (2000).

[50]European Commission (2006), recital 4.

[51]European Commission (2006), Art. 4.6.

[52]About CESR's role in the accounting area, see CESR (2002); CESR (2003) and CESR (2004).

of the new European Financial Architecture, and in particular the substitution of the CESR with the new European Securities and Markets Authority (ESMA),[53] could help in better defining the new body's accounting functions and making its role in this area more relevant.

There are two main features of the structure outlined above. First, a hybrid, public–private model exists. Not only are the standards being endorsed first set by a global private body, the IASB, but there is also a private entity, the EFRAG, that plays an increasingly crucial role in the whole procedure, both proactively by sending comment letters to the IASB and making the EU industry point of view heard, as well as reactively by giving technical advice on endorsement to the Commission.

Second, an extremely high number of bodies intervene in the procedure, and their division of functions is blurring. The fragmentation of tasks can affect the EU's capacity to influence the international standard setting process. For example, in IASB due process the EU Commission, the CESR, the EFRAG, the ARC and even national standard setters from EU Member States participate. The goal of such proliferation of bodies is to foster the legitimacy of the procedure, but it is doubtful that this goal is being achieved effectively. One case in point is the SARC: established to check on the independence of EFRAG opinions, it never released any negative opinion. Moreover, concerns about EFRAG activity are less worrisome than concerns about the international standard setting process within the IASB. As it will be shown (Sects. 14.2.4 and 14.2.5), the proper functioning of EU attempts to influence the international standard setting body is crucial.

14.2.4 2002–2008: The New Approach Implementation

The analysis has shown that the European IAS Regulation set forth an extremely complex endorsement procedure. But how likely is the Commission's refusal to endorse certain IAS and IFRS? Does the procedure work in a rather automatic way or is it an effective filter? Moreover, as mentioned above, the EU's approach to accounting harmonization is not based only on the proper functioning of the endorsement, but also on making the EU's voice heard within the international standard setting process. Did this strategy succeed? This section will look at the implementation of the New Approach. The global financial crisis put the EU endorsement under a level of pressure previously unknown, so the analysis will be divided into two parts, looking at implementation before and after 2008, respectively.

[53]European Parliament and Council (2010).

Until the crisis unfolded, the process of endorsing accounting standards was very intense: through the end of 2007, 17 adoption regulations had been approved.[54] Exceptions to the process were limited to few standards, but these are very significant.

With its first opinion, EFRAG recommended endorsing all existing standards *en bloc*;[55] ARC, though, suggested endorsing all of them with the exception of IAS32 and IAS39, concerning presentation and measurement of financial instruments, respectively.[56] In particular, IAS39 incorporates the fair value principle, which involves reporting financial instruments on the balance sheet not at their historical cost, but at "either a market price, where it exists, or an estimation of a market price as the present value of expected cash flows".[57] This principle lies at the heart of the critiques raised against IAS/IFRs after the unfolding of the global financial crisis, as will be discussed below.

With Regulation No. 1725/2003,[58] the Commission endorsed all standards but IAS32 and IAS39. The reasons for this were not clearly stated; yet, both the ARC and the EC Council referred to the ongoing revision of the two standards within the IASB at the time. The EC Council, in particular, clearly asked the Commission to request the IASB to continue its dialogue with representatives of European industries in order to find a satisfactory and timely solution for such revision.[59]

After the revision took place though, IAS32 was endorsed entirely but the endorsement of IAS39 contained two carve-outs, in order to eliminate its most controversial provisions, concerning some applications of the fair value principle.[60] In other words, even before the global financial crisis, IAS39 was only partly applied in the European legal order.[61]

The problematic endorsement of IAS39 is extremely significant for at least three reasons. First, it shows that conflicts between different accounting approaches still existed even within EU Member States:[62] after IASB's revision, the EFRAG did not release any opinion on whether or not to endorse IAS39 because of diverging views among its members.[63] Second, the refusal to endorse IAS32 and IAS39 and,

[54]See http://ec.europa.eu/internal_market/accounting/legal_framework/regulations_adopting_ias_text_en.htm.

[55]See EFRAG (2002).

[56]See ARC (2003).

[57]See ECB Glossary. http://www.ecb.europa.eu/home/glossary/html/glossf.en.html.

[58]European Commission (2003b).

[59]European Council (2003), p. 14.

[60]Larson and Street (2006).

[61]European Commission (2004).

[62]Botzem and Quack (2006), p. 281.

[63]EFRAG (2004). The comments in favour of endorsement came from regulators and supervisors including CESR, the accounting profession and national standard setters of Denmark, Germany, The Netherlands and the UK. The comments opposing endorsement came mainly from banks and the national standard setters of France, Italy and Spain.

later on, the carve-outs show that the EU endorsement can effectively act as a filter. At the same time, though, this opting out has been highly criticized and proves that the decision of not endorsing a standard can be rather costly for the EU.[64] Third: after the European carve-outs, the IASB decided to further modify its standard.[65] After this second revision, Commission Regulation (EC) No. 1864/2005 resolved one of the carve-outs.[66] The fact that both committees, ARC and EFRAG, gave positive endorsement advice shows that the changes in IAS39 met European needs. Hence, even though the EU was not the only party participating in the revision and trying to influence the standard setting process,[67] it can be inferred that its refusal to endorse the standard had a significant impact.

14.2.5 2008-Present: The Global Crisis and Its Impact on the EU Approach

Initially, the endorsement procedure acted as an effective filter, as in the case of the IAS39 carve-outs despite strong pressure from financial markets to proceed with endorsement more smoothly. The EU managed to influence the IASB, such as with the revision of IAS39 in 2005. However, measuring EU's precise impact compared to the other stakeholders involved is not easy. How did the global financial crisis affect the EU approach to accounting harmonization?

It must be pointed out that with the global financial crisis, a new debate concerning "fair value" accounting, as opposed to "historical cost" accounting, opened up. According to critics,[68] the fair value principle might have a procyclical effect: due to falling market prices in times of crisis, allegations are that it leads to excessive write-downs. Moreover, it has been argued that this principle might contribute to a financial crisis because of the link between accounting and bank capital regulation: forced to write down its assets because of distorted prices typical in a crisis, a bank should raise more capital; this is often not possible in a recession, however, and it is forced to cut down on lending.[69]

Concerns mentioned above led to a number of changes in accounting approaches. A distinction must be drawn among immediate reactions and long-term reactions.

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[64]For a critical point of view, see Simonds (2007) and also Leblond (2005), p. 26.

[65]See IASB (2005).

[66]European Commission (2005b).

[67]Comment letters were 109: see IASB (2004). Comments were coming from supervisory authorities and transnational regulators such as the ECB, the Basel Committee, IOSCO, IAIS, the CESB, the EFRAG and national standard setters from France, Italy, Sweden and UK.

[68]For a dissenting point of view, see Stiglitz (2010), pp. 130 and 157.

[69]Laux and Leuz (2009), p. 4.

In September 2008, the SEC suspended the rules equivalent to fair value in the United States, the so-called "mark to market".[70] Following this, and in order to prevent European banks from being at a competitive disadvantage, the EU asked the IASB to amend IAS39.[71] The IASB answered the request by approving some partial amendments to be used under rare circumstances.[72] These were approved in one week, in an exception to the global standard setter's usual due process. Such amendments have been approved in EU Regulation No. 1004/2008 of 15 October 2008.[73] The EU endorsement procedure was contracted too, as EFRAG did not follow its own due process.[74] This amendment can be seen as an example of the success of the endorsement procedure, which worked with the flexibility the 1995 Communication was expecting (even though such speed was at the expense of participation). Moreover, in this case the EU effectively succeeded in influencing the IASB.

These first amendments did not conclude the revision of accounting standards. Shortly after, the EU Commission asked the IASB to further revise IAS39 in order to broaden exceptions to the fair value principle.[75] The G20 called for a single set of high quality improved global accounting standards.[76] A general review process of financial reporting standards in the areas highlighted by the crisis (including IAS39) is currently being carried on through a strong cooperation between the global private standard setter and the American one, the FASB.

Cooperation between IASB and FASB started with a *Memorandum of Understanding* (MoU), signed in 2006 and updated in 2008, with the aim of achieving convergence of IFRSs and US GAPP by 2011. Yet, it is with the global financial crisis that such cooperation grew much stronger. IASB's answer to the crisis, and particularly to G20 requests, is based on the convergence project with the American standard setter.[77] The strengthening of the cooperation between the two Boards led to the establishment of the *Financial Crisis Advisory Group* (FCAG), co-chaired with regular joint meetings for consecutive days on a monthly basis.[78]

The convergence process is highly problematic, both for the content and quality of the international standard setting process and from the EU standpoint.

The letter the Trustees sent to the G20 meeting in Pittsburgh in September 2009 suggested that cost-based accounting was appropriate for some categories of

[70]See SEC – FASB (2008). Later on, U.S. House of Representatives 2008, Section 132 gave the Sec the power of suspending mark to market.

[71]European Council (2008), p. 8.

[72]IASB (2008).

[73]European Commission (2008a).

[74]See EFRAG (2008).

[75]European Commission (2008b).

[76]G20 (2009a), pp. 5–6; G20 (2009b), para. 14; G20 (2010), Annex II, para. 30 (clearly linking the completion of a single set of high quality standards with the IAS/FASB convergence project).

[77]FCAG (2009).

[78]IASB-FASB (2010).

financial instruments.[79] Most recently, though, IASB and FASB jointly proposed that the use of fair value accounting could be expanded again.[80] Hence, it is still not clear how much of the fair value principle will be left, and to what extent the new standards will go back to the historic cost method. In any case, the overall quality of the convergence process is being contested, as compromise seems to be leading to a race to the bottom and trust among market participants is getting lower.[81] The IASB itself recognized growing concern about the quality of the revised standards and decided, with the FASB, to modify its work program, postponing the completion of standards for which further research and analysis was considered to be necessary.[82]

The convergence process clearly affects the EU's strategy. As showed when examining the IASB's composition, the global standard setter is intended to represent all geographical areas in a balanced way, North America included. While any other stakeholder and national standard setter, EU included, can participate in the IASB standard setting process through comment letters or through the Advisory Council, with the convergence project the revision of the standards is being carried out by a group made up of representatives coming half from the FASB and half from the IASB, giving the American standard setter a much stronger means of influencing the standard setting process than any other entity. The "international harmonization" process appears to become asymmetrical. The new FASB role in the international standard setting process clearly affects the EU's capacity to influence it.

The EU's chances to establish itself as the main public principal for the global standard setter for accounting result also diminished due to recent changes in the structure of the IASB.

As mentioned above (Sect. 14.2.1), the recently established Monitoring Body is made up of two representatives of the IOSCO, one representative of the EU Commission, one representative of the SEC and one representative of the Japanese Financial Supervisory Authority. In this way, the EU shares the responsibility of selecting the Trustees and overseeing their activity with two national regulators, while only a transnational network – the IOSCO – has two seats. At first, the EU tried to obtain two seats within the MB.[83] Because of its dissatisfaction with the composition of the MB, the EU has refused to take part in it for a long time,

[79]IASCF (2009), p. 2.

[80]RGE (2010).

[81]Veron (2009), p. 5.

[82]IASB-FASB (2010), p. 2.

[83]In a comment letter, the CESR stated that only one European representative was not enough. As the Commission is only in charge with the endorsement of accounting standards, if it was the only European institution represented, there would not be any European body competent for the enforcement of standards. Thus, it suggests that both the Commission and the CESR itself be represented in the Monitoring Body: see CESR (2008), pp. 1–2.

occupying its seat – and hence accepting the new equilibrium among public principals influencing the IASB – only recently.[84]

The EU's strategy of influencing the IASB seemed to be appropriate, as the examples reported in the preceding section show. Moreover, it had a substantial precedent: during the 1990s, the IASB (at the time named IASC) changed its functioning and started to follow due process, modifying the content of its own standards in order to gain IOSCO endorsement. Under the current conditions, however, because of the establishment of the MB and the importance gained by the IASB/FASB convergence project, the EU – unlike the IOSCO in the '90s – is by no means the only "public principal" trying to influence the IASB's activity.

14.2.6 Summary

The EU approach to accounting harmonization involved the use of global standards in response to the pressure coming from globalization and with the aim of taking advantage of the more flexible private standard setting process. At the same time, the EU aimed to retain a twofold power. On the one hand, the endorsement procedure entails an *ex post* check on the international standards' conduciveness to the European public good. On the other hand, since the first proposals concerning the New Approach, the public regulator clearly explained it aimed to play a more active role in the international standard setting process.[85]

Over the past years, the endorsement procedure worked rather smoothly. Some examples, such as the IAS39 carve-outs, show it could act as an effective filter, restricting global regulations to be accepted within the European legal order when they were perceived to clash with EU interests. Even then, though, the pressures coming from globalized financial markets to accept the international standards were high. The EU's efforts to make its views heard within the IASB due process were continuous; some succeeded and others failed.

The global financial crisis puts the EU strategy under unprecedented pressure. From being a highly technical domain, accounting is now being perceived as a political issue and subject to a number of criticisms.

In the past, the main critique against the EU's capacity to influence the global standard setter was the fragmentation of competences among a number of bodies intervening in the accounting area.[86] Given the most recent trends – the

[84]See Veron (2009), p. 2, about EU refusal; the decision of taking part in the MB is reported in FCAG (2010). For the current composition of the MB, see http://www.iosco.org/monitoring_board/.

[85]In the *Communication* of 1995, the aim of ensuring an appropriate European input into IASC's work, in order to influence its agenda, "so that its output will increasingly reflect the EU viewpoint", was clearly stated: European Commission (1995), para. 5.4.

[86]See Dewing and Russell (2008), p. 259.

establishment of the MB and the IASB/FASB joint convergence project – the bigger difficulty the EU has to face is the one of making its views heard among the high number of public principals in positions of influence (through the MB) and against the privileged channel of cooperation the American private standard setter is enjoying.

14.3 EU and Global Standards on Auditing

14.3.1 The IFAC: Structure and the International Auditing Standards

The least known of the financial global standard setters is examined here. The International Federation of Accountants (IFAC) is a private global organization made up of representatives of the professional organizations of accountants.[87] Founded in 1977 with headquarters in New York, the IFAC has worked for a long time in close connection with the more famous IASB, and has only recently achieved more independence from the latter. Despite its growing role within global financial governance, it has attracted little attention in scientific literature.[88]

According to its Constitution, the mission of the IFAC is to "serve the public interest". In particular, it aims to strengthen the accountancy profession by establishing standards for auditing as well as the education and ethics of auditors, along with promoting adherence to these standards in practice.[89]

Within IFAC's complex structure,[90] the most important subcommittee is the *International Auditing and Assurance Standards Board* (IAASB), setting standards for auditing. During the standard setting procedure, it follows some due process

[87]See http://www.ifac.org/About/MemberBodies.tmpl. IFAC's membership has grown, over the past 30 years, from the 63 members at the beginning, to now include 157 members: see http://www.ifac.org/About/.

[88]Loft et al. (2006), pp. 429–430 and 443–444.

[89]IFAC (2006b), para. 1.4.

[90]The Council consists of one representative for each member, and is responsible for deciding constitutional and strategic matters and electing the Board. The Board, comprised of the President, the Deputy President and not more of 20 members (chosen as to reflect the level of financial contribution to IFAC by member bodies), has all the powers necessary to take the actions necessary to achieve the mission of the IFAC. There are also ten committees, four of which charged with a standard setting function: apart from the IAASB, examined in the text, they are the International Accounting Education Standards Board (IAESB), the International Ethics Standards Board for Accountants (IESBA) and the International Public Sector Accounting Standards Board (IPSASB), establishing standards, respectively, for accountancy education, for international ethics codes for the accountants, and on the accounting and financial reporting needs of national, regional and local governments: see http://www.ifac.org/About/Structure.php#.

rules.[91] Another committee, the *Compliance Advisory Panel* (CAP), is charged with the assessment and compliance with IFAC's standards of the organization's members.[92]

Similar to the IASB, the IFAC's standards (the *International Standards on Auditing*, or ISA) are part of the FSB *Compendium of Standards* and are subject to IMF and World Bank assessment through the ROSCs.

14.3.2 The EU's Strategy for Auditing

The EU started to focus on international auditing standards in 1999,[93] when the Committee on Auditing conducted a benchmarking exercise of ISAs against Member States' audit requirements, showing that there was already a high degree of convergence with ISAs.[94] Later on, with the 2002 Recommendation on *Statutory Auditors' Independence*, the Commission argued that a new strategy for auditing was needed, focusing on the use of ISAs.[95] In the 2003 Communication about *Reinforcing the Statutory Audit in the EU*, the reasons for the new approach were explicitly pointed out. After the collapse of Enron and subsequent financial reporting scandals, there was a need to reinforce investor confidence in capital markets and to enhance public trust in the audit function in the EU. The Commission regarded statutory audits as a key factor in a larger system in charge of ensuring proper financial reporting for the EU capital market.[96]

Along with other initiatives, the Communication of 2003 envisaged the use of ISAs as a requirement for all EU statutory audits from 2005 onwards. In the Commission's view, a number of preliminary actions were needed in the meantime. For example, the Commission suggested that the IFAC undertake some actions, stressing that ISAs' quality needed to be improved and IFAC's structure had to be revised in order to guarantee the independence of the standard setting process.[97]

According to Directive 2006/43/EC on statutory audits of annual and consolidated accounts, member states shall require statutory auditors and audit firms to carry out statutory audits in compliance with international auditing standards adopted by the Commission.[98] The Commission shall decide on the applicability of international auditing standards within the Community in

[91]IFAC (2006a).

[92]See http://www.ifac.org/Compliance/.

[93]About EU's policy for auditing, see also Mugge (2008), pp. 38–39.

[94]European Commission (2003a).

[95]European Commission (2002).

[96]European Commission (2003a), pp. 3–4.

[97]European Commission (2003a), p. 7.

[98]European Parliament and of the Council 2006, Art. 26.1.

accordance with the comitology procedure. International auditing standards shall be adopted for application in the Community only if they: (a) have been developed with proper due process, public oversight and transparency, and are generally accepted internationally; (b) contribute a high level of credibility and quality to the annual or consolidated accounts; and (c) are conducive to the European public good.[99]

In June 2009, the Commission started a consultation on the adoption of ISAs for the statutory audits of EU private entities, on the basis of Art. 26 of the Directive 2006/43/EC.[100] A four-month comment period was given. Eighty-nine comments were received, mostly coming from the audit profession though users, preparers and regulators were also represented.[101] The significant majority of organizations of accountants and auditors and audit firms favoured adoption as soon as possible (2009–2010), while public regulators and users held that more time was needed to prepare the transition and preferred a middle term (2011–2012) adoption.[102]

14.3.3 Summary

The EU's strategy on auditing looks similar to its approach towards accounting. First, the adoption procedure for ISAs resembles the endorsement one. In particular, Regulation n. 1606/02 provides the criteria the Commission must take into account in the evaluation process and requires it to follow the comitology procedure. Moreover, technical committees intended to help the Commission in the evaluation have also been set up in the auditing area, such as the *European Group of Auditors' Oversight Bodies* (EGAOB).[103] This element seems to point to the establishment of a common model in the accounting and in the auditing sector as well.

Second, also in the auditing sector EU not only intends to use international private standards but also to influence the global standard setter. In particular, some of the criteria to be taken into account when adopting ISAs, according to Directive 2006/43, are new (when compared to Regulation n. 1606/02): they can be adopted only if they have been developed following due process, public oversight and transparency requirements. IFAC's approval in 2006 of its *Due Process and Working Procedures*, mentioned above, seems to have a strong connection with the requirement set forth in the Directive. From this point of view, the EU forced the global private regulator to improve its transparency. Moreover, in the recent

[99]European Parliament and of the Council 2006, Art. 26.2.

[100]European Commission Directorate General For Internal Market And Services (2009).

[101]European Commission Directorate General For Internal Market And Services (2010), p. 5.

[102]Ivi, at 21.

[103]European Commission (2005c). Between EGAOB's tasks, there is the one of contributing "to the technical examination of international auditing standards, including the processes for their elaboration, with a view to their adoption at the community level" (Art. 2).

consultation on the adoption of ISAs, the EU Commission makes clear that it checked over the actual functioning of the due process by regularly attending IAASB meetings as an observer, along with the nearly 30 comment letters sent by the EGAOB about the exposure draft of the standards.[104]

A last feature merits discussion. The proposal for the directive on statutory audits explicitly stated that the Commission's final decision on whether and to what extent to endorse ISAs depended largely "on satisfactory governance arrangements relating to the operation of the IAASB being established".[105] The main change in the structure of the IFAC has been the establishment, in February 2005, of the Public Interest Oversight Board (PIOB),[106] which fulfills an oversight role with respect to IFAC's "public interest" activities, in order to ensure that they are properly responsive to the public interest.[107] The PIOB includes ten members, nominated by the BCBS, the IOSCO, the IAIS, the World Bank and the European Commission.[108] When comparing the composition of the MB, which monitors the IASB, with the PIOB, it is clear that the EU is the only "regional" institution represented in the monitoring body for the auditing area, sharing this responsibility with transnational networks and global organizations. Hence, it is likely its effort to influence the global standard setter for auditing will succeed more than in the accounting sector, where the competition with the SEC and the FASB is stronger.

14.4 Concluding Remarks: A New Model of Regulation Already Under Pressure

The EU approaches to accounting and auditing have several features in common, so that a model of regulation seems to emerge. The EU aims to use the ongoing global harmonization process in both areas. This is driven by pressure coming from financial globalization. The EU has an opportunity to benefit from the advantages of global private standard setters, given their flexibility and technical expertise. The model enacted is a hybrid with private–public regulation for two reasons. First, the standards endorsed or (possibly) adopted come from private bodies; second, some of the bodies involved in the endorsement (such as the EFRAG) are private. As a result of EU recognition, global standards at first drafted as voluntary become mandatory.

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[104]European Commission Directorate General For Internal Market And Services (2010), p. 4.

[105]European Parliament and Council (2004).

[106]IOSCO (2005).

[107]This oversight role comprises a number of powers. The PIOB can approve or reject nominations of members to all the bodies it oversees, and can request the removal of the chair if deemed necessary. Moreover, the Piob evaluates the IFAC's committees due process procedures and suggests issues to be included in their work program.

[108]See http://www.ipiob.org/index.php.

In both sectors, the EU does not intend to delegate its regulatory function to the private actors involved. In the accounting and auditing areas, it aims to retain its control through two means. On the one hand, with an *ex post* assessment of the standards, the EU has established a precise endorsement (or adoption) procedure and the criteria that must be taken into account for evaluation of the standards. On the other hand, the EU is playing a more active role within the international standard setting process and trying to influence the global regulator's agenda.

European enforcement of global private standards is not intended to be a public body's retreat from the regulation of the accounting and auditing sectors. Yet, some aspects of the above analysis show that EU strategy has some inherent, serious flaws. Moreover, the global financial crisis puts the emerging EU model of regulation through the endorsement of private standards under further pressure, at least in the most controversial area of accounting.

The New Approach for Accounting Harmonization implementation until 2008 and, more specifically, the first EU refusal to endorse IAS39 and the subsequent carve-outs show that the endorsement procedure can effectively act as a filter. Yet, the high number of critiques against such a refusal and the carve-out illustrate the pressure from financial markets towards complete harmonization.

As for the second leg of the EU strategy – i.e., bottom-up influence in the standard setting process – several examples show that the EU succeeded in making its views heard within IASB. There are two limits to this, however. First, other stakeholders' views were also incorporated in IASB due process, so it is difficult to measure the EU's specific input. Second, any efforts of the EU to make its overall and most ambitious strategy accepted within the global private standard setter – the idea according to which the very composition of IASB constituent bodies "should correspond more to all the jurisdictions that directly apply the standards or have declared that they will make the IAS mandatory in the near future"[109] – has always been rejected by the IASB, showing the inherent contradiction in the desire to make a global harmonization process conducive to the specific good of EU (as the most problematic of the criteria set forth in Regulation 1606/2002 states).

The global financial crisis, as the analysis above shows, attracted political attention to the once obscure world of accounting. The FASB/IASB convergence project risks to spoil stakeholders' trust in the quality of international accounting standards; the independence of the IASB is perceived to be at risk by the global standard setter itself.[110] It is too early to know where this process will lead, even though the postponement of part of the project in order to allow further study and the proposals bringing back the fair value principle could be the sign of a new tendency. Certainly, both the FASB/IASB convergence project and the new MB jeopardize the EU strategy, especially its second tier: the intention to influence the IASB. In this new context, given that over past years the strategy's main flaws

[109]European Commission (2005a).

[110]See FCAG (2010).

originated widely from the fragmentation of competences among bodies intervening within the procedure, the EU must focus on strengthening these bodies. The public financing of the EFRAG and, even more, the new ESMA, are steps in the right direction.

In the auditing area, EU strategy – which has not yet been enacted – seems more likely to succeed, mostly because of the less controversial nature of the standards. This explains the weaker political interest in this area. Additionally, the composition of the PIOB, which dates back to a period preceding the crisis, is more favorable to the EU.

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Chapter 15
The WTO and the EU: Exploring the Relationship Between Public Procurement Regulatory Systems

Hilde Caroli Casavola

15.1 Introduction

In recent years, efforts to protect global free trade and to integrate regional markets have given rise to a growing set of norms on procurement contracts signed by public authorities. An increasing number of international, regional and local bodies – both public and private – are providing such norms through new rules and standards.

The most developed global public procurement regulation is the Government Procurement Agreement (GPA) adopted by the World Trade Organization (hereinafter WTO or the Organization). The GPA applies to states that are Member States of the European Union (EU), as well as to states that are not. Regionally, the EU has developed its own detailed public procurement discipline over almost 40 years.

The coexistence of these two regulatory systems raises important questions regarding their respective impacts on the European procurement market. Do such overlapping sets of norms provide a useful framework for applying common principles and standards? What, if any, additional advantage does this global regulation provide, as compared with the EU public contracts directives?

The main purpose of this paper is to explore these questions by comparing the institutional frameworks, implementation mechanisms, governance, enforcement procedures and the ultimate regulatory effectiveness of the WTO public procurement regime with those of the EU regime. Particular focus will be on the relationship between the practical implications of EU's policy of procurement market integration and the GPA's goal of removing unnecessary purchasing restrictions at the global level.

The discussion subsequent to this introductory first section is organized as follows. Section 15.2 provides some basic information on the WTO and the EU regulatory frameworks and compares the purpose of the public procurement

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regulations of each. Both regulatory paradigms are vulnerable to similar problems of efficiency and cost-effectiveness, but they differ significantly in their institutional objectives and principles, and, consequently, in the functional norms they have developed over time.

Section 15.3 describes the implementation mechanisms of the GPA and of the EU public procurement regulations, and their respective effects. The issue of the legal effect of the GPA in the EU Member States has significant implications for the judicial remedies available to aggrieved providers.

Section 15.4 examines the peculiarities of the organization and functioning of the relevant international and European governing institutions. Both the European Commission ("the Commission") and the WTO Committee on Government Procurement (CGP or "the Committee") play a substantial role in the sector governance, but the degree of the legal formalization of each is significantly different.

Section 15.5 focuses on the enforcement proceedings and the system of remedies provided by the GPA and the EU regulatory regime. The inclusion of an obligation to provide for enforcement and challenge procedures at the national level makes the GPA unique among WTO Agreements.[1] As evident from certain early experiences of the EU, an effective adjudicatory system is a decisive incentive for compliance and a good reason to develop mechanisms for a minimum level of judicial oversight in different national procurement contexts.

Finally, Sect. 15.6 provides concluding remarks concerning the similarities, differences and interactions between the EU and the GPA public procurement regulatory systems as well as the peculiarities of each.

15.2 Basic Regulatory Frameworks

By the time the new GPA was concluded, on the 15th of April 1994, the EU had long become the most tireless supporter of it within the WTO, except for the United States, the GPA's chief promoter.[2] Converging economic interests of both EU and United States facilitated the conclusion of GPA. The Europeanization of many national procurement systems (and markets) had started in 1971, when the EU adopted two directives for public sector works and supply contracts.[3] Both

[1] See GPA, Art. XX.

[2] Blank and Marceau (1996), p. 122. For a discussion of the substantial economic benefits accruing to the EU from the liberalisation of procurement markets, see Cecchini (1988), p. 16.

[3] Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, O.J. English Special Edition 1971 (II), p. 678, and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, O.J. English Special Edition 1971 (II), p. 682. These early sets of norms were inspired by a "neo-classic economic approach to market integration", based on the necessary link between a competitive common market and substantial savings to the public sector (Bovis (2005).

directives provided rules based on a "negative" approach aimed at eliminating factors that distort competition rather than providing positive rights. To this end, the directives tried to lift barriers to the free trade of goods and services within the EU and to prevent nationality-based discrimination in public procurement. This approach was intended to protect the interests of traders established in any Member State who wish to offer goods or services to contracting public authorities established in another Member State. These early regulations were largely ineffective and eventually replaced by the 1992–1993 directives,[4] which were subsequently revised to comply with the GPA provisions.[5] The European law has, to a large extent, served as a model for the GPA. The principles of transparency, openness and non-discrimination embodied in the GPA, for example, were long applied in Europe as a way of safeguarding economic freedoms and building an internal procurement market that would be truly as competitive and as attractive as the comparable market in the United States.

The WTO and the EU both use competition mechanisms in order to enhance access to domestic public procurement markets.[6] Both the GPA and the European directives have had similar basic problems, such as inefficiency in price and delivery conditions and low rates of innovation in the public procurement systems. Both are international systems that regulate many aspects of the procurement process in a way that is compatible with a plurality of constitutional and administrative law traditions. Nevertheless, the objectives that inform their missions and the tools they employ to meet those objectives are quite different.

The WTO's objective, which is to promote the widest possible competition,[7] rests on the assumption that States Parties would treat the products, services and suppliers of other Party in a manner "no less favourable than" that accorded to domestic or any other Party's products, services and suppliers.[8] The GPA

[4]Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, O.J. 1992, L209/1, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, O.J. 1993, L199/1, Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, O.J. 1993, L199/54, and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, O.J. 1993, L199/84.

[5]Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts, respectively, O.J. 1997, L328/1, and Council Directive 98/4/EC of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, O.J. 1998, L 101/1.

[6]Both the WTO and the EU "revolve around the circulation of goods and services (though the European Union also protects the free circulation of persons and businesses)", Cassese (2005b), p. 109.

[7]Petersmann (2004), p. 585.

[8]GPA Art. III is equivalent to Arts. I (Most Favoured Nation Clause) and III (National Treatment) of the General Agreement on Tariffs and Trade-GATT. On the WTO as closed club driven by the

obligation not to discriminate arises from the international law principle of equality (which implies equal treatment) of all States (that are signatories to a given treaty).[9] This principle is one of the few "guiding"[10] principles of international institutions for which the conceptualization of the distinction between national public law and public international law[11] still appears meaningful and appropriate. The principle of equality of all States also implies that the peculiarities of the public authority of domestic institutions in the national legal orders cease to be relevant. In contrast with national law, the differentiation of public authorities with respect to international institutions is under-developed. Furthermore, public international law usually does not attribute to international institutions the power to control individuals through their acts.[12] Instead, the authority of such international institutions rests on the assumption that domestic law and the public authorities themselves directly frame individual legal positions.

In this perspective, the public character of international law mainly derives its meaning in the context of the relationship international institution-member. In coherence with a positivistic approach, this relationship is framed by legal texts or state will explicitly providing general and important international rules. One of these rules is the principle of non-discrimination among the States.[13]

The National Treatment and Most Favoured Nation Clauses of the General Agreement on Tariffs and Trade (GATT)[14] form the cornerstone of WTO law and the fundamental concept defining the international trade system as it is today. They were introduced to initially level the field of international trade for all players and to progressively eliminate trade barriers.[15] However, through the diverse regulatory and decision-making activities of the Organization,[16] the principle of non-discrimination expressed in those clauses has evolved into a complex, technical and specialized set of rules.

Currently, the wide range of distinctions and minute classifications used in applying the principle renders it ineffective for the levelling function it was originally intended to perform. In interpreting the different rules on non-discrimination, the

richer and more powerful members, and the vexing issue of democratic legitimacy in the Organization, Keohane and Nye (2002), and Weiler (2001).

[9]Picone and Ligustro (2002), p. 102.

[10]von Bogdandy (2008), p. 1909.

[11]The conceptualization of International law as the law of the inter-States relationships is due to Schmitt (1950). On this point, Kelsen (1952), p. 3.

[12]von Bogdandy (2008), p. 1920.

[13]Non-discrimination is recognized in the *chapeaux* of Art. XX of the GATT (1994) too (in the case of general exceptions regulatory measures shall be applied in a non-discriminatory manner) and meets all the formal requirements to be included in the sources of public international law as recognized in Art. 38 of the Statute of the International Court of Justice.

[14]GATT Arts. I and III.

[15]See, *ex multis*, Cottier and Mavroidis (2002), p. 3.

[16]In regulating and decision-making of the WTO widely differing bodies act: Ministerial Conference, committees, working groups, Panel and Appellate Body.

WTO's Panel and Appellate Body decisions have, for instance, created numerous technical distinctions between "like" products, "similar" products and "similarly situated" products.[17]

Although these distinctions were not articulated in rulings on GPA, the GPA itself incorporates the non-discrimination rule in terms equivalent to those provided in the "Most Favored Nation" and "National Treatment" provisions of the GATT.[18] It is likely, therefore, that the substantive body of WTO Panel and Appellate Body case law on the different forms of non-discrimination, which had applied to the GATT provisions, may also be found applicable to the GPA.

Those technicalities and fine definitions require administrations and competing firms to be informed and capable of embodying and fulfilling the free market requirements in the procurement procedures. Nationals of developing countries often lack the economic conditions to meet those free market requirements, or they may lack a thorough technical understanding of the requirements themselves. For instance, in applying the GPA to contract for the purchase of a stock of computers, a developing country's administration must be aware – before writing the tender notice – that the tender notice cannot (in the view of avoiding discriminatory treatment) identify the information system to be purchased by exclusive reference to characteristics protected by patent (or brand-names), and that, when it is impossible to avoid such identification, the procuring administration must at least add "or equivalent" when using any reference to the identified information system to be purchased). The competing firms must be aware, in similar cases, that the GPA allows them to pursue claims against the breach of the GPA non-discrimination rule and to have the tender notice changed.

[17]Cottier and Mavroidis (2002), p. 3. For an analysis of the GATT/WTO legal rulings, see Hudec (2002), p. 101.

[18]GPA Art. III, titled *National Treatment and Non-discrimination*, states: "[w]ith respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than (a) that accorded to domestic products, services and suppliers; (b) that accorded to products, services and suppliers of any other Party. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure that: (a) its entities shall not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership; and (b) its entities shall not discriminate against locally established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Art. IV. Arrowsmith (2003), p. 169 (arguing that, in a broad sense, international institutions pursue political objectives rather than the application of largely predetermined law). In particular, as WTO negotiating forum, the GPA appears like a set of bilateral agreements. For this reason, even if non-discrimination as comprehensive principle generates detailed award procedures (GPA Art. III, para. 2 (b)), the degree of differentiation between norms and principle is lower than it would be at national and European level.

Less developed and developing countries also often lack the ability to individually influence the Organization's decision-making or engage in drafting norms or negotiating the fine regulatory details in the committees and working groups. In the process of acceding to the GPA (based on negotiations), certain plurilateral meetings can be decisive. In such meetings, economically disadvantaged countries may be forced to accept unsatisfactory terms that serve the interests of their economic benefactors.

These economically weaker countries are also effectively excluded from the process of gaining power and influencing the decision-making of the GPA Organization. To advance their interests, these countries have to act as a part of a unit, sharing interests, pooling their resources and negotiating their power. This kind of functional cooperation is a difficult task for countries with limited resources and influence with which to bargain. Richer developed Member States have that bargaining power as well as superior training and experience in these practices. Therefore, they are able to influence the GPA activities and functioning at the expense of the others. The need for cooperation to take effective part in rule-making is one of the reasons why the GPA is not attractive for less developed and developing states.[19]

Due to these very different possibilities available for each Party to achieve the potential benefits of the on-going GPA activities, the non-discrimination rule appears to be applied to the contracts covered by all the GPA Parties, but with a limited degree of uniformity.

The EU's objective of creating a single market is based on the principles of free movement of goods, freedom of establishment, freedom to provide services, and the deeper underlying principles of equal treatment and mutual recognition. The Treaty on the EU (TEU) expressly guarantees the free flow of market forces across traditional national boundaries against protectionist regulations. These rules apply to the procurement market as well.[20] Non-discrimination and equal treatment of interested parties represent general principles of European procurement regulation.[21]

Since market competition is the fundamental public interest that informs the EU's economic policies, its regulation binds domestic regulators in EU Member States to bring national procurement regimes into compliance – by appropriate

[19]Committee on Government Procurement (1996) Report to the General Council (GPA/8 of 17 October 1996), para. 23.

[20]On EU public procurements law, see, in particular, Arrowsmith (2004), p. 1277. See also Bovis (2005); Allain (2006), p. 517; Hebly (2007).

[21]The principle of non-discrimination and equal treatment apply to all public contracts, over and below certain financial thresholds. The provision of the Commission interpretative Communication of 1st August 2006, was transposed into Italian legislation by the legislative decrees n. 6/2007 and 113/2007, integrating the legislative decree n. 163/2006 (so-called Procurement Code).

amendments to the law, if necessary – with EU rules that ensure such competition.[22] Wider competition in procurement procedures requires not only that domestic laws are compatible with the EU law, but also that the administrative practices and the case-law within a Member State's internal legal system must not conflict with EU rules.

The EU regulatory framework sets the objective of addressing obstacles to freedom of movement and competition, but gives Member States a valuable discretion in balancing the interests at stake and defining the concrete means for attaining that objective respectfully of the various national legal traditions.

Over the long evolution of EU law, the degree of discretion and the regulatory choices left to national legislators have, nevertheless, significantly changed.

An example of this change is provided by the EU rules on protection of concerned tenderers with respect to concluded contracts. This protection refers to the period between the decision to award and the signing of the contract. In this period, several interests appear relevant, like the interest of the successful tenderer and the public authorities in applying the award decision and concluding the contract, or the interest of other competing tenderers in the setting aside of the award decision.

The Treaty on the EU did not provide specific rules on the protection of concerned tenderers with respect to concluded contracts. The original legislative framework – Directives 89/665 and 92/13 – required Member States only to establish national mechanisms for applying for the review of the award decisions. They were empowered to balance the various relevant interests and to provide for the legal effects of the setting aside of the decision to award a contract. On that basis, in the last two decades EU Member States have developed (through the courts and public authorities) their own autonomous sets of rules concerning the legal effects of setting aside unlawfully concluded contracts (e.g. for irregularity, ineffectiveness etc.).

Over this time, the European Court of Justice (ECJ) played a fundamental role in developing a standardized approach. It gave harmonizing interpretations (addressed to national legislators) of the *ad hoc* solutions fashioned by the domestic courts to tackle the issues left open by the EU regime. Since the end of the last century, the ECJ made clear in its case-law that the lack of adequate protective measures has itself become an obstacle for the effectiveness of EU law.[23] The overall goal of

[22]The first phase of legislative coordination of national regulations related to the works and supplies sectors, provided a limited scope and a limited number of obligations on transparency and competition. The second phase (1989–1993) aimed to the completion of the legislative framework, giving priority to the internal market policy and providing detailed rules on scope, specifications, advertising, procedures, selection and award criteria, and review. The third generation directives (2004–2007) enhances procurement objectives, reflects structural and technological progress of purchasing practices (e-procurement), provide a framework for modernization and improve comprehensiveness and remedies.

[23]European Court of Justice, Case 81/98, *Alcatel Austria and Others v Bundeministerium fur Wissenschaft und Verkehr* [1999], ECR 7671; case 328/96, *Commission v. Austria*, [1999] ECR

removing unnecessary obstacles to freedom of movement and competition led to the imposition on Member States of the duty to provide a minimum common standard of effective judicial protection. This standard would enable concerned tenderers to apply for the review of the award decision and for the setting aside of the unlawful ones.

This line of analysis from the ECJ jurisprudence is expressly embodied in the Directive 2007/66.[24] It is known as Remedies Directive because it contains provisions to improve compliance by setting up requirements of ineffectiveness of the contract in certain cases, and requirements of alternative penalties and time limits. It binds the relevant Member-State-level review authority to consider ineffective (to set aside) any procurement award decision not compliant with specific EU rules.[25] Those rules refer to particular cases of serious violations of EU procurement law and of ineffective judicial protection. When such violations occur the interest of setting aside the award decision prevails over competing interests in the consideration of the EU institutions.

The case of protection of harmed tenderers – just examined – significantly exemplifies the multiple-fold development of EU procurement law and policy. This process matches the vertical implementation of a number of EU principles with a gradual horizontal convergence of the national law. The convergence of MS' law is partially autonomous and inspired by principles common to all the different national procurement regimes. It is partially driven by the European Court of justice. New rules arise from the ECJ jurisprudence in testing the effects of different national laws. The EU legislature develops, specifies and eventually limits those rules and the conditions of application. In this process, the rule-making is a coherent continuation of the decision-making. The characteristics of this process indicate the advanced development stage of EU procurement law as complex legal regime.

Both the GPA and the EU procurement systems are based on the same objective, the removal of unnecessary restriction to national market access. To reach this objective, the EU can rely upon a regulatory framework more sophisticated than the

7479; and Case 26–03, *Stadt Halle v. Arbeitsgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna*, [2005] ECR 1.

[24]Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving effectiveness of review procedures concerning the award of public contracts, O.J. 2007, L 335. See also Golding and Henty (2008), p. 146. The new Directive modifies and built upon the previous Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, O.J. 1989 L395, and the Council Directive 92/13/EEC of 23 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors). A useful overview of these directives is provided by Arrowsmith (1993).

[25]Article 1/2 and 2/3 of Directive 2007/66/EC (new Art. 2d/1 of the 89/665/Ce directive and Art. 2d/1 of the Directive 92/13). For a detailed analysis of the provisions on judicial protection see Chiti (2010), p. 125.

GPA. The unitary rationale of EU is realized by a remarkable consistency of the decision-making and rule-making processes. This consistency helps to harmonize and integrate national law to the end of creating a single procurement market.

15.3 Implementation Mechanisms and Their Effects

The institutional mechanisms of the EU and the WTO for the adoption and implementation of their respective rules have crucial differences, especially as relevant to procurement systems.

Within the framework of the EU's regulation, the development of a public procurement law has mainly taken place through directives, i.e. through EU acts that mandate certain results that Member States are required to achieve, while allowing them the discretion to decide how best to achieve the result.[26] The aim is to effect tighter enforcement, at the national level, of the rules promulgated by the EU at the supranational level.

Member States are required to enact legislation that give effect to the European directives and ensure that award decisions are subject to judicial review and that individual tenderers have the right to bring actions for such review**.** In states that have traditionally provided for procurement rules by adopting administrative regulations rather than statutes or other legislative instruments (e.g., the United Kingdom), the EU obligation necessitated a departure from the traditional approach in implementing the EU procurement law.[27]

The EU requirement to implement procurement directives is twofold: substantive and partially procedural. The substantive provisions of the directive, particularly those that appear unconditional and sufficiently precise, become self-executing and supersede any contrary national laws after the time limit for implementing the directive expires.[28] In other words, this act has direct effect in national law against EU Member States. With respect to the directives' procedural aspects, however, EU law primarily recognizes the autonomy of Member States to regulate their own domestic administrative and legal systems in order to reach the goals of the EU directive.

Direct effect and supremacy of extra-national regulations over national ones can be seen as structural principles that distinguish supranational organizations from

[26]National authorities are free to choose the form and methods of implementation (by reference, with formal legislation or administrative action; on this point see Arrowsmith (1998), pp. 496–497), but they are bounded as to the result to be achieved. Therefore, the domestic norms serving to implement a directive must be of a peremptory nature and suitable (see the ECJ case law in Kapteyn and VerLoren van Themaat (1998), p. 326).

[27]Sahaydachny and Wallace (1999), p. 474.

[28]European Court of Justice, Case 9/70, *Grad v Finanzamt Traunstein*, [1970] ECR 825, and Case 26/62, *Van Gend en Loos*, [1963] ECR 1.

international ones.[29] Unlike the EU rules discussed above, the GPA does not provide any indication about how it is to be implemented within the national legal systems of the Contracting Parties. In this regard, the GPA's main goal is to ensure the compliance of the Parties with their respective undertakings, not to provide a uniform implementation mechanism. States are free to choose the normative procedures and the legal acts adequate to implement the GPA in the domestic legal system. The "classic" approach to the topic of the existing interactions between EU law and international regulations related to public procurement adopts the direct effect doctrine.

Historically, the direct effect issue arose in the early 1970s, when the first ECJ decision on GATT was rendered. The ECJ found that the GATT provisions in question were not clear and precise enough to be interpreted as creating individual rights that EU citizens could invoke before national authorities of the Member States.[30] Examining the relevant rule (contained in Art. XI) within the context of the overall spirit, the general scheme, and the totality of the terms of GATT, the Court held that there was great flexibility built into the GATT. In the 1980s, a different approach was developed based on the textual examination of specific provisions of other EC trade agreements, under which the provisions of agreements signed by the EC Member states and third parties are found to be directly effective and enforceable against public authorities of Member States.[31]

A substantial change in approach came from the Uruguay Round (1994), when new dispute settlement procedures were adopted in the Dispute Settlement Understanding (DSU). The DSU gives WTO agreements a certain quasi-judicial protection by granting individuals the right to invoke them under national law within a signatory nation. At the same time, the substitution of a "mediation" model with a "judicialized" system takes place for the GPA.[32]

The GPA is the only WTO agreement that permits affected suppliers to directly challenge an award decision in courts of law or *ad hoc* independent review bodies of the state alleged to have violated the GPA rules.[33] Despite their endorsement of the GPA, the EU institutions remain largely opposed to the idea of WTO agreements having direct effect on the national laws of EU Member States. The preamble of the EU Council decision implementing the DSU explicitly rejects the

[29]von Bogdandy (2008), pp. 1930–1931.

[30]European Court of Justice, Joined Cases 21-24/72, *International Fruit Company*, [1972] ECR 1219.

[31]The ECJ recognized direct effective the Free Trade Agreement between EC and Portugal (Case 270/80, *Polydor v. Harlequin Record Shops*, [1982] ECR 329), and the Association Agreement between EC and Greece (Case 17/81, *Pabst & Richarz v. Hauptzollamtoldenburg*, [1982] ECR 1331).

[32]Arrowsmith (2003), p. 402 seq.

[33]GPA Art. XX, para. 2. See Battini (2007), pp. 42–43.

direct effect principle.[34] The European Commission's explanatory Memorandum (in connection with the DSU implementation decision) focuses on the main reason for declining to give the GPA direct effect,[35] which is to hold a strategic position in relation to the USA and the other trading partners that – in their own respective legislative acts to implement the WTO have not recognized WTO Agreements as having direct effect on their internal laws.

The extent of the binding force of both the GPA and the DSU is at least controversial.[36] Whether GPA rules represent an independent source of EU law even without further implementing measures taken by the EU or the relevant Member State, is a question for the judiciary. This is not a current topic, due to the full transformation into EU law.

Whether the decisions adopted by the WTO Dispute Settlement Body (DSB) have influence, for instance, as source of interpretation is an open question. To this extent, the *Biret* case is significant.[37] The ECJ did not explicitly conclude that the obligations deriving from WTO agreements are non-binding on the EU law and the national laws of its Member States, and clearly avoided reaching this issue by narrowly deciding the case based on the factual record.

15.4 Organization

A core aspect of the development of the public procurement law of extra-national contexts is related to the organizational features of their governing institutions. The existing EU and WTO regulatory systems must now be examined in relation to their respective institutional structures and characteristics as organizations.

Starting from the 1970s, a uniform European policy was emerging through the European Economic Community, which represented a great potential for enlarging competition in the internal national markets for public procurement contracts. Increased competition for public contracts also brought significant potential savings to taxpayers.

Because of the sectoral economic importance[38] in the institutional framework of the EU, the Director General for internal market and services is currently

[34]Council decision 94/800/Ce of 22 December 1994 concerning the conclusion on behalf of the European Community as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negoziations, Annex 4, GPA, O.J. 1994, L336/273.

[35]Doc. COM(94) 143 final.

[36]Didier (1997), p. 125; Mengozzi (1994), p. 165.

[37]European Court of Justice, Case 93/02P, *Biret International SA v. Council of the European Union*, [2003] ECR 10497. In the *Biret* judgement, the ECJ showed signs to find reasonable exceptions to the general rule holding that WTO law cannot be invoked to challenge the lawfulness of EU law.

[38]It is estimated at about 16% of the Union's GDP or €1,500 billion in 2002 (http://ec.europa.eu/internal_market/publicprocurement/index_en.htm).

responsible for dealing with public procurement policy. His Department, the Directorate General for Internal Market and Services (DGIMS) of the European Commission (the "Commission"), is empowered to exercise supervision over the implementation of EU law within the national regulatory frameworks of the various Member States.[39]

Within the DGIMS, the specific Directorate in charge of public procurement (Directorate C) is divided into four units and, with a staff of nearly sixty officers and other personnel.[40] The growing technicality of procurement procedures necessitates a complex organizational structure and the gradually increased expertise of the monitoring bodies.

The Commission plays a role in both the rule-making procedures and the interpretation of EU law.

One of the Commission's fundamental tasks is identifying the basic rules likely to be applied in the 27 Member States by way of domestic legal orders in accordance with very different legal traditions. Therefore, in more than 30 years, several directives were introduced and numerous provisions revised and replaced on the initiative of the Commission. By monitoring their application, the Commission was able to systematically find deficiencies, to propose amendments to the existing EU law and to fill the regulatory gaps in the European public procurement regime.

The Commission also influences the interpretation of the EU law in several ways. First of all, it assists in the interpretation by using public statements and other similar soft law tools. Despite the lack of binding effects, such tactics are often used by the Commission to fix its position on key issues and problems surrounding certain fields of law where different jurisdictions potentially conflict or intersect.[41] Second, the Commission expressly supports the development of procurement legislation and other strategies to bring national laws into compliance with EU policy. For instance, the Commission regularly organizes bilateral expert meetings, takes part in international conferences and seminars, and has supported national plans to adopt operational guidelines and sample contracts. Before formally committing to the implementation of any prescription, the Commission can rely on this arsenal of tools to "test" the States' capacities and national policy priorities. Through this process, it can stimulate the development of the most initiatives – some of which

[39]In case of violation, the Commission can submit the relevant issues to the European Court of Justice on the basis of Art. III-362 TEU (Art. 228 of the TEC). Between January 2000 and October 2010, the Commission submitted 76 infringement procedures initiatives related to EC public procurement law since 2001 (http://ec.europa.eu/internal_market/publicprocurement/infringements_en.htm).

[40]Three units are responsible for formulation and enforcement of public procurement law in about eight to ten Member States (units C1, C2 and C3), and the fourth unit deals with the e-procurement and the economic issues (unit C4).

[41]A significant example can be found in the 1985 White Paper, recognizing priority to the procurement sector in the internal market policy.

eventually become binding through formal legislative act or judicial decree – in pursuing its objectives.[42]

In more than 12 years, the Commission was also successful in launching and running important web-based operations, such as the Public Procurement Pilot Project (PPPP) and the Information System for European Public Procurement (*Système d'Information sur les Marchés Publics*, a.k. SIMAP). These operations have simplified and sped up the procedural requirements (i.e. preparation and publication of tender notice) for enhancing competition in the European public procurement market.[43]

Indeed, the Commission used the resulting data and information from such operations to improve the EU regulations by introducing the directives 2004.

In addition, the Commission has been an extremely active watchdog for the EU law.[44] National authorities are, in fact, required to provide the Commission with fairly detailed information about the relevant activities and to use common tools (such as the EU Official Journal for notices publication), standard forms and documents to improve the organization and operation of the European public procurement market. A significant consequence of the Commissions' increasing efforts in enforcing common European rules and standards is the growing number of infringement proceedings – submitted by the Commission to the ECJ – for inadequate implementation or for violations of EU protocols by national or sub-national contracting authorities.[45] Following these proceedings in the ECJ the compliance record of several states, such as Greece and Germany, has improved considerably.[46]

Compared with the EU system, the institutional development of the WTO procurement organization is substantially much less advanced.

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[42]See, for instance, European Commission (1996) Green Paper, Public Procurement in the European Union: Exploring the Way Forward, of 26 November 1996, COM (96) 583 final (http://europa.eu/documents/comm/green_papers/pdf/com-96-583_en.pdf).

[43]The PPPP is the single official source of information on tenders and public contracts in Europe. It is a network based on cooperation and data sharing among all the various domestic procurement bodies: enterprises, administrations, and other economic operators can browse, search, and sort procurement notices by country, region and business sector online. It includes the electronic version of the Supplement to the Official Journal of the EU, dedicated to public procurement, named Tenders Electronic Daily (Ted), which is updated five times a week with approximately one thousand and five hundreds notices, fully published in the 23 official EU languages. Simap is a portal providing access to the most important information about public procurement in the EU, including links to national public procurement databases and authorities (http://simap.eu.int).

[44]The Green Paper on public procurement [European Commission (1996)] raised the idea of strengthening the role of the Commission through investigatory competence and power of sanction, but corresponding provisions were not incorporated in the latest directives.

[45]More details are provided in the following para. 5. See, *ex multis*, European Court of Justice, Case 283/00, *Commission v. Spain*, [2003] ECR 11697. On the general issue, see Drijber and Stergiou (2009), p. 806.

[46]See Georgopoulos (2000), p. 75; Spiesshofer and Lang (1999), p. 103.

The CGP, established in 1983 by GPA Art. IX:6, was designated as and still largely remains a negotiating forum.[47] This characteristic follows to the certain negotiating origin of the GPA. During the Uruguay Round (of 1994), in fact, adhering to the GPA was voluntary, not compulsory for all the WTO Members (plurilateral character of the GPA). The access to the GPA was originally excluded from the "Single undertaking" and negotiated on the basis of mutual reciprocity among a limited number of Signatories (29 of the WTO's 140 plus members). These circumstances made it a set of bilateral agreements subject to ongoing negotiations.[48]

Composed of representatives of the GPA Parties and serviced by the WTO Secretariat,[49] the Committee is the only body empowered to take formal decisions on topics of its specific interest.[50] Since 1994, several substantive and procedural matters, such as the modalities for negotiation, the notification of national laws, the process to become observer and the circulation of sensitive documents, were concerned by the CGP decisions.[51] Its decision-making activities are governed by the GPA provisions and the final documents are generally adopted by consensus.[52] The close number of the GPA signatory states constituting the administrative body carries out preparatory activities that are quite often decisive for subsequent regulatory choices. Consultations, information-sharing and technical assistance to developing countries are some of these mainly undisclosed activities.[53]

[47]The same function – forum for trade negotiations – is performed in the other (some) 40 councils, committees and working groups of the WTO by all the Member States.

[48]The starting negotiating issue, in the early ITO discussion, was ensuring trade advantages of equivalent economic value to all the signatories, and balancing the ones likely to be offered by federal states to the trade advantages offered by unitary states. See King and De Graaf (1995), p. 552.

[49]The Committee elects its own Chairman and vice-Chairman GPA Art. XXIV.13. The technical assistance program (TA) undertaken by the WTO Secretariat in the area of government procurement includes cycles of regional activities (one TA program was launched in 2004), policy development and decision-making initiatives, practical workshops organized to deepening participant and observer members understanding of relevant WTO activities and instruments.

[50]The WTO Agreement explicitly provides that the Ministerial Conference has no decision-making authority in relation to the plurilateral agreements, including the GPA (WTO Art. IV).

[51]Other relevant decisions concern accession requirements and notification duties. In addition, the Committee is empowered to establish formal procedures for amendment of the GPA and to permit observer governments or countries interested in the process of accession to the GPA to participate and receive copies of requests and offers presented by the other parties under the condition of submitting an offer of their own (Committee Decision (July 2004) Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices, GPA/79).

[52]As the general rule of the WTO system, when no consensus decision can be reached, also the CGP can adopt resolutions by vote, according to the "one member, one vote" principle. The decisions adopted by the Committee are binding in effect and enforceable against the signatory states, whose governments are forced to hold to the CGP's commitments by the threat of trade sanctions.

[53]Working papers and reports by WTO officers refer to the above-mentioned activities (see, for instance, Anderson and Osei-Lah (2011), p. 23).

Since the beginning of the GATT experience, however, organizational difficulties of the Committee in carrying out its tasks became evident. To speed up the progress on the agreed upon text of the previous Government Procurement Code, an informal working group of the CGP was created 2 years after its inception.[54]

The Committee holds each year several formal and informal meetings.[55] Diplomacy and confidentiality are the common characters of meetings substantially representing opportunities for supportive regulatory activities. These activities consist of preliminary discussions, consultations, informal negotiations of normative formulas (including annexes and appendices), contestation and clarification of reciprocal national concessions, definition of interpretative and enforcement issues, assessing best practices and common understanding. Few official minutes of the Committee meetings timely circulate, are published and online available.[56] In the process of accession to the GPA, plurilateral and bilateral consultations are private; no public records are kept.[57] Parties' offers and requests in the ongoing coverage negotiations are by intention not publicly available.[58]

The most prominent function of the CGP is surveillance and monitoring the general procurement measures taken by parties to the GPA (the "Parties") for compliance with its terms. Pursuant to Art. XXIV.7 of the GPA, the Committee carries out a detailed annual review of the Parties' implementing efforts and addresses the final report to the General Council of the WTO.[59] Besides the obligations of the Parties set up by the GPA,[60] the CGP decision on *Procedures*

[54]Blank and Marceau (1996), pp. 104–105.

[55]GPA Art. XXI.1 provides that the Committee meetings are necessary "or the purpose of affording Parties the opportunity to consult on any matters relating to the operation of the Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties".

[56]Between 1994 and 2010, 74 official documents (22 decisions, 40 minutes and 17 annual reports) approved by the Committee are published on the official documents website of the WTO (http://www.wto.org/english/tratop_e/gproc_e/documents_e.htm and http://docsonline.wto.org).

[57]It means that the specific conditions for accession are discussed privately between the representatives of the accession candidate and an individual party or all the GPA parties collectively.

[58]The reason is that in some key areas, such as sub-federal procurement, the agreement between the negotiating Parties on the economic value of their reciprocal offers and the extent of existing trade barriers (even with a flexible negotiating approach) needs a long uneven transaction process, where negotiating abilities of the national delegations as well as non-interference of third parties are crucial conditions for success. Anderson and Osei-Lah (2011).

[59]As plurilateral agreement the GPA is implemented, administrated and operated within the institutional framework of the WTO Agreement, and that GPA parties must keep the General Council informed of their activities ‚on a regular basis'(WTO Art. IV.1-8).

[60]For the purposes of the CGP annual review, the Parties must inform the Committee of any changes in laws and regulations relevant to the GPA, and in the administration of such laws and regulations (GPA Art. XXIV.5). With regard to their specific obligations, the Parties must provide, on request, explanations of their government procurement procedures to other parties, and make available information on procurement by covered entities (GPA Art. XIX.1-3).

for the Notification of National Implementing Legislation requires the Parties to support it on exercising this function in several ways, including by supplying information about domestic legislation to other Parties on request.[61]

Such efforts aim to enhance voluntary compliance by the signatory States, to increase circulation of relevant documents and other information-exchanges among the signatory states, to make the GPA more attractive for other WTO countries to join, to facilitate the Committee's initiatives, and to reverse the trend of declining membership and defections from the GPA.[62]

However, the surveillance and monitoring role of the CGP is limited to the mere implementation phase. The application of GPA by the regulated entities is excluded.

The GPA provisions on substantial competence and its procedures for the CGP's functions confer on the Committee a limited degree of legal formalization and an apparently weak institutional role. Despite the substantial technical work carried out the CGP as an administrative body, its basic organizational structure was designed as a negotiation-based platform, lacking in openness and transparency. Moreover, the Committee has no structured relationship with national procurement authorities by which to cooperate and coordinate regular operations. It lacks leadership and resources in pushing through reforms and seriously addressing procurement issues in a wider multilateral forum.

Any further development of the CGP's institutional capacities is constrained by financial limits. Currently, only the western developed countries tend to find it profitable to participate in the various activities promoted by the Committee or even to be able to afford the costs of representation in the periodic meetings. To enhance the CGP's functions, the signatories would need to provide the necessary resources.[63] Developed countries do not have enough incentives in increasing the economic impact of their international commitments, while small developing countries, often under-represented in the CGP' works,[64] do not have enough resources to contribute.[65]

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[61]See Committee on Government Procurement (4 June 1996) Decision Procedures for the Notification of National Implementing Legislation GPA/1/ADD.1, paras. 1–4. In addition, each party must create a contact point to ensure 'best endeavours' assistance to other parties in translating the relevant documents in a WTO language.

[62]GPA Arts. XIX.5, XXI.2, and XXIV.6-10 provide several other functions of the Committee, such as collecting on an annual basis statistic data from the parties, consulting them regularly regarding developments in the use of information technologies and negotiating the necessary modifications to the Agreement, and receiving notification of the modifications to the scope of coverage set out in the Appendices.

[63]Arrowsmith (2003), p. 412.

[64]More generally, on the developing countries' participation in WTO' committees and working groups, see Nordström (2006).

[65]The above-mentioned tendency is confirmed by the recent drop of the transparency in public procurement' issue (one of the four so-called Singapore issues) out of the Doha Development Agenda (DDA), during the 2003 Ministerial Conference in Cancun, because of the massive opposition of the emerging developing countries headed by India, China, Brazil and South Africa.

15.5 Enforcement

The effectiveness of public procurement regimes depends upon the compliance and enforcement mechanisms, the monitoring activities, and the administrative structure of the relevant oversight authorities.

The general (legal–economic) institutional framework wherein the GPA rules on procurement are applied and eventually enforced is important for the degree of success that such application and enforcement achieves. A key trade agreement committing the use of competitive tendering and rule-based decision-making may have a strong impact on the traditional (usually protectionist) nature of procurement. In context of ambitious economic integration arrangements, a successful procurement system tends to have three features: highly decentralized procedures; a review mechanism for implementation and application of the procurement provisions, and a central body empowered to conduct surveillance functions and to play a role in the enforcement mechanism.

At the European level, implementation failures are revealed by the limited value of tender notices published amongst EU Member States: less than 20% of the total public procurement expenditure in 2008.[66] Within the institutional framework, the Commission has a general supervisory responsibility and carries out some specific functions of the enforcement proceeding. Under Art. III-360 of the TEU, the EU may bring, on its own initiative or in response to a complaint,[67] an action against one or more of the national authorities before the European Court of Justice to obtain enforcement orders.[68] The compliance procedures can result in pronouncement of a finding that the relevant Member State failed to comply with EU rules.

[66]Only 18,21% for the European Union, equivalent to the 3,14 % of the total EU Member States GDP (European Commission Working Document, *Public Procurement Indicators 2008*, Brussels, 27 April 2010, p. 7).

[67]Individuals cannot force the Commission to initiate proceedings against a state before the ECJ under the Art. 169 EC procedure (Case 48/65, *Alfons Luttucke GmbH v. Commission*, [1966] ECR 19).

[68]The number of infringement applications – 76 between January 2000 and October 2010 – regularly submitted by the Commission is larger in the area of public procurement than in other areas, and the ECJ proportionally dismisses numerous individual cases. Among the infringement proceedings brought in front of the Court by the Commission for the failure of contracting authorities to comply with public procurement rules, see Case 532/03, *Commission v. Ireland*, [2007] ECR 11353, Case 337/05, *Commission v. Italy*, judgment of the Court (Grand Chamber) of 8 April 2008, Case 507/03, *Commission v. Ireland*, [2007] ECR 9777, and Case 412/04, *Commission v. Italy*, [2008] ECR 619). Under Art. III-360 TEU (Art. 226 TEC), the Commission proceeds against Member States for the breach committed by any "contracting authorities", defined as all the government and non-governmental bodies, at central and local level, subject to a certain degree of governmental control or functionally active as the State is accountable for their activities. For the Commission initiative, the issue of the compliance of the national regulation to the EU law must not necessarily be at stake. On this point, see Drijber and Stergiou (2009), p. 815.

However, the financial penalties that follow the Court's judgement are quite limited, and it does not ensure dissuasive effect on future violations.[69]

Before commencing an infringement proceeding, the Commission usually intervenes in prudential supervision of the Member State's compliance with EU rules, pursuant to Art. 3 of the above-mentioned Remedies Directive.[70] In cases where it determines that 'a serious infringement of Community law has been committed' the Commission is required – before a contract being concluded – to notify both the relevant Member State and the contracting authority of the circumstances of the alleged infringement, and request its correction "by appropriate means". In the absence of specific consequent sanctions, however, the centralized procedure based on corrective mechanism is a relatively ineffective tool for the enforcement of Community regulatory regime.

The effectiveness of EU regulation mainly depends upon the operation of Member States' national review procedures. At the national level, the functioning of compliance mechanisms has appeared substantially heterogeneous and has resulted in failures and ineffective implementation of the EU public procurement review guarantees. As noted, the new Remedies Directive has been adopted to improve compliance.

The enforcement mechanisms of EU law are decentralized and diverse. There are a few common denominators, including national review bodies, independent of contracting authorities, for hearing tenderers' complaints and a minimum standstill period between the date of the award decision and the conclusion of the contract. The latter provision ensures rejected tenderers the opportunity to take actions for review and correction of improper decisions while there is still time to correct it. If the standstill period has not been respected, national courts and administrative bodies are requested, under certain conditions, to consider the signed contract ineffective. They are also required to set aside contracts in cases where the award procedure lacks transparency or a competitive tendering process prior to the award.[71] In order to comply with the EU directive, national legislators have introduced special legislation to provide a basis for rendering contracts ineffective when signed in breach of certain EU rules.[72]

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[69]When the defaulting Member State ignores the judgement of the Court as result of the compliance procedure, the Commission can bring against the defaulting Member State an action under Art. III-362 TEU (Art. 228 (2) TEC), which means a further Art. III-360 TEU (Art. 226 TEC) action, eventually resulting in the obligation for the State to repeal any discipline and to abandon any unlawful practices.

[70]See para. 2. Art. 3 of the Directive 89/665/EECand Art. 3 of the Directive 92/13/EEC, replaced by the Directive 2007/66/EC.

[71]For instance, such a case is found when the contract has been awarded without prior publication of contract notices in the Official Journal. See articles 2*bis* – Art. 2 *quinques* of the Directive 2007/66/EC.

[72]Among others, the German and the Italian laws implementing the EU directives (Bundesgesetzblatt vom 23 April 2009, s. 790, and Italian Legislative Decree n. 53, March 20, 2010).

At the core of the EU legal system, the European Court of Justice has full jurisdiction to decide interpretative questions referred to it by national review bodies. The ECJ is an adjudicatory body that has been extremely active in identifying the required elements of legally adequate contracts (public service contracts, service concessions, grants of exclusive rights and more), so that its rulings have had great practical impact in this field of law. In addition, it has ensured the necessary balance among occasionally conflicting fundamental Community principles, not only related to economic market rights.[73] In the growing body of ECJ case-law, application of EU procurement standards to Member States increasingly focuses on transparency obligations and tendering procedure. These are becoming the defining features representing the fundamental principles of non-discrimination, equal treatment and proportionality in the area of public purchasing.[74]

In the WTO, enforcement of the applicable GPA rules is mainly carried out through an intergovernmental system, the Dispute Settlement Mechanism (DSM). The WTO Panels decide disputes between states that are bound by the GPA provisions and those who have an interest in the application of GPA.[75] More specifically, WTO Member States may raise complaints against another WTO Member State whose contracting authorities are bound by the GPA but have allegedly violated the GPA rules in awarding procurement contracts.[76] The Parties in the dispute settlement procedure before DSM are states, not individuals, even if the procurement procedure involves national private tenderers and single procuring entities, irrespective of their national, regional or local nature.

Under Art. XXII of the GPA, the Understanding on Rules and Procedures Governing the Settlement Disputes (Dispute Settlement Understanding or "DSU") applies the general GATT/WTO DSM standards with few modifications to the GPA.[77] The most important modification is the composition of the

[73]Drijber and Stergiou (2009), p. 811 seq.

[74]See, for instance, the interesting analysis of the emerging "certain-cross-border-interest" criterion in the ECJ jurisprudence on public procurement, of Drijber and Stergiou (2009), p. 808 seq.

[75]A number between 20 and 40 disputes are handled per year by the DSM related to all the trade sectors. For a detailed analysis of the WTO's Dispute Resolution system, see Petersmann (1997). For a general outline, see della Cananea (2005), p. 125.

[76]Selected examples of enforcement of different global public procurement regulations, including the GPA, are considered by Caroli Casavola (2010), p. 27.

[77]The DSU is attached to Annex II to GPA. Its first intent is reconciling the disputing parties. Thus, direct consultations and negotiations with the alleged State must take place before invoking the DSU. When these attempts of amicable settling the dispute result unsuccessful, on request of the complainant, the Panel proceeding starts. Affected parties shall request the WTO Dispute Settlement Body-DSB to establish, in consultation with the parties, an independent Panel, comprising experts in public procurement field. The starting procedure allows States to obtain a formal ruling on the dispute. As its task, the Panel has to hear the case and provide a report to the parties concerned on the alleged breach of the Agreement. The WTO DSB then adopts the Panel report and request the state in breach to annul all the measures found violating GPA. The WTO Appellate Body is empowered to review such ruling in second instance and to provide a report to be adopted

DSB.[78] While in general the DSB is composed of members from all WTO signatory states, when it hears cases relating to the GPA, only GPA Parties are entitled to participate at the decision-making. A relevant exception relates to disputes concerning both the GPA and any other WTO agreement: in this circumstance members from non-GPA parties are excluded from participation only when panels decide on the interpretation and application of the GPA, and not from the other parts of the panel proceedings.

The importance of this provision is related to the crucial role of the DSB decision process. Although it was established primarily to administer the WTO DSM, in practice, it increasingly plays rule-maker.[79] The significant improvements made under the 1994 multilateral negotiations of the Uruguay Round, in terms of certainty and predictability of how rules are applied (necessary for traders to rely on the rules), led to a growing practice of using the DSM as a tool to update WTO trade disciplines.[80] DSB panels do more than just review the legitimacy of the acts and measures falling under WTO agreements; they quite often issue judgments on the merits. Their decisions are likely to affect emerging non-economic interests (e.g. those relating to social and environmental issues) and to identify a starting point for new provisions to adopt in a plurilateral context. To this extent, GPA parties have a clear interest in resolving disputes on GPA rules within the "GPA club", limiting access to DSB membership.

A useful example of the significant functional development of the GPA intergovernmental adjudicatory system is found in the *Trondheim* case.[81]

The dispute arose from the old GATT Agreement on Government Procurement (AGP), which lacked the provisions for bringing challenges at the level of national laws.[82] A GATT Panel ruled that certain contracts had been awarded in breach of the GPA, but the contracts were already signed by the time the dispute was resolved. The complainant United States asked the GATT Panel for compliance measures to be put in place and a recommendation to be issued to reopen the award procedure and to annul the disputed contract. In its report, adopted by the GATT Council in 1992 (as ruling), the Panel described the measures requested by the United States as "disproportionate, involving waste of resources and possible

by the DSB. As ultimate sanction, if the state does not repeal those measures, the DSB may unilaterally suspend the application of the GPA within the state affected by the violation.

[78]Article XXII.3 and 4 of the GPA and Art. 2.1 DSU. Other limited differences with the general GATT/WTO DSM concern, among others, the requirement for panelists being persons specifically qualified in government procurement and short time limits.

[79]Stewart (2011). See referred cases on environmental measures and intellectual property rights (e.g. WT/DS2 – *United States: Standards for Reformulated and Conventional Gasoline*, 24 January 1995; WT/DS332 – *Brazil: Measures Affecting Imports of Retreaded Tyres*, 20 June 2005; WT/DS28 – *Japan: Measures Concerning Sound Recordings*).

[80]Helmedach and Zangl (2006), pp. 101–105.

[81]Panel Report GRP-DS2/R, adopted in 1992 under BISD 40S/319, *Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, para. 4.17.

[82]The AGP was concluded in 1979 and was in force between 1981 and 1986.

damage to the interests of third parties", and denied the request. The reference in the Panel report to the principle of proportionality raises, among the AGP signatory States, the potential for different outcomes, since the proportionality test could be applied by the GATT decision-making bodies in future cases wherein the measures requested by the complaining parties could be deemed "proportionate" under the circumstance, and the relevant contracts could be annulled. This possibility of annulment of disputed contracts by GATT panels, and the risk of recognizing in these bodies the power of reopening national award procedures – implicit in the binding character of the *Trondheim* ruling on remedies – have pushed the GPA signatory states to adopt the so-called *Trondheim* provision.

The *Trondheim* provision consists of new language that was incorporated into Art. XXII, para. 3 of the GPA, which recognizes the DSB as competent to authorize "consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible." This provision has been controversial. It does not impose any obligation on offending states to take remedial initiatives to provide redress. Nor does it impose any legal consequences when compensation measures are not agreed to between the consulting parties.[83] The provision leaves free the offending state to choose whether or not to exercise the legal initiative of consultation as a voluntary act.

Despite its strengthened independent and authoritative character, the DSM enforcement system still appears inadequately effective so far as GPA is concerned. In more than 15 years since the DSB's establishment, its panels have dealt only 6 of the 390 cases brought before it.[84] The reason that so few disputes have arisen may be that the time and costs of settling a dispute, combined with the fact that decisions seem predictable, often discourage harmed parties from bringing claims to the DSB. Application of the standards adopted by the WTO adjudicatory system is limited to the degree to which contracting parties avail of them.

A second enforcement technique, consisting of domestic legal challenge procedures, marked a significant "judicialization" of the GPA compared to the AGP. As noted above, Art. XX:2 of the GPA provides for direct private challenge before national review bodies. The right of aggrieved suppliers to challenge award decisions includes the duty of the states to ensure certain common, basic requirements: the independence of the reviewing body from the regulated entities and a minimum standard of procedural guarantees in the challenge hearing. The common procedural guarantees include requirements of transparency, non-discrimination, publicity, expeditious and timely completion of the procedure, and reasoned award decisions.[85]

The provision of domestic challenge procedures increased the degree of availability and effectiveness of the legal remedies required by the GPA rules on the

[83]Arrowsmith (2003), pp. 374–375; Hoeckman and Mavroidis (1995), p. 71; Schede (1996), pp. 161–185.

[84]www.wto.org.

[85]In this respect, the author takes the liberty of referring to Caroli Casavola (2006), p. 4.

adjudicatory system. That provision also enhanced the role of private parties in promoting compliance through increased opportunities to identify and remedy any violations of the GPA.

On the one hand, the right to challenge a decision directly through inter-governmental initiatives frees private parties to focus on the opportunities most likely to bring them economic benefits without worrying about the support of their own national or local government in case of a dispute. On the other hand, decentralized actions brought through national proceedings, especially where they are speedier and less cumbersome than they would be in an inter-governmental setting, may improve the effectiveness of GPA enforcement mechanisms. The outcome depends on how procedural requirements and obligations are discharged in practice and how the mechanisms for doing so are implemented at the domestic level. In states that have well developed and stringent public procurement processes and strong constitutional and administrative traditions of appropriate remedies, the mandate of the GPA rules on challenge is likely to be easily satisfied. National courts and administrative bodies play a crucial role in adapting and clarifying those rules – and making them enforceable within their own domestic legal context – through interpretation and application.

To this end, effective global rules and remedies are partially secured in many states already subject to analogous or even more rigorous review standards than that provided by the GPA. In these countries, the relevant case-law and administrative practice have promptly and positively satisfied the effectiveness and compliance conditions set out by the GPA. Here again, national courts and authorities have led the effort to maintain the consistency between the internal (e.g., EU) and the external (GPA) regime. So far as implementation is concerned, a convergent regional or supranational system – especially when based on centralized action – may usefully serve the GPA's purpose of removing unnecessary restrictions on procurement. In economic terms, this positive interaction results in two types of savings: in the costs of amending domestic standards to bring them into compliance with the GPA and the costs of training administrators and officers to make the system function.[86]

Thus far, no central review authority equivalent to the European Commission has existed under the GPA[87] or within the WTO framework, generally, to which various parties could refer issues of interpretation. The WTO's dispute settlement bodies can deal with questions of interpretation in inter-governmental disputes only. From this perspective, the substantive characteristics of the existing administrative branch permit only a gradual evolution consistent with the "member-driven" nature of Organization.

EU procurement rules provide a significant example of positive interaction between regional procurement regulatory framework and GPA enforcement

[86]Dischendorfer (2000), p. 27.

[87]Gordon et al. (1998), p. 183.

system. Within the EU regime, the ECJ's influence on domestic administrative practices is evidenced in that it has become the most important institution with regard to procurement in the domestic policy context.[88]

15.6 Conclusions

The parts of the European and WTO public procurement systems that we have examined operate as components of significantly different regulatory frameworks.

Both these regulations are aimed at removing restrictions on access to national procurement markets. The relevant restrictions (which include protectionistic national measures as well as procedural conditions and asymmetric information) affect not only foreign tenderers but also domestic procuring authorities. Different from the GPA, the EU regulation is focused on procurement market integration more than on the de-restriction of market access.

A primary institutional difference relates to implementation of the EU and GPA rules. In both cases, the source of law is a formally binding one. However, the former provides a uniform harmonizing mechanism ultimately based on the substantial prominence of EU law upon national disciplines. It confers on the national level legal apparatus a certain degree of flexibility mainly related to the determination of procedural details. Furthermore, through its implementation mechanism it attempts to harmonize the jurisprudentially developed EU law with domestic enacting instruments. By contrast, the GPA does not indicate any act or procedural requirement to be adopted in the implementation procedure by the Member States legislators' within the national legal systems. Nevertheless, the GPA does impose an obligation to provide some domestic procedures for challenging award decisions, and this obligation has a direct impact on the ability of individual participants in the public procurement market to seek redress of grievances in accordance with the GPA's standards.

In addition, the organizational features of the GPA and the EU have also developed differently. Compared to the GPA, European procurement law is produced and applied through a more advanced institutional framework. The DGIMS Commission is a multi-tasking body: acting as rule-maker, coordinator and supervisor of the process of applying the common rules by national authorities. It exercises the crucial leading function of reforming and improving the system as a whole.[89] Furthermore, its multi-focused activity often appears continuous with the adjudicatory function (and its proper outcome). The CGP performs normative and monitoring tasks as well, but it is still largely a negotiating forum lacking structural

[88]It is evident from the case of unclear legislation or vague terminology that the ECJ's plays the main role of finding out what a directive really seeks to achieve (Arrowsmith 1998, p. 497).

[89]European administrative law indirectly, using a modestly sized administration, while the primarily function of carrying it out falls on the national authorities.

coordination with the national judicial authorities. Despite their substantive regulatory relevance, the administrative activities carried out by the CGP are far from transparent and open to the public. The CGP does not play any relevant role with respect to the national challenge procedure and to the inter-governmental enforcement mechanism.

Finally, as far as enforcement is concerned, both the EU and GPA rules set forth a highly judicialized model. Significant authority is given to the decisions of the adjudicatory bodies of the EU and the GPA, respectively. Both the European Court of Justice and the DSB have gained the deference of other international institutions as expert and independent decision-makers. Both systems are mainly enforced through decentralized mechanisms for bringing actions before Member States' national review bodies independent of procuring entities. But both the EU and the GPA have been plagued with a high degree of inconsistency in the various national review mechanisms and have experienced serious difficulties in obtaining effective enforcement of procurement rules.

For the EU law, implementation failures have resulted primarily from the lack of efficient sanctions in the centralized procedure as well as in the field of common remedies. The 2007 Remedies Directive introduced detailed provisions aimed at correcting any improper outcome of an award procedure before and after the signing of the contract. But, while the centralized corrective mechanism is often unsatisfactory because of the lack of specific sanctions available for the Commission to impose on the offending entities before a contract is signed, effective remedial tools do exist, such as the right of injured parties to claim compensatory damages before national reviewing authorities and the obligation of such reviewing authorities to void improperly awarded contracts even after they are signed.

Under the GPA, the remedies issue is also a controversial one. At the intergovernmental level, offending states are not bound to declare void those contracts that are signed, even when they are found to be in breach of the GPA. Nor are the states bound to provide redress to affected parties or suppliers. At the national level, the existing differences among the various domestic remedial systems result in an inconsistency (as discussed above) that makes it possible to leave GPA violations unpunished and the incurred damages unpaid.[90] Yet, this fractured system persists, because the settlement procedures at global level are much more time-consuming and costly. In most cases, the economic and logistical implications of the foreseeable outcome of this remedial system are deterrents to bringing complaints against violators.

[90]It is interesting to note that with regard to the application of the GPA at the European level, the recent ECJ decision *Fabbrica italiana accumulatori Montecchio (F.I.A.M.M.) and Others v. Council and Commission* recognized that the European Community is not bound to ensure compensation for damages in cases wherein contracts found to be in breach of any WTO agreement is signed by its institutions (ECJ decision of September 9, 2008, jointly decided Cases 120/06 P e 121/06).

In broader terms, the structural nature of WTO procurement framework, as compared with the EU, is characterized by strong asymmetry among signatory countries in the institutional, regulatory and adjudicatory mechanisms. Only those countries that are able to attend every CGP meeting can participate consistently in the substantive rule-making process. Developing countries and states with small economies and insufficient resources engage so extensively are underrepresented and practically cut out from the technical rule-making. Even negotiating for accession to the GPA becomes too economically and logistically unfeasible for some countries. As far as enforcement is concerned, they eventually find it unprofitable to bring claims to the DSB when injured by other GPA parties and they are discouraged from initiating the proper proceedings.

By contrast, the EU procurement system clearly appears to be a better developed "connecting regime" in that institutional cooperation among Member States is routine.

To return to the initial question about the framework in which the GPA and the EU law are applied, the analysis carried out in the preceding pages suggests that a positive interaction has developed between the coexisting supranational and global regulations. From a GPA perspective, European law is an "internal" factor of domestic discipline for most of the signatory States (27 of the 40 GPA signatory States are EU Members States). EU law imposes analogous – and sometimes even more detailed and rigorous – rules and standards than does the GPA. Effective enforcement mechanisms and remedies are partially secured when WTO rules apply to EU Member States' award procedures. In these cases, national regulatory bodies, domestic courts, and public authorities already behave as parts of a mature and complex extra-national regime by interpreting and applying supranational and global standards. Thus, they are trained to carry out functions other than the national ones and are likely to better exercise the functions belonging to the "external" GPA system. The relevant case-law and administrative practice can promptly and positively satisfy the compliance conditions set out by the GPA.[91] The centralized action of the EU's supranational institutions helps the GPA achieve its global objectives, chief among which is the removal of unnecessary procurement restrictions at the national level.

From the EU perspective, the GPA is a crucial "external" factor. On the one hand, through the intergovernmental mechanism (DSM) it applies key common rules and ensures the predictability necessary for EU traders to rely on those rules vis-à-vis GPA Signatory States. To this end, it provides international commitments for enhancing the global procurement market and improving juridical conditions for the protection of European economic interests outside the Union. On the other hand, the GPA is a reforming factor. For example, the 2004 packet of procurement directives was introduced to meet the GPA requirements related to tendering procedures. Furthermore, important common principles and rules – like

[91]To this extent the ECJ jurisprudence on the transparency principle gives a relevant example (para. 5 of this contribution).

competitive tendering procedure, transparency, publicity, motivated decisions and review – have been emerging, circulating, and spreading at the global level, spurred on by the GPA and consistently with its aims. This positive interaction mutually reinforces both the systems.

The practical implication of the coexistence and positive interaction between the EU and the GPA is that it brings a twofold advantage: economic and legal. On the one hand, GPA membership facilitates access to profitable public purchasing activities of traditionally protectionist non-European states. On the other hand, the competitive tendering procedure generally required by the GPA combines with a few basic guarantees (such as transparency, publicity, motivated decisions and review principles) which are everywhere recognized as valid, independently of local legal traditions and cultures.

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Part VI
Cross Implementations

Chapter 16
Basel–Brussels One Way? The EU in the Legalization Process of Basel Soft Law

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16.1 Introduction

The Basel Committee on Banking Supervision (hereinafter BCBS or Basel Committee), established in 1974, is a fundamental forum for coordination and harmonization of banking supervision at international level. Among the global regulatory systems, the Committee stands out as one of the most important cases of direct coordination among national independent authorities. Indeed, its sector-specific composition excludes the participation of governmental bodies. This bears important consequences with regard to the features of the organization. On the one hand, the independence from governmental influence of its components is reflected in the independence of the Committee. On the other, the activity of the Committee does not have formal international legal binding value.

When the Basel Committee started its activities, the Community harmonization process on banking services was moving its first steps. The First Banking Directive (Dir. 77/780/EC) prompted the harmonization of authorization regimes and got off an intense legislative activity that radically changed most Member States' banking supervision systems.

Although rooted in different institutional settings, the BCBS and the Community harmonization process worked together to change the general philosophy underlying the banking supervision systems built after the '29 crisis. These systems were not able to cope with the increasing international activity of financial

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The opinions expressed by the author in this article are strictly personal and are not to be attributed to his institution.

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intermediaries, following the collapse of the Bretton Woods systems in the 1970s and the building process of the internal market. Either loopholes of the national systems allowed for easy elusions of national strict controls through international activities, or the national barriers seriously hampered the development of wider projects, like the European internal market objective.

Compared to the 1930s, this new financial legal framework did not originate from the political will of single states, neither from the general agreement of governmental actors within international organizations, but it was shaped in completely new environments. On the Basel's side, the direct cooperation between national independent regulators operated. On the Brussels's one, the activity of a supranational entity with well-specified objectives and institutions mediated the political wills of national Member States. In both cases, the decisional process was not driven by a national political constituency. In the former case, a technical consensus, mediated by the administrative structures of national states or, lately, by means of global administrative law tools,[1] operated. On the European side, this process was supported also by supranational actors driven by the legitimacy provided from the rule of law and the equilibrium among different powers.[2] Notwithstanding the lack of a political constituency, thus, adherence to some Basel principles has been widespread, also outside the sphere of its members.

Thus, while following different institutional paths, both Basel Committee activity and European banking law dealt with a common fundamental problem, that is the need to achieve a mutual and credible coordination of separate national regulatory systems.

While sharing a common objective, they mutually interacted, along two different "routes". The route from Basel to Brussels mainly recalls the common wisdom of European banking law as a mere copycat exercise of decisions agreed in the secretive Swiss club by national authorities. In this view, the European banking law is seen as the tool for legalization of the substantive coordination achieved among technical authorities. However, compared to other implementation "routes", as the one to Washington, the distinctive characteristics of the European law system have an impact on the overall equilibrium of the system. Domestic accountability instruments in the implementation phase in the United States have been investigated and they showed a major role played by federal banking authorities and their legislative instruments.[3] It will be shown that the EU system of implementation provides for a much stronger legalization of Basel provisions in hard law provisions, both at the European and at the national level. It also involves several actors in the process, i.e. the European Commission, the ECB, the national

[1]On the global administrative law, see, in general, the symposium Kingsbury et al. *The emergence of global administrative law*, in 68 *Law and contemporary problems*, 2005; Cassese (2005), p. 663.

[2]On the differences and similarities among the EU and international administrative organization, see chapter 2 in this book.

[3]On the accountability through the implementation process, with specific regard to the US, see Barr and Miller (2006), p. 28 ff.

authorities and the Committee of European supervisors (CEBS), nowadays the European Banking Authority (EBA). While it could increase the rigidity of the system, this also had the effect to increase the credibility of EU banking system complying with Basel provisions and, eventually, to the strengthening of the overall Basel system of rules.

The other "route" of interactions goes from Brussels to Basel and it involves the role of European institutions in the Basel standard setting activity. This also calls in question the role of a European interest in the Basel process, in the middle of deep changes of the structure of the BCBS and of the European banking regulatory architecture. Many studies on the BCBS focused on the main question of accountability of Committee's activity, either through internal institutional arrangements, external pressure due to market operators or the implementation process within national legislation.[4] Also on this aspect the peculiarities of European banking system provide for accountability arrangements where national interests are mediated through the growing role of European institutions.

In fact, the role of European coordination, although lying at the heart of the original Basel Committee, was not fully taken into account in its (although informal) structure. With regard to the ECB, whose function of general oversight of macro stability of the entire EU financial system is steadily growing, its role within the Basel club has been gradually recognized, even beyond the formal status as "observer". This can be understood if one looks at the roots of the BCBS, where the central banking participation could have been the element giving credibility to the informal coordination through Basel soft law. With regard to the supervisory side, on the contrary, European interests are still mediated by national authorities, although the on-going reforms of EU supervisory architecture could also have an impact on the role of European interest in Basel.

The chapter is structured in two parts. The first part (Sect. 16.2) will deal with the main features of Basel Committee, its structure, composition and activity. This analysis will look at the evolutionary path that the BCBS undertook, from its origins and its link to the central bankers' community already settled in Basel under the roof of the Bank of International Settlements (BIS) to the governmental pressures that finally led to the Basel 3 Accord in response to the financial crisis.[5] This analysis will address the apparent oddity between the legal status of Basel informal soft law and the widespread compliance and substantial legal value of its prescriptions in view of the role of the central bank comity as a major element providing enforcement mechanism of Basel provisions. The second part (Sect. 16.3) will focus on the interactions between Basel Committee's soft law and European banking law and institutions. Both "routes" will be analyzed, the interaction in implementation and the role of Europe in the ascending process. Finally some conclusions will be drawn in Sect. 16.4.

[4]See Slaughter (2001), p. 365.

[5]See *infra* para. 2.2.4.

16.2 The "Fluid" Governance of the Basel Committee

16.2.1 The Institutional Framework

The main institutional features of the Basel Committee attracted attention from several scholars, sometimes focusing on the international status of the organization[6] while other studies abandoned the international stance to underline the administrative nature of the participants mirrored in the internal arrangements of the organization.[7]

It is true that the organizational features of the Committee stand out for their informality: there is not a formal treaty establishing it and the Committee does not hold legal personality, neither from an international nor from a national point of view;[8] moreover, the Committee does not have rules on internal organization or predefined procedures and decisions are essentially taken by consensus.[9] Although the initial secrecy surrounding the first meetings and decisions of the Committee has been nowadays come through by a more open attitude towards external participation, this "formalization" still lacks a legal or statutory basis and does not involve the whole activity of the Committee. More generally, the lack of any legal "constitutional" provision makes difficult any qualification of the Committee as a standalone institution within traditional international law categories[10], while theories on international relationships proved to be more successful to analyze a phenomenon not caught by (international) legal formalization. Even if the attempt to provide a legal framework for the Committee can be inadequate with regard to a standalone analysis, one could thus be tempted to analyze the Committee within the broader evolution of the BIS "conglomerate"[11] and more generally of the central banks' comity.

16.2.1.1 The BCBS Within the Central Banks' Comity

Like the BCBS, the BIS represented at the time of its creation an intriguing creature for international lawyers.[12] Moreover, although established by means of an

[6]Zaring (1998), p. 304 ff.

[7]Bertezzolo (2009), p. 259 ff.; Borrello (1999), p. 423.

[8]This stands in contrast to other International financial regulatory organizations (IFROs), like the International Association of Insurance Supervisors (IAIS), which is a no profit organization incorporated in Illinois, cf. Zaring (1998), p. 301.

[9]Zaring (2005), p. 555 ff.; Bertezzolo (2007), p. 23. See for instance the adoption of the final version of the Basel II agreement, cf. press release in http://www.bis.org/press/p040511.htm.

[10]Zaring (2005); Battini (2003) (with regard to the main difference with the International administrative unions).

[11]See Felsenfeld and Bilali (2004), p. 951.

[12]Its ambiguous nature, as an international organization established according to the 1930 The Hague Treaty and as a Swiss corporate company, has only recently been clarified in favour of the former aspect. On the legal status of BIS, see Bederman (2003), p. 787. More generally, on

international treaty signed by sovereign states, the membership of the BIS is reserved to the central banks holding the shares of the bank, with a special status for those of the original founders.[13] The life and the evolution of the organization, thus, has been driven by entities that enjoy a peculiar position within their domestic constitutional environment, which usually guarantees special safeguards for their independence from the government.[14] The BIS Statute as well provides some special guarantees from undue influence of Governments.[15]

The legal relationships between the BIS and the BCBS are far from being clear. The Committee was not set up by the BIS, but by the central banks of the Group of Ten[16] and no overlaps among the two constituencies (the one of the BIS and of BCBS) can be drawn.[17] With the near collapse of financial systems of major first-world countries in 2008–2009, however, the exclusivity stance of the Committee was abandoned and the need to take into account a wider constituency representing new international powers as well led to a sudden change in the membership policy of BCBS, with the accession of new 14 countries between March and June 2009.[18] Second, although set up by a central banks' initiative, the Basel Committee includes

the nature of BIS, see Giovanoli (1989), p. 844 and, more recently, Baker (2002) and references therein.

[13]The Governors of the central banks of Belgium, France, Germany, Italy, the United Kingdom and the Chairman of the Board of Governors of the US Federal Reserve System, whereas Japan surrendered its rights in 1952.

[14]For a general overview of the independence guarantees of the most influential central banks of the world (widely represented in the BIS membership and executive positions) see Amtenbrink (1999).

[15]Besides the membership, limited to central banks, Art. 24 forbids the Bank from making advances to the Governments and opening current accounts in the name of Governments, whereas Art. 30 provides for a (although not absolute) incompatibility between membership of the board of governors of the BIS and of national Governments or legislative bodies. On the independence of BIS, see also Felsenfeld and Bilali (2004), p. 966.

[16]The composition of the group of ten mirrors the participants to the General Agreement to Borrow of 1962 (Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom, and the United States), plus the inclusion of Switzerland since 1964.

[17]On one side the G-10 group is both wider than the original six signatories of the 1930 Hague Convention and narrower than the BIS central banks membership, also at the time of its foundation, in 1974; on the other side one of the member of the G-10 group, the US Fed, although formally part of the original BIS founders group, did not took its seat in the BIS Board till 1994; on this latter point, see Felsenfeld and Bilali (2004), p. 961. Moreover BCBS official membership has been very exclusive until 2009 and it was reserved to the so-called developed countries: besides Luxembourg, that was included in the original 1974 group due to its monetary union with Belgium, only Spain, in 2001, has been invited to join the Committee. On the other side BIS shares and membership have been constantly expanding, although with a faster pace in recent years, nowadays amounting to 56 central banks members. Finally, BIS includes ECB as a full member since 1999, see Scheller (2006), p. 151.

[18]Nowadays the BCBS members are 27, including *Argentina*, *Australia*, Belgium, *Brazil*, Canada, *China*, France, Germany, *Hong Kong SAR*, *India*, *Indonesia*, Italy, Japan, *Korea*, Luxembourg, *Mexico*, the Netherlands, *Russia*, *Saudi Arabia*, *Singapore*, *South Africa*, Spain, Sweden, Switzerland, *Turkey*, the United Kingdom and the United States (in italics the new members).

representatives of banking authorities too, notwithstanding that these authorities are not allowed to acquire BIS full membership.

These differences would support the usual claim that BCBS and BIS are formally separate entities, as they separate seats in the Financial Stability Board would confirm. However, the BIS acts as secretariat of the Committee[19] and in a fluid organizational environment, where decisions are currently taken by consensus and formal procedures are not established, the difference between official membership, secretarial role (and the observer status itself) is likely to blur: what it counts is being there and having the substantive possibility to express its views or, more importantly, to introduce proposals or problems, besides the role of keeping contacts with non-members.[20] With regard to these aspects, the secretarial role cannot be underestimated and one commentator, although recognizing the formal distinction, stressed that the BCBS "functions and is widely accepted as (a unit of BIS)".[21]

With regard to the membership, it has to be stressed that the oversight body of the Committee, the original Group of Ten, was initially composed only by central bankers, regardless of their actual involvement in banking supervision.[22] The initiative then stemmed from a closer co-operation of some central banks, all formal members of the BIS[23] and coherently with the objectives set up in the BIS Statute.[24] In order to accomplish the broader task of supervision coordination, this group expanded, with the inclusion of the heads of national supervisory authorities. More importantly from a European perspective, the actual "Group of Central Bank Governors and Heads of Supervision" comprises the European Central Bank, whose governor actually has been chairing the group since 2003.[25] This body bears a decisive role in addressing the policy orientation of the BCBS activity,

[19]I.e. it "prepare[s] the meetings . . ., draw[s] up background papers and report[s] and publish[es] the work of the groups . . . served". This is not to be intended as a mere logistical support, as it might be with other "non BIS related" committees holding their own secretariats in the BIS premises, like IAIS. The secretariat is currently deeply involved in the life of the Committee and sub-committees; one sub-committee, the Policy Development Group, is actually chaired by Mr. Stefen Walter, an official of BIS holding the Secretary General of BCBS.

[20]On the role of the secretariats as backbones of the international civil services, although within the UN system, see Battini (2003).

[21]Felsenfeld and Bilali (2004), p. 951.

[22]The role of the Group of central banks and heads of supervision is different from the role of the G-7, which does not have any supervisory or policy oversight, see Bertezzolo (2007), p. 25. Moreover the most recent moves towards an increasing role of the G-20 and the extended membership of the Committee will likely reduce the role of the G-7.

[23]The US did not exercise their right to be in the Board till 1994.

[24]Article 3 of the Statute mandates the BIS to "promote the co-operation of central banks". It might be stressed also that although not expressly sanctioned in the Statute, the activity of the BIS as central banks hub has been increasingly meant as focused on promoting financial stability, either by direct intervention as the bank of central banks or through its involvement in "regulatory activity".

[25]Scheller (2006), p. 151.

especially with regard to the most recent moves: indeed, the new "Basel 3" framework, with its focus on liquidity and systemic dimensions, has been oriented by decisions of the Group of Central Bank Governors and Heads of Supervision (see Sect. 16.2.2.5).

This leads to the odd situation where the governing body of the Committee is actually chaired by a subject that it is not an official member of the Committee itself and participates to it only as an "observer". Conversely, and more generally, it could appear counterintuitive that the Committee itself includes national central banks, even in the cases where national legal frameworks do not provide any legal competence with regard to prudential supervision and regulation that instead represent the subject matter of the Committee works. These apparent oddities, however, can be explained if the Committee is seen with the wider angle of the "co-operation" between central banks.

As mentioned, central banks usually hold a peculiar position within the domestic regulatory space: since their origins, they usually had both legal personality and a separate patrimony from the State. During the first half of 20th century the regulatory regime on financial stability deeply changed, gradually following the collapse of the original *gold standard* regime: from a web of commercial relationships pivoting around the financial activity of the central bank to a hierarchical system of administrative controls.[26] In addition, financial stability itself evolved as a different objective from monetary stability.[27] Whereas in the *gold standard* meta-legal regime the achievement of monetary and financial stability mainly relied on the financial authority and power of the central banks as a (although special) bank, the environment following the '29 crisis provided a clear anchorage of rules on financial stability to the legal order and the institutions of the State.[28] This is not to say that the power to coordinate the financial actors stemming from the central bank position within the financial system suddenly elapsed, but it was embedded within the State legal order rather than in the gold standard regime. Sometimes this has led to the creation of sector-specific authorities formally separated from the central bank, a phenomenon recently characterizing the evolution of financial regulatory architectures, although already operating during the 1930s. Notwithstanding the different features of the two systems of intervention (preventive action by means of authoritative powers and stabilizing intervention through direct intervention in monetary markets), however, they both represent the two sides of the same coin. The consequences of failures in authoritative supervision actually spill over the monetary activity of the central bank as lender of last resort, whereas on the contrary stark fluctuations of exchange rate might endanger the stability of the banking system.

[26]Giannini (2004).

[27]See Borio and Toniolo (2006), pp. 16–24, available at http://www.bis.org/publ/work197.pdf?noframes=1.

[28]On the theory of legal institutionalism, cf. Romano (1977).

With regard to the international cooperation among central banks, being corporate entities they often established direct bilateral relationships with foreign public and private financial institutions outside the realm of international law, well before the creation of BIS.[29] Its establishment, hence, could be seen as a first attempt to institutionalize this kind of collaboration within an international public law framework whose legal basis lied on a traditional international treaty between sovereign States.[30] However it did not expressly include the coordination of the (at the time) new authoritative functions on banking regulation and supervision, still in place in few of the founding states or not managed by central banks.

As international collaboration limited to monetary field and ex post intervention showed its deficiencies in the 1970s, due to the increasing international activity of financial institutions following the collapse of Bretton Woods system, the BIS framework naturally evolved, although with few formal changes.[31] The decision to establish the Basel Committee, thus, could be seen as a necessary step some central banks undertook in order to achieve the effective collaboration mandated in the BIS statute:[32] inadequate supervision of international activities and institutions, indeed, could endanger central bank collaboration in financial crisis due to collective action problems in providing "lender of last resort" (LOLR) facilities.[33] This in turn required close cooperation with other national authorities involved in banking supervision[34] and explains the initial focus of the Committee's activity on allocation of competences (see also *infra*).[35] Moreover, it explains the participation of central banks to the Committee as *central bankers* regardless of their supervisory involvement.

Thus, although not binding as international law instruments, Basel activity could bear some effects with regard to the member central banks' behavior, at least within

[29]On the commercial legal nature of these relationships, see Shuster (1973), p. 308.

[30]Interestingly, the original 1930 scheme included the central banks, rather that States, as actual actors in the international arena Compared to the following framework yielded by the Bretton Woods agreements, the Hague convention was probably still influenced by the former environment based on the direct autonomous co-operation between central banks.

[31]According to para. 4 of the Constituent Charter of BIS, Art. 3 of the BIS statute providing for the general objectives of the institution and Art. 14 on membership could not be changed by the general meeting without a change of the original charter that should call in question a change of the original 1930 treaty.

[32]The link between central banks collaboration and supervisory standard setting is stressed by Simmons (2006), p. 10 e ss.

[33]This final link with LOLR's functions could also explain the exclusion of the ECB from formal membership within the Committee, since they have not yet been formally transferred at the European level, at least before the 2007-2009 crisis, see Schoenmaker (1997), p. 419 ff.

[34]The need to expand membership to supervisory authorities was soon felt by the G-10 group of central banks, see Kapstein (1994), p. 45 and references thereto.

[35]Kapstein (1994), p. 49 underlines the shortcomings of the initial activity of the Committee on the basis of the ambitious initial plans, which should comprise also more stringent commitments on LOLR facilities.

the BIS, being stabilizing intervention needed.[36] After all this kind of effect would closely mimic the formal conditionality characterizing the International Monetary Fund (IMF) support,[37] although within the informal setting of central banks "para-legal" order.[38] Even if it has been always clear that the Basel Committee did not aim to coordinate LOLR responsibilities, but only supervisory ones,[39] failure to adequately coordinate prudential supervision within the Basel framework could justify a shrink from collaboration in monetary fields in case an intervention is needed.[40] Moreover, besides the provision of lending facilities and the monetary sphere, further support for a "para-legal" value of Basel framework could be found with regard to the consistent behavior of supervisory authorities within their sphere of discretion: as far as national legal frameworks leave them with the discretion to weight different public interests or to identify the criteria for a technical qualification, the authorities would be bound by their international commitments. This is especially true if they have been published and raised legitimate expectations among operators and/or depositors.[41]

[36]For instance collaboration within early intervention groups of the Committee could raise expectations on the behavior of the member central banks within the BIS on support schemes for the central bank concerned.

[37]With regard to the effects of IMF conditionality as a indirect means of enforcement of Basel standards, see Ho (2002), p. 647.

[38]The word "para-legal" is not used to disregard the legal characteristic of this possible effect, rather to stress the difference with effects that are fully recognized within national legal order, as the ones stemming from formal international law. With regard to the plurality of legal orders and their relationships, see Romano (1977). This is not to say that central banks behaviour is unconstrained by national law and they can lawfully agree to international obligations binding its member states. However, the web of international relationships built under the aegis of "central bank cooperation" allows for a constraint in international activity of central banks, within their sphere of independence granted by national law. In the Eurosystem, moreover, this international "para-legal" capacity has been fully recognized by the Community legal order, see Zilioli and Selmayr (2007). For a similar view on the role of BIS in financial stability, although as a future development, see Felsenfeld and Bilali (2004).

[39]Kapstein (1994), p. 45. Indeed, the extent of LOLR functions and the difference with real bank bail-outs is not clearly defined by the economic theory and practice. While the latter would include the LOLR in pure monetary policy instruments, the former stress the difficulties in distinguishing pure illiquidity from insolvency situations. In practice the LOLR function, in particular when provided to selected banks, often implies a rescuing function that needs legal support at a legislative and political level, thus it calls in question the role of national governments and parliaments and cannot be coordinated at the BCBS level.

[40]In this respect, the case of Ambrosiano's bail-out in 1982 could provide an evidence of indirect "para-legal" effects of Basel rules: the refusal of Bank of Italy to bail-out the Luxemburg-based subsidiary was justified also on the inadequateness of supervision in that latter country and the lack of consolidated reporting obligations. The lacunae in the international supervisory framework turned out to be an obstacle for central bank coordination.

[41]Bertezzolo (2007), referring to the decision of TAR Lazio n. 6157/05 on the Ambroveneta case.

16.2.1.2 The Objectives of the Committee

The inclusion of BCBS within the BIS conglomerate and in the context of the wider framework of central banks collaboration would provide some hints on the objectives of Basel Committee activities (see also *infra*).[42] At least at the beginning, the principles on collaboration developed by the Committee had as their primary objective the development of resilient banking systems *notwithstanding* their international interconnections, in order to minimize the need for emergency intervention by the central bank community. The "monodimensional" focus on financial stability of its constituency was mirrored in the perspective of the Committee, although in an international dimension.

In order to achieve this objective in an international dimension, the Committee engaged in a standard setting activity, with the provision of focal points that made possible the dialogue between different supervisory systems and philosophies (leveling the playing field). However, although not directly engaged in the liberalization of provision of services and capital movements, the activity of the Committee ended out to provide procedural and substantive rules that could (partially) substitute the tight controls on the structure of the market that characterized the supervisory regimes set up in the 1930s. In addition and with specific regard to capital risk weighting, the harmonization process brought about also important modifications on the ability of national authority to implement qualitative controls on lending activities and to channel banks liabilities according to political economy objectives.[43] The original objective of financial stability turned out to reinforce the process of internationalization and liberalization of financial markets.[44]

Although the homogeneity of members of the Committee would have supported a narrow-defined objective underpinning their activity, it is true that the role of common values in this international dimension starkly differs from the role of statutory objectives in domestic legal frameworks. In the latter case, it is an accountability instrument for independent agencies, by means of the enforcement of the rule of law and the judicial review of its activity *vis-à-vis* the original legislative mandate. In the latter case, it bears a much more limited effect, especially when it is not formally expressed but can be only derived from its

[42]The debate on the objectives of Basel activity is mirrored in the debate between the stability or the competitive drives as major national preferences underpinning countries participation in the drafting and implementation of the capital adequacy frameworks and core principles, see Oatley and Nabors (1998), p. 35, for the stability view, and Kapstein (1994), p. 103 ff., for the competitive one.

[43]This effect received much criticism from some third countries that pointed out the discriminatory treatment of OECD and non-OECD countries sovereign debt with regard to risk weighting, see *People's Bank of China, Letter to the chairman of the BCBS*, 30 May 2001, cited by Ho (2002), p. 665.

[44]Which in turn could have limited the due consideration of systemic issues within the Basel 2 negotiation, since different treatment of systemically important institution could run against the objective of fair competition, see Ohler (2009), p. 27.

constituency.[45] On the other side, the focus of sector-specific global regulator might alter the domestic equilibrium among different public interests governing the national authorities: due to the influence of international commitments the domestic balance between different principles (such as stability and competition) could be biased in favor of the objectives set by the regulators' comity interaction.

16.2.2 The Activity of the Committee

Due to the informal nature of the Committee, the institutional analysis cannot be carried out without reference to the activity the BCBS has been undertaking, i.e. the outcome of the "fluid" interaction between the different actors involved in international prudential regulation. This outcome changed overtime, indeed, with reference to both the subject matter of the regulatory activity and the procedural arrangements surrounding it.

16.2.2.1 Procedural Coordination

The primary drive for international cooperation in banking supervision was the need for early warning and effective information sharing between the supervisory authorities and between central banks, which could strive to cope with domestic banking crisis spurred by international activities. This task required collaboration at the operative level, somehow leaving aside wider policy target and the need for an international legal legitimacy. The Committee was thus initially involved in what might be called "low key cooperation", i.e. "enabl(ing) its members to learn from each other and to apply the knowledge so acquired to improving their own systems of supervision, so *indirectly* enhancing the likelihood of overall stability in the international banking system"[46] (italics added).

The 1975 Concordat was not focused on the definition of substantial rules of supervision, rather on the implementation of the very general principle such that "no foreign banking establishment escapes supervision"y, integrated in 1983 by the further specification that the "supervision should be adequate". This required some common understating on allocation of responsibilities and procedural arrangements

[45]With this qualification, the assumption that "there is no indication that these international organizations (...) have defined the values that collaboration through IFROs is designed to vindicate" (Zaring 2005, p. 580) can be better understood. In the case of BCBS, as stressed by Kapstein (2006), pp. 3-5 ff., the preferences of national (or regional) actors, indeed, could play a major role in the strategic interaction between members. This could be increasingly true since the 2009 extension of BCBS membership also changed the homogenous constituency of the Committee.

[46]G. Blunden, cited by Kapstein (1994), p. 45.

between national authorities. It is commonly said that this was found in the "home country control" principle, which however, bears significant differences with the homologue principle established in European Union law (see *infra*).[47] The host authority keeps all its powers with regard to the branch or subsidiary operating within its jurisdiction, although it is not able to assess its conditions within the broader picture of the whole group. Actually the 1992 Minimum Standards require the mandatory consent of both the home and the host countries for cross-border expansion of banks.[48]

Probably, this initial regulatory activity was still strongly influenced by the usual features of central bank cooperation, mainly based on information sharing, coordination of national competences and informal mutual understandings. The Concordats encompassed a common understanding on very broad principles that did not hold the degree of precision needed for legally enforceable rules. In any case, the approaches of national supervisory regimes were not at the stake, but for the need of completeness in the assessment of banks' solvency.[49] Accordingly, except for the introduction of consolidated supervision, it mostly dealt with internal arrangements between supervisory authorities that were thought as unable to raise legitimate expectations among operators.[50] This might also explain the extreme confidentiality characterizing the initial activity of the Committee and the limited need for formal implementation through legislation into member states.

16.2.2.2 Capital Adequacy Standards

A sea-change in the Committee activity took place in the second half of 1980s with the harmonization of capital adequacy rules. This is probably the most known part of BCBS activity that received broad implementation among members as well as third countries and that raised the major concerns as far accountability is concerned (see *infra)*.

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[47]According to the Concordats, the host country does not have its supervisory prerogatives fenced off; on the contrary they just require that the home country assesses the safety and soundness of the institution, especially with regard to solvency aspects, taking into account its overall international situation and the ability of the host authority to carry on adequate supervision, see BCBS, *Concordat on Principles for the supervision of banks' foreign establishments*, 1983 (also 1983 Concordat), p. 4. This implied the adoption of consolidated supervision of the home country and the 1990 supplement to the Concordat on *Information flows between banking supervisory authorities*. The system envisaged by the Concordat, thus, provided for a "dual key supervision" (home and host countries, see Duncan (2005), p. 248) rather than a pure home country control principle.

[48]See principles n. 2 of the BCBS, *Minimum Standards for the Supervision of international Banking Groups and their Cross-border establishments*, 1992.

[49]In some countries, such as Germany, the introduction of consolidated supervision on non-banking and foreign subsidiaries did not have a legal basis in the German law, thus it has been introduced on a voluntary basis.

[50]Kapstein (1994), p. 50.

The harmonization of capital adequacy rules actually encompassed a rather different approach, compared to the low-profile collaboration typical of central banks comity. First of all, the initiative for the extension of BCBS activity to substantive supervisory issues was mainly prompted by the pressure of some member states willing to redress the tendency towards declining capitalization of banking intermediaries, exacerbating the risk of a race to the bottom of supervisory standards.[51] Whereas in the 1970s the Committee sought to reduce the risks for national banking systems stemming from the growing internationalization, the focus on capital adequacy provides a common supervisory framework for a safe and sound activity of the international banking system; in other words, whereas at the beginning the objective was the maintenance of domestic financial stability within a more internationalized environment, the focus on capital adequacy is aimed at addressing the broader issue of international financial stability and the concerns raised by the competition of several legal orders. Thus financial stability cannot be seen in disjunction from the need for a leveled playing field.[52] Within this new setting, the strategic behaviour of single players or group of players is extremely important for the definition of the international standards,[53] as the approaches of national supervisory systems are at the stake.[54]

This change in the underlying objectives is mirrored in the outcome of the BCBS activity. Whereas the Concordats merely sanctioned broadly accepted principles that should guide the coordination among authorities, the 1988 Accord, the following activity dealing with capital adequacy principles and, above all, the 2004 Accord (Basel 2) brought the scope of BCBS activity well beyond the mere coordination of national competences under general principles. First of all the Accords deal with issues on the substantive features of supervisory systems,

[51]After the debt-crisis of the 1980s, the US authorities were highly concerned for the sound capitalization of its banks, but a move towards higher capital ratios could pose serious hurdles for the competitiveness of US banking industry, especially compared to the Japanese banking system.

[52]The two major considerations that led to the Basel I Accord actually were that "the framework should serve to strengthen the soundness and stability of the international banking system" and that "the framework should be fair and consistent in its application to international banks in different countries so as to diminish one important source of competitive inequality", see *Outcome of the consultative process on proposals for international convergence of capital measurement and capital standards*, 11th of July 1988, para. 3.

[53]With regard to the 1988 Agreement, two different views of this interaction have been proposed. According to Kapstein (1994), the 1987 agreement between the US and UK on capital adequacy catalyzed the consensus for a broader deal at BCBS level that strengthened the position of US *vis-à-vis* Japanese banks and the one of UK within the EC negotiation for the capital adequacy directive. According to Porter (2001), p. 1, on the contrary, the focus on capital adequacy as a major supervisory tool for banking stability within an international framework was already defined by the EU long-lasting negotiations.

[54]See Barr and Miller (2006), p. 23, on the important policy choices undertook by the Basel Committee and the misleading belief of pure technical neutral provisions.

facilitating the shift from structural towards prudential supervision[55] and limiting the powers of national supervisory authorities on qualitative controls on credit allocation. This in turn has led to a detailed set of rules (on capital definition, risk weighting, etc.) that greatly differ from the general principles that characterized low-key collaboration.

The relationship with implementing measures changes altogether. On one side, harmonization often requires hard implementation, in order to make credible the leveling playing field function. This is probably especially true with regard to the Basel 2 framework, since it involves an overall supervisory system for capital adequacy.[56] On the other side, the activity on capital standards influences both the legislative activity setting the general principles of supervisory regimes and the technical enforcement by regulatory authorities.

With regard to legislative implementation, it is commonly said that Basel's provisions do not have any binding legal effect, as national legislators of member countries are free to implement or adapt Basel measures to their legal framework.[57] On the latter side (technical enforcement by authorities), these rules can bear an indirect legal effect. Actually supervisory authorities rarely operate within a detailed set of legislative "rules"; rather their activity is often defined by broad statutory "principles".[58] The application of capital adequacy rules, then, can follow the curse of direct implementation by national decision-makers where these broad legislative standards (such as adequate organization, sound and prudent management) are to be applied. As far as technical provisions do not require a legislative implementation, it can be assumed that the consensus within the Committee can support legitimate expectations of market operators over an application of broad legislative clauses consistently with the detailed international commitments of the authority. Actually detailed rules are more likely subject to direct application by judges as approximation measures of broader concepts stated in the law.[59]

[55]On the differences between structural and prudential supervision, see Camilli and Clarich (2009), pp. 29-30.

[56]Besides the Pillar I, which revises the old 1988 accord with the aim of more realistic risk weightings for credit risks, the Basel II accord is based on other two pillars which provide a wider prudential framework for credit institutions and supervisory authority for the overall assessment of capital requirements and market evaluation of bank capitalization, see Camilli and Clarich (2009), p. 39 ff.

[57]An indirect binding legal effect on legislative implementation, however, specifically with regard to third member countries, is due to the inclusion of Basel Standards as measures for conditional support by IMF, see Ho (2002).

[58]On the distinction between rules and principles (or standards) in a constitutional setting see Sullivan (1992), p. 57 ff. and references hereinto, Zagrebelsky (2003); on the role of imprecise rules in administrative activity, see Diver (1983), p. 65.

[59]See the case Tar Lazio 6157/05, cf. Bertezzolo (2007).

16.2.2.3 Core Principles

A third field of activity of the Committee, although with a broad participation of third member countries,[60] led to the definition of *Core Principles for Effective Banking Supervision*, whose first version was issued in 1997, replaced by the new 2006 framework, with their respective methodologies. In 2009 this harmonization of basic principles of supervisory systems extended to deposit insurance systems, with the adoption of the *Core Principles for effective deposit insurance systems*. Finally, in October 2010 the Committee adopted the *Good practice principles on supervisory colleges*, in order to improve the framework dealing with the supervision of international financial institutions.[61]

As with capital adequacy standards, also the Core Principles go beyond the scope of low-profile coordination and involve the definition of substantive principles.[62] However, some major differences with the technical harmonization of capital adequacy standards can be underlined.

First of all, the scope of the Core Principles goes far beyond the mere technical coordination that still characterizes the capital adequacy frameworks;[63] rather it involves really "core" elements of supervisory systems that are usually regulated by primary (if not constitutional[64]) law provisions.

Second, the principles do not form a monolithic set of provisions inextricably linked with each other and pivoting around a single *rationale*. Although categorized around 7 groups,[65] each principle can be implemented singularly and there are several degrees of compliance, according to the number of essential requirements met.[66] More than a comprehensive body of rules, the Core Principles set a scale for best practices and benchmarking for the evaluation of supervisory systems.

[60]See Duncan (2005).

[61]These latest developments need to be mentioned, since besides being one of the first attempts to harmonize ex post safety net intervention, after the failure to coordinate LOLR functions in the 1970s, they also followed similar European experiences. On the failure to coordinate LOLR see Kapstein (1994). The principles have been issued in cooperation with the International Association of Deposit Insurers.

[62]Duncan (2005), p. 261.

[63]Which are taken into account only in principles 6 and 7 out of the 25 Core Principles of the 2006 version.

[64]See, for example, the legal protection for supervisory authorities and its constitutional consequences, e.g. in Germany, or the limits to the allocation of regulatory powers to agencies independent from the executive in France.

[65]Objectives, independence, powers, transparency and cooperation (principle 1); Licensing and structure (principles 2–5); Prudential regulation and requirements (principles 6–18); Methods of ongoing banking supervision (principles 19–21); Accounting and disclosure (principle 22); Corrective and remedial powers of supervisors (principle 23); Consolidated and cross-border banking supervision (principles 24 and 25), see *2006 Core Principles*, para. 6.

[66]See *2006 Core principles methodology*, paras. 7-11.

Sometimes strict compliance could prove to be impossible for developed countries as well, as they can clash with domestic legal principles indeed.

Furthermore, some principles do not achieve a detail such that defined rules can be drawn from them, thus leaving the state free to implement them in different manners.[67] Consequently, they involve basic legislative options that require "hard" implementation by primary law. This leaves much less room for direct technical implementation by the regulators or by the judges.

Although the degree of precision of the Principles is lower than the technical capital adequacy rules, their enforcement is nonetheless supported by the extensive involvement of the International Monetary Fund and of the World Bank in the review of national supervisory systems within the Financial Sector Assessment Programs (FSAP). The degree of application of the Core Principle is a key element for the evaluation of national financial systems and this benchmarking is taken into account by both the IMF itself in its emergency interventions and by major credit rating agencies in the evaluation of the sovereign debt.[68]

16.2.2.4 The Road Towards Basel 3

The financial crisis casts many doubts on the adequacy of prudential supervision in improving the resilience of the banking system. While the road to Basel 2 was prompted by the need to optimize the system of capital adequacy standards with regard to the real market forces steering the financial activities, the (relatively) fast definition of the new prudential framework named Basel 3 has been spurred by a much deeper reassessment of some regulatory choices underpinning the actual capital adequacy system.

First of all, some general external policy inputs from G20 steered the activity of the Committee along the pattern leading to the final Basel 3 accord at the end of 2010.[69] These general and somehow undefined inputs have been followed by

[67]The methodology provides a more detailed specification of the principles, by spelling out some essential and additional requirements to be met in order to comply. However, also these requirements often set objectives that the legal framework or the supervisors have to comply with, rather than specified rules (e.g. essential requirements related to CP 1, the definition of banking activities, the definition of connected and related counterparties, etc.) and do not set the specific policies and processes the supervisor should apply. The detail of principles, however, can radically change where specific Basel documents or accords are mentioned, thus compliance can be achieved by reference to the guidance contained thereto, as with regard to capital adequacy requirements. Also in these cases, however, the methodology clarifies that the implementation of Basel I or Basel II regimes is not mandatory in order to comply with the Core Principles, see *2006 Core principles methodology*, para. 21.

[68]Duncan (2005), p. 288.

[69]First of all, during the G20 summit held in Pittsburgh the governmental actors as well as the central bankers called upon "strengthening the international financial regulatory system", in particular by "building high quality capital and mitigating pro-cyclicity" and "addressing cross-border resolutions and systemically important financial institutions", see the second point of the

concrete actions within the central banks' comity, both in the Financial Stability Board and in the Group of Central Bank Governors and Heads of Supervision, the latter in particular increasingly becoming the center of gravity of BCBS's activities. On 6 September 2009, the Group reached a first agreement on the pillars of the future Basel 3 accord,[70] which has been integrated at the beginning of January 2010. On the basis of this "mandate," the Committee drew the draft of the accord that has been again subject to approval by the Group in the sessions of 26 July and 12 September 2010.

Following the expansion of the Committee's membership and the increased relevance of some external policy objectives, new internal governance emerged, with a clear distinction of roles between the Group and the Committee. From a functional point of view, they now fulfill completely different tasks: the Group provides the main policy lines and approves the Committee's proposals, whereas the latter, through its sub-Committees, carries on the technical activity leading to the draft proposals.

These new governance arrangements have been mirrored in the contents of the new Basel 3 framework. In fact, the new Accord involves both micro-prudential and macro-prudential issues and it broadens the scope for regulation and supervision.[71] Beyond that, moreover, further reforms are envisaged concerning coordination of cross-border resolution mechanisms and a revision of the Core principles for effective supervision in view of the introduction of the new framework.

16.2.2.5 Accountability of Legalization Process of Basel Soft Law

It is a common thought that Basel standards do not have and are not intended to have any binding effect on members and, above all, non-member countries. Due to

final statement of Pittsburgh summit available at http://www.pittsburghsummit.gov/mediacenter/129639.htm. All the policy statements of the summit were addressed to both G20's financial ministers and central banks, but the latter took the lead with regard to the regulatory reform.

[70]I.e. raising the quality consistency and transparency of Tier 1 capital base; introducing a leverage ratioas a supplementary measure to Basel 2risk-based framework; introducing a minimum global standard for funding liquidity; introducing a framework for countercyclical capital buffers above the minimum requirement; issuing a recommendation for reduction of systemic risks related with the resolution of cross-border banks, see http://www.bis.org/press/p090907.htm.

[71]With regard to the former, the Committee proposes to strengthen the quality of Tier 1 capital, to improve supervision over risk management techniques, to include new liquidity standards and to increase market transparency over vehicles and remuneration schemes, See for instance the final text of the "Global regulatory framework for more resilient banks and banking systems" (available at http://www.bis.org/publ/bcbs189.htm) and of the "International framework for liquidity risk measurement, standards and monitoring" (available at http://www.bis.org/publ/bcbs188.htm); with regard to the macro-prudential issues, both pro-cyclicality and supervision of systemically important institutions are envisaged, see the "Guidance for national authorities operating the countercyclical capital buffer" (available at http://www.bis.org/publ/bcbs187.htm); all the text have been issued last 16th of December 2010.

lack of formal legal personality of the Committee and of a legal basis for international rule making power, this statement is supported by strong formal arguments indeed.

Notwithstanding that, some Basel provisions have been widely implemented across the world, showing a high degree of *voluntary* compliance by national legislators. Moreover, sometimes technical provisions have been directly implemented by supervisory authorities, like in the United States. In these cases the commitments undertook at the global level could bear some legal effects on the implementation phase, although the internal accountability mechanisms can lead to adjust some elements (such as the entering into force and the scope of application) in order to fit them with the domestic environment.[72] Although not formally binding as hard law, the standards issued by the Committee have been usually categorized as soft *law*, thus bearing some legal effects, even if not based on its formal characteristics.

As stressed by a commentator, the "soft law" of Basel proceeds along the "legalization continuum" towards hard law.[73] Among the three constituent elements of legal norms highlighted by most recent doctrine (i.e. the degree of obligation, of precision and of delegation in enforcement),[74] the different standards set by the BCBS fulfill within a certain extent some of these requirements. First of all, it is widely recognized that some Basel rules (as for capital adequacy) have a high level of precision that *per se* can have a relevant effect on the legal understanding of these provisions.[75] With regard to the obligatory character two different addressees of the standards can be distinguished, i.e. national or regional legislators and supervisory authorities. With regard to the former, no *opinio iuris* can be found, as the State actors did not agreed to confer any formal rule-making power to the Committee. However, some obligatory character could be found with regard to the latter group of addressees, since they have been involved in the definition of standards: as far as the domestic legal frameworks of supervisory authorities do not expressly rule out the possibility to implement these standards, the obligatory character would stem from the market expectations that they will fulfill their commitments (*pacta sunt servanda*). With regard to delegated tool of enforcement, some Basel provisions (i.e. the Core Principle on effective supervision) are indirectly enforced though the IMF evaluations and sanctioned within the conditionality system.[76] Further investigation and empirical support, instead, would be

[72]Barr and Miller (2006).

[73]Kern (2000), p. 7.

[74]The most recent studies on legal norms abandoned the exclusive "state-centric" stance, by recognizing the *legal* characteristics in many norms of behavior produced outside the realm of the traditional public international law, see Abbot and Snidal (2000), p. 421 ff.

[75]See. Kern (2000), p. 10; Giovanoli (1999), p. 3 ff. The precision of rules is particularly relevant for technical rules on capital adequacy.

[76]Indeed, this delegated form of enforcement would markedly diverge from classical legal enforcement, since it is biased against weaker countries seeking IMF support. For instance, the

required with regard to the existence of an implicit enforcement mechanism within the BIS support systems and central banks cooperation.

As a consequence of these several patterns that soft norms can follow along the legalization path, concerns on accountability of BCBS standard setting activity have been raised. These concerns involve both the role of independent national authorities within the Committee and the influence of the Committee activity on member and non-member states. With regard to the former aspect, it has been stressed that the domestic accountability instruments[77] can have limited effect with regard to their international activity.[78] This is a point that deserves further investigation, since it depends on the domestic legal frameworks and accountability instruments within the negotiating and the implementation phases, showing some differences among the two sides of the Atlantic.[79]

Conversely, the influence of BCBS activity could strengthen the position of national authorities *vis-à-vis* the domestic constraints of national legal regimes. Furthermore, the regulators' consensus in the global arena can exert a substantial influence on the implementation by national legislators, despite the formal absence of legal binding effects. These latter aspects are even more problematic with regard to implementation within non-member countries: besides their formal exclusion from the Committee, accountability problems for third countries implementation derive above all from the indirect but binding legal effect of Basel measures through IMF conditionality.

These accountability concerns have found a twofold answer at the international level. First of all the Committee sought to gain legitimacy through process,[80] by increasing the participation of stakeholders in the drafting phase and adopting impact analysis techniques for its proposals.[81] This quest for procedural legitimacy is particularly clear with regard to the Basel 2 Accord, whose consultation period lasted almost 4 years. Second and probably more importantly, the Committee moved in 2009 to widen its membership.[82] These relevant progresses of

US has not been subject to any Financial Assessment Program by the IMF and their compliance with Core Principles is only based on self-assessment that reported full compliance (see Duncan (2005), p. 281 ff.). Notwithstanding that, the 2008-2009 crisis showed that also the US supervisory system has major flaws.

[77]Especially the legal accountability instruments, such as rule of law, judicial review, notice and comment.

[78]The risk of "agencies on the loose" has been stressed by Slaughter (2004), p. 48 ff.

[79]On the adequacy of domestic accountability instruments in the US implementation of Basel 2 Accord see Barr and Miller (2006), p. 35.

[80]Zaring (2005), p. 578.

[81]See Bertezzolo (2007).

[82]The phenomenon was already highlighted by Zaring (2005), p. 580 ff., as "proselytization".

accountability instruments at the global level attracted the attention of global administrative law scholars.[83] Both evolutions, however, need to be qualified.

With regard to hard proceduralization, it cannot be understated the difference with the domestic prescriptions on independent authorities rule making powers: due to absence of a formal framework, the growing participation of market operators and other stakeholders in the proceedings is not supported by judicial review.[84] On one side, this makes the procedural safeguards unenforceable and might be adapted to the different circumstances, as the much faster consultation process for the new Basel 3 framework showed. On the other, however, this can strengthen the impact of market interests on the Committee's activity, since there is not a statutory mission that sets the boundaries of BCBS (soft)rule-making power. These arrangements, thus, cannot perfectly substitute internal procedural safeguards as accountability instruments.

Moving to extended membership, it is probably too early to assess its impact on the Committee activities.[85] What is probably clearer after the crisis is that in this new setting the links with other international *fora*, where major policy choices are agreed among the governmental and monetary international constituencies, seem becoming more stringent on the activity of the Committee, as with regard to the G20. And in particular, the transmission chain between the high level policy choices and the technical implementation is represented by the central banks' comity, which operates at both levels.

Actually, the relationship between global administrative law instruments and the "legalization" of Basel rules is mutually reinforcing, but it is anyway based on a fragile equilibrium where national or regional constituencies still carries on a relevant impact.

Among these constituencies, the role of the EU needs to be stressed. As mentioned above, both Basel activity and the EU banking law led the change of national banking regulatory systems born during the 1930s. It might thus be interesting analyzing how these two institutions interacted. The following part of the chapter, thus, will focus its attention on the role of the EU within the drafting and implementation phase of Basel activity and its "legalization" path.

[83]The definition of global administrative law as "the structures, procedures and normative standards for regulatory decision-making [...] to informal intergovernmental regulatory networks" can be found in Kingsbury et al (2005a), p. 5. Within this framework, the analysis of the Committee by Barr and Miller (2006), is carried out.

[84]See Zaring (2005), p. 579.

[85]Full membership of a selected number of developing countries, however, could brought about further effects, besides the "proselytization" envisaged by Zaring (2005), p. 580 ff. Rather than a transfer of good practices from developed regulatory systems towards developing ones, the full membership granted (only) to some (strong) emerging economies could effectively change the spirit of the Committee, with a shift from the homogeneous regulatory background characterizing the G-10 environment to a more dialectical debate among different regulatory approaches.

16.3 The Hard Law Approach of EU Banking Law

Compared to the informal approach of the Basel Committee, the Community intervention in banking supervision has been characterized by solid, "hard law", foundations. It is true that since June 1972 an informal *Group de contact* was established among the banking supervision authorities of the EC Member States, in order to not only exchange information but also to provide technical support to the future legislative intervention in the banking sector carried out by the Community. But the legislative process that first started with the Directive 73/183/EC and finally led to the recent establishment of a European Banking Authority has been carried out under the vessels of the EC Treaty freedoms of establishment and of provision of services and their legal basis.

Thus, while spontaneous coordination within the Basel framework was fuelled by the need to effectively fulfill national competences and responsibilities within a more internationalized business environment, Community intervention explicitly followed a supranational objective, the creation of an internal market for banking services, integrated within national supervisory systems.[86] As a consequence, whereas the Basel Committee's aims mirrored the objectives of its account holders (i.e. banking and more generally financial stability, even if increasingly referred to the whole international system), the Community law followed a political objective overriding national competences but that at the beginning did not involve financial stability.[87]

The hard law approach and the different objectives underpinning their activities did not hinder the on-going interaction between the two regulatory systems, rather they mutually reinforced each other. At the same time, however, the EU supervisory architecture is rapidly changing after the crisis. As with the governance of the Committee after the crisis, the new European framework could yield new equilibria at the internal (EU) and global level that are investigated in the last sections.

16.3.1 A Two-Way Route Between Brussels and Basel

Even if EU institutions had not been formally represented within the Committee, the Basel activity went on in parallel with Brussels initiatives.[88] This parallelism does not involve only the legislative implementation of Basel standards within the EU (the Basel–Brussels route), but also the other way around, as developments in

[86]On the legal roots underpinning the Community's intervention on banking supervision, see Dragomir (2010), p. 66 ff.

[87]This basic difference between Community and Basel coordination of banking supervision is also stressed by Borrello (1999), p. 432.

[88]On the interaction between Basel and EU banking law, see also Dragomir (2010), p. 100 ff., in particular 102.

the EC (now EU) harmonization favoured cross-border banking and strengthened direct supervisory coordination.[89]

16.3.1.1 The Parallelism of Basel and Brussels Principles

The parallelism between Basel and Brussels initiatives in banking supervision first of all involves the basic principle for allocation of responsibilities, i.e. the home country control. As already said, a "light" version of the home country control underpinned the 1975 Concordat, but at the same time the principle inspired the Community harmonization path since Dir. 77/780/EC.[90] Furthermore, the revised version of the Concordat in 1983 proposing consolidated supervision proceeded in parallel with the introduction of consolidated supervision under Dir. 83/350/EC.

These Community's acts did not represent mere internal implementations of the general Basel's principles: the home country control has been a cornerstone of overall Community's harmonization framework for goods and it has been further developed by the *Cassis the Dijon* jurisprudential doctrine on mutual recognition and its enhanced legislative version for banking services as defined in Dir. 646/89/EC.[91] As a consequence, the final outcome of Community legislation greatly differs from the Basel version of home country control defined in the 1992 minimum standards.[92]

The deeper integration of European supervisory systems brought off by the home country control, together with the mutual recognition principle, also required some common understanding on prudential measures that could substitute the structural controls characterizing national supervisory systems. This basic need is first expressed in the First banking directive, in the view of the future implementation of the home country control. As an experimental and supplementary tool for supervision, Art. 6 of Dir. 77/780/EC expressly provided that the competent authorities "establish ratios between the various assets and/or liabilities of credit institutions with a view to monitoring their solvency and liquidity and the other measures that may serve to ensure that savings are protected"; furthermore, it established that the contents of the coefficient and the method of calculation shall be decided by the Advisory Committee set up according to Art. 11 of the Directive itself.

[89]Such that Clarotti (1985), p. 1115, stated that the Community framework indirectly lied at the foundation of the Basel Committee too.

[90]The First banking directive did not fully implement it, due to political resistances to harmonization at the time. However, Recital 3 of the directive clearly stated that the home country control should be the final outcome of Community regulatory design.

[91]Zavvos (1990), p. 473.

[92]While in the former the home supervision fully substitutes the host control of branches, but for specified exceptions, the Basel 1992 minimum standards require mandatory authorization of foreign branches in the host state, as a tool for the latter to check adequate supervision in the home country.

It is then clear since the 1970s that the EC banking integration project requires some tool for granting financial stability (of both solvency and liquidity sides) within an international dimension, well before that the 1980s debt crisis pushed the US towards some capital adequacy standardization.[93] It is also noteworthy that the directive allocated this harmonization task directly to the Advisory Committee, without calling in question the Commission regulatory competences. Also in the EC framework the definition of capital adequacy standards was deemed to be dealt out of the political arena and by means of direct coordination of competent authorities.

It is also probably true that compared to the original purpose of EC, the consensus needed for effective capital adequacy standardization required a broader policy endorsement in the western world, i.e. the US participation. After the 1987 US-UK agreement, the BCBS managed to reach the first accord on capital adequacy, but as recognized by the Committee itself, most of the preparatory work on capital ratios was carried out in close relationship with the EC Banking Advisory Committee.[94] Therefore, the Basel's activity on capital adequacy, one of the Committee's most successful achievement, was backed by some basic policy choices defined at the EC level since 1977.

A similar parallelism characterized the further evolution of Basel I accord. As with regard the further integrations of the Accord in order to take into account market risk, the EC's initiative has been a fundamental propelling factor for BCBS proposal. The Dir. 93/6/EC actually preceded Basel proposals on market risk capital requirements and some commentators saw it as a move to "pre-empt" autonomous Basel choices and to gain some bargaining power in international negotiations.[95]

With regard to Basel 2 negotiations, they started in Basel in 1999 together with the revision of Solvency and Own Funds Community's directives and its consultation document.[96] Actually, the Commission submitted a consultative document that was supposed to supplement national consultations on Basel negotiations (wherever they have been carried out), but it nonetheless put forward some policy options on Committee's proposals and it anticipated most of national consultations. Thus, notwithstanding the Commission is not formally involved in the Committee, it has tried to directly settle a European common position within the industry with a view to closely follow the Basel works. For example, with regard to the adoption of an internal rating approach, the Commission strongly supported this option compared to a revision of standardized risk weighting factors.[97] Hence, since 1999 the

[93]On the leading role of European framework on risk-based capital adequacy standards before the US-UK 1987 agreement, see Porter (1993), pp. 69-70.

[94]On the close relationships between the two Committees, due to the similar (at the time) constituency, see Norton (1989), p. 254 in particular, citing the BCBS reports on its activity.

[95]Matthews (1995), p. 188 with regard to preemption by the EU. In fact the CAD has been afterwards amended in 1998 in order to take into account also Value-At-Risk models.

[96]See first consultation paper, 22nd of November 1999.

[97]See first consultation paper, 22nd of November 1999, Chapter 2 para. 4.

consultation rounds of the Commission followed the pace of Basel progresses till 2005, when a proposal for a revised capital adequacy framework was adopted by the European executive. In any case the European policy choices in the consultative period were driven by the European Commission. Actually some final European Commission's policy options, as with regard to the scope of application (both banks and investment firms, both national and internationally active intermediaries) have not been fully endorsed at Basel's level. It is hard to say whether these options lacked sufficient support at Member States level negotiating in Basel[98] and whether a direct participation of European institutions would have had a different impact on the Basel outcome, but the broader scope of EU implementation of Basel accord was consistent with the need to set a leveled playing field with different national attitudes towards investment firms.

As far as the Core principles on supervision are concerned, the influence of EU law principles is probably less evident. More than a set of rules proactively defined in order to face some regulatory loopholes, they have been defined as benchmarking standards, indeed. Actually, some of the principles directly involve national financial supervision architectures, as with regard to their independence and objectives or their liability rules, not being expressly dealt by European legislation.[99] With regard to other operative principles, they are often modeled on the general regulatory framework adopted in most developed financial systems and generally influenced by Community legislation, as with regard to the clear definition of permissible activities and of licensing criteria, or the focus on know-your-customer rule. With regard to home-host country relationships, indeed, the Community framework would probably represent the state of the art, due to the institutionalized framework for on-going supervision within the Colleges of supervisors and the proactive role for the adoption of Memorandum of Understanding dealing with cross border crisis.[100]

[98]With regard to the UK concerns on the broad scope of application of Basel II rules to investment firms, see HM Treasury 2003, p. 25 ff.

[99]However, the ECJ ruled on liability of national supervisors based on inadequate application of Community legislation in cause C-222/02, *Paul et al*., stating that Community rules on prudential supervision are not intended to confer individual rights to third parties, thus providing some legal protection to supervisors following the German *Schutznormtheorie* and consistently with the *Core principles*. For a critical view of the decision and of the "self-interested" view of Basel principles on the issue, implicitly endorsed by the Luxemburg judges, see Tison (2005), p. 641. However it is fair to say that Community legislation does not envisage the implementation of this Core Principle.

[100]The reference to the EU experience of Colleges of supervisors is now expressly mentioned in the *Good practice principles on supervisory colleges*, adopted by the Committee in October 2010, available at http://www.bis.org/publ/bcbs177.htm; see in particular Annex I.

16.3.1.2 The Role of EU Law in the Implementation Phase

As already seen, within the EU context the major policy choices of regulation are extensively influenced by the European Commission, rather than by the single national legislators, and this is mirrored on the mutual interaction of Basel's proposals and Brussels' principles showed above. National authorities operating within the Basel Committee, indeed, have been granted independence from national governmental directions but they are increasingly intertwined at the European level[101] and influenced by European major policy directions. Within a certain extent, the interaction at Basel's level reinforced authorities' national independence while at the same time strengthening EU interdependence.

This is even truer with regard to the implementation in EU Member States, where at least an additional layer of regulation is required, since both European and national legislation need to be adapted. Actually, the presence of the European layer brought off some interesting differences of implementation between the two shores of the Atlantic, i.e. the United States and the EU.

In the US national legislation explicitly confers negotiating and implementation powers to the supervisory agencies attending the Basel Committee. According to the International lending supervision Act of 1983, SEC. 901 (b) "(t)he Federal banking agencies shall consult with the banking supervisory authorities of other countries to reach understandings aimed at achieving the adoption of effective and consistent supervisory policies and practices with respect to international lending",[102] whereas with regard to the implementation phase SEC 910 (a)(1) states that "(t)he appropriate Federal banking agencies are authorized to interpret and define the terms used in this title, and each appropriate Federal banking agency *shall prescribe rules or regulations or issue orders* as necessary to effectuate the purposes of this title and to prevent evasions thereof". This explicit mandate to non (fully) governmental bodies either in the negotiating and in the implementation phase is anyway backed by a general responsibility of the Congress for stability concerns due to international activity[103] and a general auditing obligation to the Comptroller General that might "include a review or evaluation of the international regulation, supervision, and examination activities of the appropriate Federal banking agency, including the coordination of such activities with similar activities of

[101]Nowadays within the CEBS and, before, the Banking Advisory Committee.

[102]Moreover, Sec. 912 establishes the federal authorities allowed to join the Basel Committee, i.e. the Fed, the Office of Comptroller of the Currency, the Federal deposit insurance corporation and the Office of Thrift Supervision.

[103]Cf. Sec. 902. (a)(1) "It is the policy of the Congress to assure that the economic health and stability of the United States and the other nations of the world shall not be adversely affected or threatened in the future by imprudent lending practices or inadequate supervision." On the basis of this general clause, the Federal agencies are often required to report to the Congress both during the negotiations and after the implementation, see Barr and Miller (2006), pp. 33-34.

regulatory authorities of a foreign government or international organization".[104] As a consequence Federal agencies implemented Basel rules directly, without the need of a legislative intermediation,[105] even if they are involved in an internal dialectical process with the market operators, among themselves and with the legislative and executive powers.[106] Finally, the legislative mandate for direct implementation is limited to international activities and this provides a strong legislative basis for a differentiation between regulation of pure national financial operators and banks internationally active. The implementation process, thus, is rather concentrated, since it lies in the hands of the negotiating authorities themselves, even if under close scrutiny of other institutional actors.

As far as EU implementation is concerned, a much more fragmented framework is in place. Basel's standards are mostly implemented by EU directives, which require further national enforcement through primary domestic legislation, whereas operative regulations are deployed by national supervisory authorities, some of them (9) already involved in the original negotiation process. This basic scheme of the legalization path of Basel's soft law towards European and national hard law, moreover, has to take into account the role of European "soft" law, as stemming from the CEBS (now EBA) guidelines,[107] the ECB opinions on the basis of Art. 127 para. 5 of the Treaty and, in the near future, from warnings and recommendations of European Systemic Risk Board. Compared to Basel's soft law provisions, the European "soft law" has a complementary nature, thus it completes the provisions of European and national legislation in order to coordinate the single national authorities.[108]

Compared to the United States, the European system of implementation requires primary law implementation, with the participation of not only several institutional actors like the Commission but also the European and national parliaments as well as governmental actors. It is hard to say whether the participation of national parliaments and governments really fostered the role of national interests within the implementation process. As with regard to the Basel 2 accord, the most important policy choices that characterize its implementation in EU members states

[104]Sec. 911.

[105]With regard to Basel II implementation, for instance, see the Final rule issued by the four federal agencies, published in the Federal Register, 7th of December 2007.

[106]For a broad overview of the transnational coordination at US level, see Barr and Miller (2006), p. 32.

[107]Compared to securities regulation, the implementation of EU banking law did not fully implement the two-stage European legislative steps as envisaged by the original Lamfalussy scheme, with level 1 directives adopted by the European Parliament and the Council and level 2 directives following the Comitology procedure.

[108]On the specific features of international (or global) soft law as compared to domestic soft law in the financial sector (being the former "stand-alone" standards, whereas the latter exists as tools to clarify and coordinate the hard law provisions), see Giovanoli (1999), pp. 36-38.

are defined at the European level.[109] On the other side, the final executive measures are adopted by national authorities within their rule-making power coordinated at the level 3 committee level, thus the role of national legislators is limited to the transposition in the national legal order of increasingly stringent community directives.[110] It is more probable that national interests of (some) members states are more likely be represented in the ascending phase and through the mediation of EU institutions, rather than in the implementation phase.

Accordingly, the role of European law also increases the credibility of Basel's implementation at international level, as the risk of hold-up due to national interest is greatly reduced. Finally, within the European regulatory environment and according to the Internal Market objective, the distinction between domestic and international players, as well as the applicable regulation, is meaningless; as a consequence, Basel principles have been applied to all banks within a homogeneous regulatory environment.

In other words, notwithstanding the several political actors involved, the vertical relationship between the EU and the national legislative layers is anyway hierarchically structured, whereas the horizontal dialogue among the four US federal agencies probably leads to an increased role of political bargaining in the implementation phase. As an example, in the United States the scope of application of Basel II framework and its timing have been seriously affected by the need to integrate the new capital requirements with the US Prompt Corrective Action model for FDIC intervention.[111]

A further effect of EU hard law approach to the implementation of Basel's standards is their "ossification". As already noted, the Basel's standardization mainly involves technical standards of supervision, although it gradually expanded to some fundamental policy elements of supervision. Some of these technical standards, thanks to European legislation and also within the context of the Lamfalussy procedure, could acquire a formal primary law status and this increases their rigidity.[112] However, unlike securities directives, the Directives 2006/48/EC and 2006/49/EC did not directly foresee a level 2 (hard) legislation. In fact, the harmonization of technical issues has been fostered also by means of soft law at the

[109]Such as the scope of application, the supervisory authorities disclosure obligation, the capital treatment of venture capital private equity, covered bonds and real estate mortgages, the financing of SME, till the determination of the consolidating supervisor. On the specific features of EU implementation of Basel II, see Dierick et al. (2005), p. 23 ff.

[110]Although still formally limited to "minimum harmonization" (see for instance Recital 7 of Dir. 2006/48/EC), the most recent banking directives provides a very detailed legal framework that hardly leaves some residual discretion for the national legislator. See also Dragomir (2010), pp. 160 ff. and reference thereto, envisaging a *de facto* achievement of maximum harmonization.

[111]On the PCA system of FDIC intervention developed after the savings and loans crisis in the 1980s, see Kaufman (2002). For the stark divergences of FDIC on the implementation of the Accord due to the incompatibility with the PCA principles see Barr and Miller (2006), p. 32.

[112]See for instance the 8% ratio stated by the first Basel capital adequacy accord that was formally included in the Second banking directive (Dir. 89/646/EC).

CEBS level that, on the contrary, has become increasingly important in implementing Basel's principles.

16.3.2 The Evolving EU Institutional Framework

16.3.2.1 The Evolution of the EU Approach

As mentioned, the achievement of financial stability was not deemed to be a primary European law responsibility, even if the most recent developments of EU intervention aim at establishing a homogeneous level of consumers' and depositors' protection.[113] This explains the maintenance of national regulatory frameworks and the absence of direct supervisory powers of European institutions. Accordingly, this is mirrored in the limited formal relevance of European actors within the original governance of BCBS.

Within this framework, the main actor of European banking law has been the Commission, through its proposal role for legislative measures and infringement procedures, although experts' committees have been envisaged since Dir. 77/780/EC and their role greatly expanded within the Lamfalussy framework. Actually, the European directives accorded to the Commission also an explicit mandate for international negotiations dealing with supervisory treatment of European credit institutions in third countries.[114] Indeed, if these clauses probably hindered formal negotiations among government, they did not prevent national supervisory authorities from informal international negotiations, as within the Basel Committee.[115] On one side, due to the Committee's informal nature, the Commission external competence was not activated. On the other hand, due to their full responsibilities for banking supervision, the national authorities were free to operate and coordinate autonomously within this context. After all, the participation of the Commission to the BCBS could have clashed with the nature of the Committee itself, since it would have implied the participation of an institution with broad

[113]The move towards full harmonization with regard to investor protection in the Mifid (2004/39/EC) and in the Consumer Credit (2008/48/EC) Directives, indeed, aims at full harmonization, see Moloney (2003), p. 809. A further step is represented by the faculty to set up Community institutions under Art. 114 TFEU (ex Art. 95), as far as they are "responsible for contributing to the implementation of a process of harmonization", see European Court of Justice, cause C-217/04, *United Kingdom v European Parliament and Council*. Also in this developed form, however, the legal basis remains Art. 114 of TFEU, i.e. the harmonization of regulation (including primary legislation and the rule-making activity of the national authorities), leaving apart the allocation of primary responsibility for financial stability.

[114]See Art. 9 para. 3 of Dir. 77/780/CE and Art. 9 paras. 3 and 4 of Dir. 89/646/CE. For an overview of Community external powers in banking see Zavvos (1990), p. 491 ff.

[115]Besides the negotiations within the Basel Committee, see also the US-UK understanding of 1987, whose importance is stressed by Kapstein (1994).

policy objectives in a body composed by independent regulators or central banks bound by the financial stability objective.

This traditional view of European banking law, however, needs to be up dated according to most recent developments, from the adoption of the Lamfalussy framework till the reform package following the 2008-2009 financial crisis. In particular, due to the need for overall oversight of systemic risk and for more stringent regulatory convergence, the European financial institutional architecture extended its scope grew in complexity and, within a certain extent, in fragmentation.

First of all, after the Maastricht Treaty an alternative legal basis for European intervention in prudential supervision has been provided by Art. 105 para. 6 of EC Treaty (now Art. 127 para. 6 TFEU). This article does not only involve an alternative allocation of competences among the European institutions (from the Commission to the European Central Bank), but it involves a more radical change of the features of EU legal basis. Actually it would more generally imply that banking stability is not anymore only a national objective to be coordinated by EU law in order to eliminate barriers for the provision of services, but it is a genuine European responsibility too, linked to the more general monetary stability of the Union. So far, the implementation of Art. 127 para. 6 TFEU was deemed to be highly unlikely, since it would represent a major change in EU banking law, requiring a unanimous political consensus among Member States. The deficiencies of macro-prudential supervision at national level showed during the recent crisis,[116] however, have sensibly changed the political setting.

Second, after the crisis the meaning of the internal market objective itself gradually evolved, from the establishment of an internal market for financial/banking services to the protection of functioning of the whole internal market from the risks posed by the collapse of the financial system.

The crisis, indeed, stressed the importance of macro-stability objective with regard to the "too big to fail" problem, being it related to the private financing sector, as in 2009, or to the government debt, as in the recent 2010 Greek crisis. In particular, the burst of the crisis in 2008-2009 put under pressure the economy as a whole and spurred increasing State intervention both in the financial sector and in the economy as a whole; correspondingly the risk of new surging national barriers emerged and as well as the need to monitor the increasing recourse to State aids.[117]

[116]Especially in countries, such as the UK, that opposed further integration of supervisory systems.

[117]See the framework set up by the Commission with regard to State aids policy during the crisis, composed by (a) Communication from the Commission of 13 October 2008 on the application of state aid rules to measures taken in relation to financial institutions in the current global financial crisis, OJ (2008) C 270/8 (the Banking Communication); (b) Communication from the Commission of 5 December 2008 on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ (2009) C10/2 (the Recapitalisation Communication); (c) Communication from the Commission – temporary Community framework for state aid measures to support access to finance in the current financial and economic crisis, adopted on 17 December 2008, as amended

16.3.2.2 The Global Projection of the New EU Actors

The new EU macro-prudential framework is based on two legal pillars.[118] It is true that the Regulation establishing the European Systemic Risk Board (ESRB) has been adopted pursuant to Art. 114 TFEU, i.e. approximation of law in view of the achievement of the internal market. However, in this case, the internal market's objective has been spelled out broadly, not only with reference to the specific financial sector, but taking into account the role of systemic stability for the entire economy.[119] On the other side, the Regulation conferring specific tasks to the ECB within the ESRB framework required for the first time the activation of the legal basis provided for in art 127 para. 6 TFEU. Direct hierarchical relationships between the Board and the ECB, on one side, and between the Board and the national authorities, on the other, are not envisaged.

The Board, although without legal personality, is meant to be a body completely separated from ECB and it should carries out a coordination role between the macro stability objective of central banking and the micro stability one of supervisory systems. In the context of the EU law the ESRB is supposed to gain an increasingly relevant role at international level. Although the Regulation only mentions the task of "coordinating its actions with those of international financial organizations" (Art. 3 para. 2 lett. i), the recitals draw an ESRB "tak[ing] on all the global responsibilities required in order to ensure that the voice of the Union is heard on issues relating to financial stability", especially at the policy level, i.e. the G20, the IMF and within the Financial Stability Board.

Apparently, it might be envisaged that the synthesis of the positions of all the European actors (ECB, Commission, central banks' and regulatory comities) at the

by the Communication from the Commission amending the temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, adopted on 25 February 2009 (Consolidated version), OJ (2009) C 83/01 (the T emporary Framework); and (d) Communication from the Commission of 25 February 2009 on the Treatment of Impaired Assets in the Community Banking sector, OJ (2009) C 10/2 (Impaired Assets Communication). For an analysis of the metamorphosis of the role of the State after the crisis, see G. Napolitano, *Il nuovo Stato salvatore: strumenti di intervento e assetti istituzionali*, in *Giorn. dir. amm*., 2008, 1083 ff.; the corresponding rise of the model of emergency delegation to the government, with its counterbalances at the European level as well, is analysed in Id, *Delegation choice and strategies to control government in the economic crisis*, paper presented at the 2009 *European Association of Law and Economics* conference held in Rome in 2009.

[118]See *Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board* and the *Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board*, both in Official Journal of the European Union, L-331 of 15 December 2010. It might be noted that only the first Regulation is a legislative instrument, whereas the latter is an executive measure.

[119]See Recital 10 of the Regulation 1092/2010, according to which the objective of financial stability would be functional to the mitigation of "negative impacts on the internal market", to be intended as the economy as a whole, rather than the internal market of financial services.

highest policy level (G20, FSB, IMF levels) is an ESRB's task, whereas the ECB maintains its position within the steering body of the BCBS, the Group of Central Banks Governors and Heads of supervision. The risk of "antagonism" between ECB and ESRB at international level should be avoided thanks to the personal overlapping (for the first 5 years the Regulation couples the chairmanship of ESRB with the presidency of the ECB) and the inclusion of the board within the administrative structure of the central bank.[120] Moreover, Art. 2 lett. d) of the Regulation establishes that the Secretariat provided by the ECB shall include "the support to the ESRB in its international cooperation at administrative level with other relevant bodies on macro-prudential issues".

As far as the relationship with the national authorities are concerned, which are autonomously involved in the technical drafting and, above all, in the implementation of Basel's soft law, the Regulation does not envisage a direct binding effect of the ESRB warnings and recommendations, but rather a "name and shame" system of enforcement among peers.[121]

Finally, other recent developments of the European banking supervision architecture could indirectly affect the governance of EU states in the BCBS, or at least their behavior within the Committee. It is a common thought that the adoption of the Lamfalussy method in banking regulation represents a major step forward towards stringent harmonization at EC level. With regard to banking matters in particular, the Level 3 Committees carry on a decisive role in the implementation of banking technical regulations, the same subject matter of standardization within the Basel Committee.[122] In 2009, the Commission already decided to strengthen the role of Level 3 Committees and provided for a qualified majority procedure for the adoption of recommendations and a formal legal effect for these acts.[123] The new Regulations, adopted by the Council and the Parliament in 2010, established real "European Authorities", such as the EBA.[124] The increasing role of the

[120]The link with the ECB, however, is especially strong with regard to the membership of the Board, through the participation of President and Vice-President and the participation of members of the Governing Council of ECB, without taking into account the power to nominate the head of the secretariat.

[121]Article 17 of the Regulation 1092/2010 provides that in case of non-compliance to the Recommendations, the ESRB will notify the Council and the relevant European authority, but only in the exceptional cases of Art. 18 it will let the information to the public.

[122]On the decisive role of CEBS in the Community side of implementation of Basel provisions, see Bertezzolo (2009), p. 257 ff.

[123]National authorities are obliged to reason why they did not follow the CEBS recommendation, see EC Decision C(2009) 177, Art. 14. For a introduction on Lamfalssy procedure within the context of global harmonization see Bertezzolo (2009), p. 268 ff., figuring out an informal mechanism for coordination of EU position within the BCBS through the CEBS.

[124]See *Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC*, in Official Journal of the European Union, L-331 of 15 December 2010.

Authorities has been accompanied by the expansion of EU membership, which has led now to a substantial divergence between EU and Basel's constituencies.[125]

This new framework poses some questions on EBA's role in the Basel rule-making process, either directly or indirectly, in comparison with the former Committee of European Banking Supervisors (CEBS).

In fact between the former CEBS and the BCBS, no formal link was established, although they dealt with the same subject matter and the role of CEBS in EU implementation of Basel standards was essential.[126]

The new Regulation establishing the EBA (Reg. 1093/2010), on the contrary, includes some specific references to its activity on the international scene. Pursuant to Art. 1 para. 5 lett. c), strengthening the international supervisory coordination is one of the tasks of the newly established authority. More explicitly, Art. 33 provides a clear legal basis for EBA's participation to administrative arrangements with, *inter alia*, international organization, although this empowerment shall be without prejudice of the competences of the Member States and it does not entail a delegation of external powers of the Union.

Compared to the former role of CEBS (before 2009), the change in the decision procedure could lead to policy statements or consultation comments voted by a qualified majority or to recommendations aiming at suggesting a common position for the EU members of the BCBS. Moreover, the Reg. 1093/2010 could also provide a sound legal ground for direct participation of the EBA in the Committee, even if in this case two sets of boundaries could apply to the EBA. First of all, its international activity should mirror its "internal" competence, *vis-à-vis* the Member States' own competences;[127] accordingly, one could argue that policy making (and active participation to the Group of Governors and Heads of supervision as well definition of macro-prudential standards) in this case would not be included in the scope of the EBA, since it is empowered to improve consistency in the application of EU law.[128] In addition, also within the scope of its activities, Recital 66 of the Regulation stresses that while developing its international administrative arrangements it shall "fully respect[...] the existing roles [...] of the Member

[125]Until 1992 most of EU members were also Basel members. Nowadays only 9 EU member states out of 27 participate to Basel. Moreover, the recent expansion of Basel membership left the EU countries in minority, again 9 out of 27; meanwhile where other powerful international actors play a relevant role, as the US, Japan, the Asiatic giants India and China and the fast developing countries.

[126]Actually, it participated to open public consultations during the drafting phase of Basel 2, but only when agreement between its 27 members was achieved, leaving free the single members to individually comment the Basel proposals. The essential role of CEBS in the implementation phase is underlined by Bertezzolo (2009), p. 275, who also points out that this Committee represent the transmission chain of EU-wide interests within the Basel process. If this view can be agreed from an international relationships point of view, however, there is still a substantial lack of legal instrument to support this mechanism.

[127]See Art. 33 para. 1 Reg. 1093/2010.

[128]See in particular Art. 1 para. 1 Reg. 1093/2010.

States", so that its participation could not substitute the activity of Member States. Thus, participation along with Member States could be considered consistent with this mandate, if the Committee would confirm its technical (i.e. administrative) profile *vis-à-vis* the policy inputs stemming from the Group of Central Bank Governors and Heads of supervision.[129]

In conclusion, within the European framework the European Commission has carried out a pivotal role with regard to main policy options and primary legislative implementation, whereas national authorities born full responsibility for the maintenance of financial stability, mimicking the domestic relationship between legislative and executive bodies on one side and independent authorities on the other. Meanwhile, sector-specific bodies dealing with banking supervision at European level have been emerging and they are likely to assume an increasingly relevant role, if not direct administrative responsibilities. In terms of Basel's membership, however, this evolution has been taken into account only partially. On one side, the Commission gained a special status in the Committee as "observer", which is not recognized to other national legislative or executive bodies. The same status is granted to the ECB, with some relevant differences: while it would probably be suitable for full membership as it fulfills most if not all the central bank functions of Euro-area and it is gradually expanding its influence to prudential matters, it anyhow maintains a prominent role in the policy-making activity within the Group. On the other side, national authorities of Member States are not bound by formal mechanisms to a common EU position within BCBS, even if in the future increased cohesion at the European level could be mirrored in the EU members' behavior within the BCBS and in the participation of EU bodies.

16.4 Conclusive Remarks

The analysis carried out in this chapter clearly showed that both BCBS and the EC (now EU) banking law proceeded in parallel in the definition of the new prudential supervisory paradigm. Although based on different objectives, they mutually interacted. The BCBS was meant to coordinate national supervisory systems dealing with international banking group, with a view to reduce the likelihood of national LOLR intervention *ex post facto*. Consequently, it is suggested that it mainly relied on the informal "meta-legal" effect stemming from interaction of central bankers. It ended up then to provide a formidable instrument to foster the European harmonization objective, i.e. the strengthening of prudential measures as substitutes to control of the structure of market. On the other side, it cannot be underestimated the role carried out by the European conceptual vision of market

[129]Reg. 1093/2010 expressly mentions only "administrative arrangements" with third countries and international organizations, whereas Recital 44 also adds "contacts", which could entail also more informal arrangements, as the one underpinning the Basel Committee, see *supra*.

integration at the root of Basel integration, with the adoption of the home country principle and the focus on direct interaction of independent authorities.

The comparison with the "Atlantic" implementation route, indeed, showed that the hard law approach of European law as well as the vertical chain between it and Member States' implementation could be considered as a major element to enhance the credibility of Basel's coordination. On the other hand, the peculiar European structure probably reduced the role of national interest in the negotiating and implementation phases.

The main actor at European level, indeed, has long been the European Commission, which however is not formally part of the Basel Committee. This is especially evident at the end of the 1980s, when the BCBS activity extended from low profile coordination of national supervisory system and safety net facilities to deep standardization of capital adequacy measures with very detailed micro-prudential rules and limitation of national discretion. In this period, the agreement between national supervisory authorities at the Basel level represented the technical tool to support the broader picture of harmonization envisaged by the Community directives within the overall internationalization of financial markets. The European interest mainly relied on the adoption of a supervisory paradigm compatible with the Internal Market objective and the credibility of international coordination. At the same time, the Basel Committee opened its doors to the market, by means of extensive consultation exercises. Thus, from an institutional point of view, the accountability *vis-à-vis* the macro-stability objective, indeed, was probably underestimated, compared to the quest for micro-stability harmonization and leveling playing field of prudential rules.

The financial turmoil starting in 2008, however, raised some doubts of the actual micro-prudential regulation in preventing major systemic shocks and it fuelled major structural reforms of supervisory systems. From a global point of view, the governments are stepping forth requiring a more active involvement in financial regulation, as the quest for a Global Legal Standard would show. These policy inputs have been translated into practice mainly through the central bankers' comity, which gained a more prominent role within the Basel's governance. From the European side, the reflection is leading to an increased relevance of stability objective as a pan-European task. The coordination between regulators seemingly requires a stronger emphasis on macro-stability issues and a revival of central bank coordination. In this regard, the role of the ECB as a "pure" central bank, not involved in micro-prudential regulation, could have a strong impact in the future interaction at Basel level. Moreover, with regard to the proposals stemming from the crisis, the Reform package of 2010 already sets the scene for new European actors at both policy and technical levels, the ESRB and the EBA. But this institutional change could also involve a new equilibrium of international projections at the Basel level. The increased role of ECB within the Basel governance should increase the focus on macro-stability objective and it could open the doors to a new season of interaction between Basel activity and European institutions. In the near future, the fastest route between Brussels and Basel will require a short deviation through Frankfurt.

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Chapter 17
The Review of Compliance with the Aarhus Convention of the European Union

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17.1 Introduction

There is, today, a growing complexity of regulatory regimes applicable throughout Europe. This chapter analyzes the complex relation that is established between global, European Union (EU) and national administrative law in the environmental field, and more precisely in the case of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as the Aarhus Convention.[1]

The Aarhus Convention establishes procedural rights to be implemented in the legal orders of the Parties[2] and is part of the emerging "global administrative space".[3] However, as the EU is one of the Parties to the Convention, a connection between the global and the European sphere must be made. The principles regarding administrative procedure and review of the Aarhus Convention become applicable to the EU institutions, bodies and agencies,[4] as well to the EU Member States. The compliance mechanism of the Aarhus Convention is, thus, a laboratory in which one can see the results of the relation between the global and EU legal regimes.

[1]The Aarhus Convention was adopted on 25th June 1998 in the Danish city of Aarhus and entered into force on 30th October 2001, after obtaining ratifications by 16 of the signatory parties.

[2]Macchia (2008), p. 75.

[3]Kingsbury et al. (2005a), p. 3. See also, e.g., Kingsbury et al. (2005b), pp. 5 and 25 ff.; Kingsbury and Krisch (2006), pp. 2 ff.; and Cassese (2005).

[4]On the emergence of a EU administrative system, see Cassese (2004), p. 21; Schwarze (2006); Craig (2006); della Cananea (2006); Ortega (2008); Auby and Dutheil De La Rochère (2007); Chiti (2008).

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The chapter begins with a brief presentation of the Aarhus Convention and then presents the EU as a Party to the Aarhus Convention. It goes on to explore the consequences of this, including the scope of application of the Convention, the duty of implementation by the EU's institutions and by the Member States, and the consequences of non-compliance. Finally, the chapter focuses on the application of the compliance mechanism of the Aarhus Convention to the EU's Member States and to the EU itself, it studies three concrete cases of review of compliance by the EU to the Convention, and it explores the foreseeable impact of the procedure to review compliance of the EU to the Aarhus Convention.

17.2 The Aarhus Convention: Procedural Rights and Compliance Mechanism

The Aarhus Convention is one of the most important instruments of international environmental law. The foundational idea of the Convention is that sustainable development can be achieved only through the involvement of all stakeholders – *i.e.* the people.

The Aarhus Convention represents a leap forward in terms of environmental agreements in granting rights to the public and imposing to the public authorities of its Parties certain obligations in terms of administrative and judicial procedure.

The Convention recognizes certain procedural rights in the field of environmental law as instruments to the protection of the environment. These rights are: (a) A right to environmental information; (b) A right to participation in decision-making; (c) A right of access to judicial review in environmental matters.

As for the first, the scope of environmental information, as defined in Art. 2, (3) of the Convention, is very broad covering the state of the environment, its elements and their interactions, as well as the factors likely to affect these elements, such as environmental agreements, policies, legislation, plans and programmes, and administrative measures, but also the state of human health and safety, conditions of human life, and the built environment, as these may be affected by the state of the elements of the environment or by the factors just mentioned. The general public should be entitled – without needing to prove a special interest – to access to information about these matters.

The content of the right to access environmental information under the Convention is spelled out in detail in two further articles: Art. 4, on access to environmental information, and Art. 5, on the collection and dissemination of environmental information. The Convention also provides for more active dissemination of information about the environment among the general public.

The Aarhus Convention also provides for the right to participate in decision-making procedures that could have an impact on the environment.

The Art. 6 of the Convention sets out the mechanisms of public participation in decisions on specific activities listed in a separate annex and to other activities, which have a significant effect on the environment. Article 7 of the Aarhus

Convention deals with the public participation in procedures concerning plans, programmes and policies relating to the environment. Finally, Art. 8 of the Aarhus Convention provides that the signatory states are under the obligation to strive to promote effective public participation during the preparation of legally binding rules and regulations (e.g. ordinances) that may have significant consequences on the environment.

The Aarhus Convention finally provides for the right of access to review procedures to challenge violations of these rights as well as any acts and omissions by private persons and public authorities, which contravene provisions of their national law relating to the environment. In this sense, any requester of information who considers that the request has been ignored, wrongfully refused, inadequately answered, etc., has access to a review procedure before an independent and impartial body established by law (Art. 9, (1), of the Aarhus Convention). The Convention also lays out the framework features of the review mechanism.

However, the scope of the right of access to the review procedure before an independent and impartial body also covers the situations where the procedural right established in Art. 6 is in question, as well as other procedural rules, and even the substantive legality of the decision in question (Art. 9, (2), of the Aarhus Convention). Finally, the right of access to administrative or judicial procedures by the members of the public also covers the possibility to challenge acts and omissions by private persons and public authorities, which contravene provisions of their national law relating to the environment (Art. 9, (3), of the Convention).

In contrast to other treaties, the Aarhus Convention establishes a mechanism for review of compliance which "shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention" (Art. 15). This article also establishes that the "arrangements" for reviewing compliance are "optional [. . .] of a non-confrontational, non-judicial and consultative nature". Article 15 was implemented by Decision I/7 on review of compliance,[5] adopted at the first Meeting of the Parties in 2002. A Compliance Committee was thus created for the review of compliance by the Parties with their obligations under the Convention.

The Compliance Committee consists of nine members serving in a personal capacity and must perform their functions impartially and conscientiously. These individuals are to be nationals of Parties or Signatories to the Convention who are persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience.[6] The Compliance Committee members serve a 3-year term.[7]

[5]In addition, at their second meeting, in May 2005, the Parties adopted Decision II/5 on general issues of compliance.

[6]An analysis of the Compliance Committee as a reviewing body, which is part of the emerging global administrative law can be found in Macchia (2008), pp. 71 ff.

[7]The members of the current Compliance Committee are: Mr. Veit Koester (Denmark) who is the chairperson; Ms. Svitlana Kravchenko (Ukraine) who is the vice-chair; Mr. Merab Barbakadze

The Compliance Committee has several attributions, all related with the compliance with or implementation of the provisions of the Convention. The most important of these attributions is the power to consider submissions made by the Parties, referrals made by the Secretariat or communications made by members of the public concerning a Party's compliance with the Convention, made in accordance with paragraphs 15–24 of Decision I/7. This means that not only does the Aarhus Convention establish the participatory rights in the decision-making procedures, but it also provides for a mean for the people to react against lack of compliance by the Parties.

A communication made by members of the public may address any of the following:

(a) A general failure by a Party to take the necessary legislative, regulatory or other (e.g. institutional, budgetary) measures necessary to implement the Convention as required under its Art. 3 (1) in a manner, which is in conformity with its objectives and provisions.
(b) Legislation, regulations or other measures implementing the Convention, which fail to meet the specific requirements of certain of its provisions.
(c) Specific events, acts, omissions or situations, which demonstrate a failure of the State authorities to comply with or enforce the Convention.

After due consideration, the Committee can submit reports and draft recommendations to the Meeting of State Parties which, in its turn, may decide upon appropriate measures to bring about full compliance with the Convention. In addition, the Committee may examine compliance issues on its own initiative and make recommendations. The decision-making procedure of the Compliance Committee is regulated in the Decision I/7 and in the modus operandi.[8]

The number of communications made by members of the public is vastly superior to the number of submissions made by the Parties – there has been only one of the latter, referring to the compliance by other Parties[9] – and of referrals made by the Secretariat – to date no referrals have been made by the Secretariat. In comparison, there have been 49 communications made by members of the public to

(Georgia); Mr. Jonas Ebbesson (Sweden); Ms. Ellen Hey (Netherlands); Mr. Jerzy Jendroska (Poland); Mr. Alexander Kodjabashev (Bulgaria); Mr. Gerhard Loibl (Austria); Mr. Vadim Nee (Kazakhstan). Out of the total of nine, seven of the current members serve in this capacity since the creation of the Committee, in 2002.

[8]Both instruments were adopted in the first Meeting of the Parties. See the Report of the first Meeting of the Parties (MP.PP/C.1/2003/2).

[9]There was a submission made by Romania about compliance by Ukraine. The reference number of this submission is ACCC/S/2004/01. Romania alleged violation by Ukraine of Art. 6.2(e) of the Convention by failing, in the opinion of the submitting Party, to ensure that the public affected by the Bystroe Canal project in the Danube Delta was informed early in the decision-making procedure about the fact that the project was subject to a national and transboundary environmental impact assessment procedure.

this date.[10] The communications are on the compliance of Parties of all of Europe – with the United Kingdom as the Party with the most of the communications (7), followed by Kazakhstan (5).

The data seems to indicate that the need to improve the protection of environmental rights is felt throughout Europe, irrespectively of the EU membership of the country or its recent history, in the case of former Communist states of Central and Eastern Europe.

17.3 The EU as a Party to the Convention

The European Community (EC) became a Party to the Convention on May 17, 2008, following its approval by Council Decision 2005/370/EC of February 17, 2005.[11] After the entry into force of the Lisbon Treaty, the EU succeeded the EC as the Party to the Convention.[12]

The fact that the EU is a Party to the Aarhus Conventions means, obviously, that the EU must comply with its obligations – including the rights established therein – and is subject to the mechanism of review of compliance.

Besides, the Convention also resulted in an uniformization of the procedures (administrative and otherwise) at a European level – and, especially, at an EU level, since all EU's Member States are parties to the Convention – according to its framework. Moreover, the fact that the EU is, in itself, a Party of the Convention, side-by-side with the EU's Member States also has significant consequences.

[10]The Parties whose compliance motivated a communication are the following: United Kingdom (7); Kazakhstan (5); Armenia (3); Austria (3); European Community (3); Hungary (3); Poland (3); Spain (3); Albania (2); Belarus (2); Denmark (2); Ukraine (1); Turkmenistan (1); Belgium (1); Romania (1); Lithuania (1); France (1); Republic of Moldova (1); Germany (1); Georgia (1); Slovakia (1) – (the Parties were distributed by number of communications and by alphabetical order). The details of three of the communications are not yet available for the general public. One can find the list of communications in http://www.unece.org/env/pp/pubcom.htm (accessed 9 June 2010).

[11]Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ L 124, 17.5.2005, p. 1).

[12]It was the European Community (EC) which was a Party to the Aarhus Convention. However, with the entry into force on 1 December 2009 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, the duality between European Community and EU ended. The EU was given a single legal personality which replaced the former EC. See Art. 1 (3) TEU; see also Art. 2, (2), a), of the Lisbon Treaty.

17.3.1 The Scope of Application of the Convention: The EU Institutions and the Member States

Given the broad definition of "public authority" given by the Convention in Art. 2 (2), the scope of the duties provided by the Aarhus Convention covers all of the EU institutions as described in Art. 13 (1) of the Treaty of the European Union (TEU), *i.e.* the European Parliament, the European Council, the Council, the Commission, the Court of Justice of the EU, the European Central Bank and the Court of Auditors.

However, this is not all. Not only the EU institutions, but also all the EU bodies, offices, agencies and other entities, as well as services or committees, established by, or on the basis of the EU Treaties or EU law, fall within the scope of the definition. Some examples are the Economic and Social Committee and the Committee of the Regions (Art. 13 (4) TEU), the European Ombudsman [Art. 228 of the Treaty on the Functioning of the European Union (TFEU)] and the European Investment Bank (Art. 308 *et seq.* TFEU).

The EU must comply with the Aarhus Convention – in the same sense that any other Party to the Convention – while exercising its legislative, administrative or judicial powers. This means that while adopting regulations or directives, the EU is bounded by the Convention. The same happens when the EU institutions adjudicate or somehow act in administrative or executive procedures. Finally, the EU courts are also bound by the Convention.

The fact that the EU is a Party of the Convention also has consequences for the EU's Member States.

Prima facie, the Member States are bound to observe the Aarhus Convention, as an obligation of EU law, when they are implementing Union law. In fact, in that case, the Member States are acting *indirectly* as EU's administration. Thus, they are bound to the Convention through the same ties as the EU's institutions.

But this is not all. As it was concluded and acceded by both the EU and its Member States, the Aarhus Convention must be considered a mixed agreement. In accordance with the European Court of Justice's (ECJ) case-law, mixed agreements concluded by the Union,[13] its Member States and non-member countries have the same status in the Union's legal order as purely EU's agreements in so far as the provisions fall within the scope of EU competence.[14] The Member States must ensure compliance with commitments arising from an agreement (mixed or not) concluded by the EU institutions, in order to fulfil, within the EU system, their obligations in relation to the Union, which has assumed responsibility for the due

[13]The case-law is from before the entry into force of the Treaty of Lisbon, which means it involves agreements made by the EC and not the EU. However, there is nothing in the current text of the Treaties, which can lead us to question its validity after that entry into force.

[14]See, to that effect, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 9, Case C-13/00 *Commission* v *Ireland* [2002] ECR I-2943, paragraph 14, and Case C-239/03, *Commission v. France* [2004] ECR I-09325, paragraph 25.

performance of the agreement.[15] Article 216, (2) TFEU clearly states that the Member States are bound by agreements concluded by the EU.[16] But it is also a consequence of the principle of sincere cooperation between the Union and the Member States (Art. 4 (3) TEU) which binds them, amongst other things, to take any appropriate measures, general or particular, to ensure fulfilment of the obligations resulting from the acts of the institutions of the Union – as the approval of the Aarhus Convention.

In fact, the ECJ has decided in the "Etang de Berre" case[17] that compliance with a mixed agreement "falls within the Community Framework", even though no specific EU legislation implementing such agreement exists.[18] According to the Court, it is so when the rights and obligations under scrutiny were established "in mixed agreements concluded by the Community and its Member States and concern a field in large measure covered by Community law".[19] This means that the Court recognizes "jurisdiction to assess a Member State's compliance with those articles in proceedings brought before it under Art. 226 EC".[20]

As the Aarhus Convention is a mixed agreement which creates rights and obligations in a field covered in large measure by EU legislation (the environment – more specifically, procedural rights of the citizens in environmental law), which is the subject-matter of the Convention, the same reasoning must apply. The compliance of the Member States with the Aarhus Convention must be considered as a duty also originated in EU law and must be controlled accordingly. This means that the EU Member States that are also Parties to the Aarhus Convention are confronted with a direct obligation of compliance to it, derived from international law and the principle of *pacta sunt servanda*, but also an indirect obligation to comply with the same Convention, which comes from the EU law.

Therefore, a triangular relation between global (or international) law obligations (the Aarhus Convention), EU law and national law is established.

The national governments of the Member States and their public authorities must act within the framework provided by the several legal documents in question. Sometimes the relation can be merely bi-polar (involving only the obligations of the Aarhus Convention and the national law) but, given the breath of the scope of EU law, especially environmental EU law, most of the time the relation is going to be triangular.

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[15]See, to that effect, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 11, Case C-13/00 *Commission* v *Ireland* [2002] ECR I-2943, paragraph 15, and Case C-239/03, *Commission v. France* [2004] ECR I-09325, paragraph 26.

[16]See, to this effect, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52, Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25, and Case C-308/06, *Intertanko and Others* [2008] ECR I-04057, paragraph 42.

[17]Case C-239/03, *Commission v. France* [2004] ECR I-09325.

[18]Case C-239/03, *Commission v. France* [2004] ECR I-09325, paragraph 31.

[19]Case C-239/03, *Commission v. France* [2004] ECR I-09325, paragraph 29.

[20]Case C-239/03, *Commission v. France* [2004] ECR I-09325, paragraph 31.

17.3.2 The Implementation of the Convention by the EU

17.3.2.1 The Obligations of the EU's Institutions and of the Member States

The Aarhus Convention was implemented in the EU by means of several instruments. These instruments regulate the rights established in the Convention, i.e. access to information, public participation and access to justice. In some cases, the legal framework already in place was deemed sufficient to guarantee the implementation, while in other cases the need was felt to introduce changes in EU law, through the approval of legislative acts.

The EU established different regimes for the implementation of the Aarhus Convention in regard to its Member States and to the EU institutions.

The EU established rules in order to impose all three sets of obligations to its institutions. In order to do so, the European Parliament and the Council adopted Regulation (EC) no. 1367/2006 of the European Parliament and of the Council, of 6 September 2006, on the application of the provisions of the Aarhus Convention to Community institutions and bodies. This regulation established the procedural rights and mechanisms to ensure the implementation of the Convention amongst EU's institutions and bodies.[21]

As for the Member States, the EU relied on directives as the legislative instrument for the implementation.

The right to public access to environmental information is regulated in Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information. The right to public participation is regulated by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.[22]

Finally, the need to regulate right of access to justice was the reason for the presentation of a proposal for a Directive of the European Parliament of Council on access to justice in environmental matters, laying down a minimum standard throughout the EU's Member States, by the Commission on 24 October 2003 (COM (2003) 624). The draft directive is still pending before the Council, having received a first reading by the European Parliament in 18 March 2004 within the framework of a co-decision procedure, which was not favourable to many of the

[21]Which are described in the Regulation as any "public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity" by Art. 2 (1) (c) of the Regulation (EC) no. 1367/2006.

[22]Provisions on public participation can also be found in other directives in environmental matters, such as the Directive 2001/42/EC of 27 June 2001 on the assessment of certain plans and programmes on the environment and the Directive 2000/60/EC establishing a framework for Community action in water policy.

Commission's proposals and required a number of amendments (2003/0246 (COD)).[23] The legislative procedure appears to have stopped. The main criticism made on the draft directive was that its scope exceeded that of the Aarhus Convention and, with specific regard to the procedural arrangements, that it did not take sufficient account of the principle of subsidiarity. The draft directive was said to not restrict itself to a framework, not leaving room for the Member States to establish the details.

As an example, the draft directive regulated aspects of legal standing rules in administrative and judicial proceedings to challenge acts and omissions which infringe environmental law, notably the need to prove a sufficient interest or, where the relevant Member State's administrative procedural law so required, the maintenance of an impairment of a right. Despite the fact that the directive did not allow an "*actio popularis*",[24] it granted "qualified entities"[25] general legal standing, which is not subject to the requirement of sufficient interest or an infringement of the law. This extension of standing is not required by the Aarhus Convention and was considered to have far-reaching implications. Also, the statutory obligation of a procedure of request for internal review,[26] which was regulated by the draft directive, was said to go beyond the obligations laid down in the Aarhus Convention.[27]

The fact that the draft directive went beyond the scope of the Aarhus Convention was admitted by the Commission itself. The Commission's view on such issues is expressed in the explanatory memorandum accompanying the proposal. The Commission's argument appears to be, albeit implicitly, based on a necessary link between efficiency and uniformity: the protection of the environment can be achieved through effective actions before the courts and such actions will only be effective if they follow uniform rules.

However, the draft directive seemed to ignore that the legislation on the settlement of legal proceedings has remained by large the province of the Member States.

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[23]See the procedure and the documents available in http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=186297.

[24]An "*actio popularis*" gives a person the right to bring an action in the event of a breach of the law without the personal rights of that person necessarily having been impaired.

[25]Several conditions must be met to be considered a "qualified entity", namely it must be a non-profit-making legal person, which has the objective to protect the environment.

[26]Members of the public and qualified entities who have access to justice against an act or an omission should be able to submit a request for internal review. This request is a preliminary procedure under which the person or entity concerned can contact the public authority designated by the Member State before initiating legal or administrative proceedings. If the authority fails to respond to the request within the period fixed for this purpose or if its decision does not enable compliance with environmental law, the party submitting the request may initiate an administrative or judicial procedure.

[27]Article 9 (2) of the Convention leaves to the discretion of the Parties to decide whether a judicial review will suffice or to opt for the introduction of a preliminary review procedure before an administrative authority.

That follows from the principle of the organizational autonomy of Member States' legal systems. In fact, national courts and public administrations are to implement EU law directly, but according to their own procedural legal regimes. In accordance with settled case-law, in the absence of EU rules in the field "it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive" from EU law, provided, "first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)".[28] This follows the principle of sincere cooperation. The draft directive on access to justice in environmental matters seems to be going beyond this general principle, going beyond what is strictly necessary to ensure compliance with the Convention, violating the subsidiarity principle and the autonomy of the Member States. The directive should provide only minimum standards for effective protection, not uniform standards.

With the legislative procedure stopped, there is no single directive on access to justice in environmental matters which assures compliance with the Aarhus Convention. However, Directive 2003/4/EC on public access to environmental information and Directive 2003/35/EC on public participation contain provisions on access to justice.

17.3.2.2 The Non-compliance with EU Law Implementing the Convention

The way to react to an infringement of the obligations established in the Aarhus Convention imposed on the institutions by the EU law is regulated by the Regulation – for NGOs – and by the EU Treaties. Any act of the institutions, bodies, offices or agencies of the Union, which is illegally not in conformance with the Regulation (EC) no. 1367/2006 can be reviewed by the ECJ according to the general procedures established in the Treaties.

[28]Case C-2/06, *Willy Kempter* [2008] ECR I-00411, paragraph 57. See also, in particular, Case 33/76, *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraph 5; Case 45/76, *Comet v Produktschap voor Siergewassen* [1976] ECR 2043, paragraphs 12 to 16; Case 68/79, *Hans Just v Danish Ministry for Fiscal Affairs* [1980] ECR 501, paragraph 25; Case 199/82, *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595, paragraph 14; Joined Cases 331/85, 376/85 and 378/85, *Bianco and Girard v Directeur Général des Douanes des Droits Indirects* [1988] ECR 1099, paragraph 12; Case 104/86 *Commission v Italy* [1988] ECR 1799, paragraph 7; Joined Cases 123/87 and 330/87 *Jeunehomme and EGI v Belgian State* [1988] ECR 4517, paragraph 17; Case C-96/91 *Commission v Spain* [1992] ECR I-3789, paragraph 12; Joined Cases C-6/90 and C-9/90, *Francovich and Others v Italian Republic* [1991] ECR I-5357, paragraph 43; Case C-312/93, *Peterbroeck* [1995] ECR I-04599, paragraph 12; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43, and Joined Cases C-222/05 to C-225/05 *vander Weerd and Others* [2007] ECR I-4233, paragraph 28.

The access to judicial review of the EU's Institutions acts is regulated by the TFEU – especially Art. 263 *et seq*. The main problem here is the access to the judicial review of legality of EU acts by private persons. In fact, Art. 259 (4) TFEU states: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".[29] The problem lays on the correct interpretation of the expression "direct and individual concern".

The ECJ has laid down its interpretation of the expression in the 1960s in the "Plaumann case",[30] in which the Court ruled that "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed" - this interpretation became known as the "Plaumann test". The ECJ reaffirmed the "Plaumann test" in its case-law over the years[31] and specifically on environmental matters in the "Greenpeace case".[32]

The problem is that the Plaumann case-law does not give answers to problems of standing by private citizens or NGOs in cases of public interests, such as the environment, which are by definition diffuse and collective and cannot therefore fulfil the conditions set out by the Court in Plaumann. The Court usually points out that in the cases which are not covered by the Plaumann case-law, the parties can always ask the national court to ask the ECJ to give a preliminary ruling on the subject. However, this is not really the answer for the problem because the preliminary rulings are dependent on the national court's initiative, not on the

[29] *Ex* Art. 230 (4) TEC, which stated: "Any natural or legal, person may, under the same conditions [as those laid down in paragraph 2], institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former".

[30] See Case 25/62 *Plaumann v Commission* [1963] ECR 25.

[31] See, *e.g*., Case T-173/98 *Union de Pequenos Agricultores v Commission* [1999] ECR II-03357 and Case C-50/00P *Union de Pequenos Agricultores v Council* [2002] ECR I-06677; Case T-37/04 *Regiao autonoma dos Açores v Council* [2008] ECR II-00103. In the *Jégo-Quéré* case the Court of First Instance (CFI) tried another approach to the interpretation of the "*direct and individual concern*" clause (Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR I-05137). The proposed alternative was quashed by the ECJ in the appeal, which reasserted the *Plaumann* test (Case C-263/02P *Jégo-Quéré v Commission* [2004] ECR I-03425).

[32] See Case T-585/93 *Greenpeace and Others v Commission* [1995] ECR II-02205 and Case C-321/95 *Greenpeace and Others v the Commission* [1998] ECR I-01651. In this case, Greenpeace International together with local associations and residents in Gran Canaria, were seeking the annulment of a decision adopted by the European Commission to provide financial assistance provided by the European Regional Development Fund to Spain for the construction of two power stations in the Canary Islands without first requiring or carrying out an environmental impact assessment. See also, *e.g*., Case T-91/07 *WWF-UK v Council* [2008] ECR II-00081.

private citizen's one. On the other hand, they also presuppose a judicial proceeding before a national court – which will depend on the rules of legal standing of every Member State. The problem of the narrow interpretation of the "direct and individual concern" clause by the Plaumann case-law and the Aarhus Convention rules on the access to justice is still unresolved.

However, one of the areas where there were developments by the Regulation was the establishment of a right of standing for NGOs. In fact, any NGO which meets the criteria set out in Art. 11 of the Regulation (EC) no. 1367/2006 is entitled to make a request for internal review to the Community institution or body that has adopted an "administrative act"[33] under environmental law or, in case of an alleged administrative omission,[34] should have adopted such an act.[35] The procedure to make requests for internal review and the way in which the EU institution or body concerned should consider such request is laid out in Art. 10 of the Regulation (EC) No 1367/2006. Under Art. 11 (2) of the Regulation the Commission adopted provisions to ensure transparent and consistent application of those criteria. To that effect the Commission adopted the Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) no. 1367/2006 as regards requests for the internal review of administrative acts.

Regulation (EC) no. 1367/2006 also provides that NGOs whose requests for internal review have been unsuccessful may institute proceedings before the ECJ in accordance with the relevant provisions of the EU Treaty.[36] This possibility may raise issues of compatibility with Art. 263 TFEU, to the extent that it appears to be granting NGOs standing before the ECJ over and above the criteria laid out by Plaumann.[37]

As it was said earlier, the compliance of Member States with the Aarhus Convention is to be considered as a duty originated in EU law. In that sense, the EU must control the compliance (or lack thereof) of the Member States with the directives implementing the Aarhus Convention or even with the Convention itself. The scope of the control focuses on the activity of the Member States not only while transposing the directives but also while enforcing EU law. The Commission may exercise its power to ensure the application of mixed agreements through enforcement proceedings, wherever these fall within its area of competence.

[33]"Administrative act" is defined by Art. 2 (1) (g) of the Regulation (EC) no. 1367/2006 as "any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects".

[34]"Administrative omission" is defined by Art. 2 (1) (h) of the Regulation (EC) no. 1367/2006 as "any failure of a Community institution or body to adopt an administrative act as defined in (g)".

[35]Article 10(1) first subparagraph of Regulation no. 1367/2206.

[36]Articles 263 and 264 TFEU. The first case whereby applicant NGOs have instituted proceedings for annulment of the reply sent to them by the Commission under Title IV of the Aarhus Regulation is now pending before the General Court (Case T-338/08).

[37]See Case 25/62 *Plaumann* v *Commission* [1963] ECR 95.

Another question is: can the EU citizens also react against an infringement of the obligations by the Member States? If the infringement is of an obligation imposed by a directive, then the EU citizens can react in the same way as any other infringement of directives. In this case the EU citizens are entitled to raise issues of direct effect, if and when national authorities fail to release relevant documents or fail to consult or otherwise allow public participation or, finally, fail to allow for an effective appeal against such decisions under the access to justice provisions in the above directives. So these Directives are certainly not irrelevant to the recognition of environmental rights.

17.3.2.3 The Non-compliance of EU Law with the Convention

The compliance of Member States and EU institutions with the Aarhus Convention is to be considered as a duty originated in EU law. But can a person react to a violation of the Convention by a Member State or an EU institution in the same ways as he can react to a violation to EU law? In that case, no doubts are raised about the right of the person to petition the Commission on the subject, for instance. The question is raised, however, in the judicial remedies.

As the Aarhus Convention is an agreements concluded by the Union, it is part of EU Law and the EU institutions are bound by it [Art. 216, (2) TFEU]. In this sense, any acts of the institutions, bodies, offices or agencies of the Union must respect the Convention.

According to ECJ case-law, it is clear from Art. 216, (2) TFEU that the EU institutions are bound by agreements concluded by the EU and, consequently, that those agreements have primacy over secondary EU legislation.[38] *Ergo*, the validity of a measure of secondary EU legislation may be affected by the fact that it is incompatible with rules established in agreements concluded by the EU.[39]

Where that invalidity is pleaded before a national court, the ECJ must review, pursuant to Art. 267 TFEU, the validity of the EU measure concerned in the light of all the rules of international law, subject to two conditions, established in case-law:[40] (a) the EU must be bound by those rules,[41] either by acceding the agreement in question or because the provisions of the international agreements codify customary rules of general international law;[42] (b) the "nature and the broad logic" of

[38]See, to this effect, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52, Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25, and Case C-308/06, *Intertanko and Others* [2008] ECR I-04057, paragraph 42.

[39]See Case C-308/06, *Intertanko and Others* [2008] ECR I-04057, paragraph 43.

[40]See Case C-308/06, *Intertanko and Others* [2008] ECR I-04057, paragraphs 43–45.

[41]See Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 7.

[42]See, to this effect, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 and 10; Case C-405/92 *Mondiet* [1993] ECR I-6133, paragraphs 13–15; Case C-162/96 *Racke*

the international treaty "do not preclude" the examination of EU Law's validity with it "and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise".[43] In regard to the second requirement, it is necessary that the agreement establishes "rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude"[44] of the party State. The direct effect of the agreement in question must be "compatible" with its spirit, its "general scheme" and its terms.[45]

It is clear that the first requirement of the ECJ case-law – the EU must be bound by the agreement – is fulfilled. The question is whether the Aarhus Convention fulfils the second requirement. Given the *ratio* of the Convention, one must conclude that it does. The spirit, the "general scheme" and the terms of the Convention indicate that, at least partially, it does establish rules intended to apply directly and immediately to individuals – otherwise the review mechanism established, with the possibility of communications directly from the public, would not make sense. Hence, national courts should refer to the Aarhus Convention directly, as part of their EU law obligations. Secondary legislation in the form of Directives or Regulations can also have this effect. But this means also that the ECJ can control the compliance of EU law acts, like regulations or directives, with the Aarhus Convention obligations. In fact, the ECJ may review any EU secondary legislation that is introduced in compliance with the international obligations incumbent on the Union as party to the Convention.[46]

However, there is once more the problem of the access to the judicial review of legality of EU acts by private persons and, more specifically the interpretation of Art. 259 (4) TFEU, according to the Plaumann case-law, in the same terms as it was discussed previously.

[1998] ECR I-3655, paragraph 45; and Case C-308/06, *Intertanko and Others* [2008] ECR I-04057, paragraph 51.

[43]See Case C-308/06, *Intertanko and Others* [2008] ECR I-04057, paragraph 45. Also see, to this effect, in particular, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 39.

[44]See Case C-308/06, *Intertanko and Others* [2008] ECR I-04057, paragraph 64.

[45]See e.g. Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 20 and Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paragraph 47.

[46]See Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, paragraph 54 and C-149/96 *Portugal v Council*, paragraph 49. In this later case, the Court states that "It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules".

17.4 The EU and the Compliance Mechanism of the Convention

As the EU is a Party to the Aarhus Convention, it is subject to the mechanism for review of compliance with the obligations established therein. This means that the EU can be subjected to the Aarhus Convention's compliance mechanism in the situations described in Decision I/7. These situations are: (a) When another Party makes a submission to the Committee because it has reservations about the EU's compliance with its obligations under the Convention (no. 15 of Decision I/7); (b) When the EU makes a submission to the Committee concerning its own compliance (no. 16 of Decision I/7); (c) When the secretariat of the Convention makes a referral to the Committee (no. 17 of Decision I/7); (d) When members of the public bring a communication before the Committee concerning the EU's compliance with the Convention (no. 18 *et seq*. of Decision I/7).

17.4.1 Can a Member State Make a Submission on the Compliance of the EU or of Another Member State?

As both the Member States of the EU and the EU itself are Parties of the Aarhus Convention, one can wonder whether a Member State can make a submission to the Compliance Committee over the EU's compliance with its obligations under the Convention, bypassing EU law and EU courts.

In the same line of though, there is, *prima facie*, also the possibility of a Member State to make a submission to the Compliance Committee over the compliance of another Member State of the EU, which is also a Party to the Convention, once again bypassing EU law and EU courts.

In relation to the latter question, the ECJ has already case-law that can shed some light, The "Mox plant" case[47] involved a mixed international agreement on protection of the environment, concluded under Art. 192 (1) TFEU, more specifically the United Nations Convention on the Law of the Sea (in regard to protection of the marine environment). The ECJ found, with interest to the matter at hand, that "an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under [Art. 19 TEU, former Art. 220 TEC]. That exclusive jurisdiction of the Court is confirmed by [Art. 344 TFEU, former Art. 292 TEC], by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein".[48] The system provided by the United Nations Convention on the Law of the Sea, namely in Art. 282, for the

[47]See Case C-459/03, *Commission v Ireland* [2006] ECR I-04635.

[48]See Case C-459/03, *Commission v Ireland* [2006] ECR I-04635, paragraph 123.

settlement of disputes is very different from the compliance mechanism set out by the Aarhus Convention. However, several of the conclusions drawn are useful to the finding of an answer to the questions asked *supra*.

When dealing with areas of competence transferred by the Member States to the Union, one is within the scope of EU law obligations. In that case, a dispute "between two Member States in regard to an alleged failure to comply with Community-law obligations resulting" from the international agreement in question, "is clearly covered by one of the methods of dispute settlement established by the EC Treaty within the terms of [Art. 344 TFEU, former Art. 292 TEC], namely the procedure set out in [Art. 259 TFEU, former Art. 227 TEC]".[49]

The ECJ concluded that the system for the resolution of disputes set out in the EU Treaties must in principle take precedence over that contained in mixed international agreements, as long as an EU law obligation is in question, because "an international agreement [...] cannot affect the exclusive jurisdiction of the Court in regard to the resolution of disputes between Member States concerning the interpretation and application of Community law".[50] This obligation devolving on Member States "to have recourse to the Community judicial system and to respect the Court's exclusive jurisdiction, which is a fundamental feature of that system, must be understood as a specific expression of Member States' more general duty of loyalty resulting from [Art. 4 (3) TEU, former Art. 10 TEC]".[51]

The Aarhus Convention is a mixed international agreement, which deals with several areas of competence transferred by the Member States to the Union – namely environmental protection. In this light, one can conclude that a Member State should not make a submission on the compliance of the EU or of another Member State, when subjects that can be considered EU law obligations are concerned, so as not to breach the EU Treaties. In fact, according to the ECJ case-law, the general duty of loyalty imposes that the system for the resolution of disputes set out in the EU Treaties must in principle take precedence over that contained in mixed international agreements.

17.4.2 The Communications from the Public on the Compliance of the EU

One of the triggers of the compliance mechanism of the Aarhus Convention is the possibility of members of the public to bring communications to the Committee on the compliance of a Party – which obviously includes the EU. This possibility means that any person, natural or legal, or any association, organization or group

[49]See Case C-459/03, *Commission v Ireland* [2006] ECR I-04635, paragraph 128.
[50]See Case C-459/03, *Commission v Ireland* [2006] ECR I-04635, paragraph 132.
[51]See Case C-459/03, *Commission v Ireland* [2006] ECR I-04635, paragraph 169.

can also make a communication to the Compliance Committee concerning EU's compliance with the Aarhus Convention, independently of being an EU citizen (see Art. 2 (4) and Art. 3 (9) of the Convention).

In this case, *prima facie*, an EU citizen has two ways to react to a non-compliance of the EU institutions with the Convention: (a) the judicial remedies set up by the EU Treaties (for instance, the review of the legality of acts or an action for failure to act);[52] or (b) the possibility to bring a communication to the Compliance Committee. One must, however, bear in mind the principle of exhaustion of domestic remedies before one can bring a communication to the Committee (see no. 21 of Decision I/7).

In fact, if the EU law's mechanisms of compliance review of the Member States with the Aarhus Convention's obligations fail, the person can make a communication to the Compliance Committee concerning the compliance not only of the Member State in question, but also of the EU, for its lack of enforcement. There have already been cases of communications from the public on the compliance of the EU with the Aarhus Convention.

17.4.2.1 The Kazokiskes Case

There has been a case in which a Lithuanian NGO (the Association Kazokiskes Community) submitted a communication to the Compliance Committee alleging non-compliance by the European Community with its obligations under Art. 6 (2) and (4) and Art. 9 (2) of the Convention.[53]

The NGO alleged the non-compliance because of:

(a) The Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC Directive) and Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment as amended by Council Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice.
(b) The decision of the European Commission to co-finance a landfill in Kazokiskes (Lithuania).
(c) The General failure on the part of the European Community (at the time) to correctly implement provisions of the Aarhus Convention into the Community law, in particular through the provisions of the IPPC Directive.

The communicant alleged non-compliance both because of failures to implement the Aarhus Convention's obligations through legislative measures and

[52]See Art. 263 TFEU and Art. 265 TFEU.

[53]The reference number of this communication is ACCC/C/2005/17.

regarding the decision-making administrative procedure concerning co-financing of establishment of the landfill (with provisions of Art. 6 of the Convention).

The Compliance Committee has already issued a report on this matter.[54] The Committee started by stating that, as the decision to fund the project in question was taken before the European Community ratified the Convention, it would not consider the allegation. The Committee has pointed out that the EU stated "that the Convention as an agreement concluded by the Council is binding on the Community's institutions and Member States and takes precedence over the legal acts adopted under the EC Treaty (secondary legislation), which also means that the Community law texts should be interpreted in accordance with such an agreement".[55]

As the communicant alleged a general failure of the EC to correctly implement Arts. 6 and 9 of the Convention, the Committee analyzed some issues of a general character with respect to the implementation of the Convention into Community law, however limited to the type of activity here in question, i.e. landfills.[56] In this analysis, the Committee noted that "the structure of the European Community and its legislation differs from those of all other Parties to the Convention in the sense that while relevant Community legislation has been adopted to ensure public participation in various cases of environmental decision-making, it is the duty of its Member States to implement Community directives".[57] This "distribution of power between the European Community and its Member States" justifies that the assessment of compliance of the EU must take a different approach from the usual one took by the Committee: "The question to be considered is whether the EIA Directive and IPPC Directive allow the Member States to make the relevant decisions for landfills without a proper notification and opportunities for participation".[58] The Committee concluded that it does not. Hence: "the Community legal framework in principle properly assures achievement of the respective goals of the Convention".[59]

However, the Committee has drawn attention to the need that the EU legal framework assures a complete implementation of the Convention because "most

[54]Report by the Compliance Committee on the Compliance by the European Community with its obligations under the Convention presented to the Third Meeting of the Parties to the Convention held from 11 to 13 June 2008 in Riga (URL available in http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_10_e.pdf – consulted the last time at 20 January 2010) – henceforward the Kazokiskes Report.

[55]See no. 35 of the Kazokiskes Report.

[56]See no. 36 of the Kazokiskes Report, which goes on stating that "This approach is in line with the Committee's understanding, set out in its first report to the Meeting of the Parties (ECE/MP.PP/2005/13, paragraph 13), that decision I/7 does not require the Committee to address all facts and/or allegations raised in a communication. This procedural decision by the Committee to focus on these issues does not prevent it from addressing other aspects of the case".

[57]See no. 44 of the Kazokiskes Report.

[58]See no. 45 of the Kazokiskes Report.

[59]See no. 46 of the Kazokiskes Report.

Member States seem to rely on Community law when drafting their national legislation aiming to implement international obligations stemming from a treaty to which the Community is also a Party" and because the provisions of the Directives "are being directly invoked in some legal acts concerning provision of Community funding [...]. Thus, in practice they may be applied directly by European Community institutions when monitoring compliance with the EIA Directive on the occasion of taking decisions concerning Community funding for certain activities".[60]

The Committee has also used the analysis of the "general division of powers between the European Community and its Member States" to justify that it could not conclude that the EU did not comply with the Convention, even though "both the EIA and the IPPC Directives lack provisions clearly requiring the public concerned to be provided with effective remedies, including injunctive relief".[61]

The report of the Compliance Committee concludes that it "is not convinced that the matters examined by it in response to the communication establish any failure by the European Community to comply with the provisions of the Convention when transposing them through the EIA and IPPC Directives". However, this conclusion is based on the assumption that the Directives are interpreted in conformity with the Convention.[62]

This Report is very important because one can draw several general points from it:

(a) The Compliance Committee, which is a regional body created by a non-EU legal order, analyses the compliance of the whole EU legal order with the obligations established in the Convention.
(b) The Committee recognizes that the EC was not a Party like the other Parties of the Convention – *it recognized the particularity of the EC legal order*.
(c) In that sense, the "distribution of power between the European Community and its Member States" matters in the test of compliance.
(d) However, as "most Member States seem to rely on Community law when drafting their national legislation aiming to implement international obligations stemming from a treaty to which the Community is also a Party",[63] there is a special responsibility of the EC to provide correct implementation of the Convention – it is as though the EC could be held accountable for not providing the Member States EC law instruments which assure complete implementation.
(e) The Committee concludes that the EC did not fail to comply with its obligations, but only if one accepts that the EU secondary law is interpreted in conformity with the Convention – *a principle of consistent interpretation of EU secondary law with the Convention is assumed*.

[60] See no. 49 of the Kazokiskes Report.
[61] See no. 57 of the Kazokiskes Report.
[62] See no. 61 of the Kazokiskes Report.
[63] See no. 49 of the Kazokiskes Report.

The legality of EU law – in the sense of its conformity with legal standards, as the Aarhus Convention is – is being accessed by a non-EU body – outside the scope of the EU courts.

17.4.2.2 The Bay of Vlora Case

Another case that was under consideration of the Committee was the Bay of Vlora case.[64] In this case, the communicant was an Albanian NGO (the Civic Alliance for the Protection of the Bay of Vlora), which alleged that the EC, through the European Investment Bank (EIB), was in non-compliance with the Aarhus Convention, more specifically: (a) With Art. 4 of the Convention, concerning the initial refusal of disclosure of certain information; (b) With Art. 6 of the Convention, concerning the decision-making process to finance the construction of a thermo-power plant in Vlora, Albania, without ensuring due public participation in the process. It was not disputed that the provisions of the Convention were applicable to the EIB.

The Committee has adopted its findings at its twenty-third meeting, held in Geneva, 31 March to 3 April 2009.[65] A thorough analysis has been made of the requests for information and the grounds given for refusing the requests. However, the information requested was eventually provided to the requester, so the Committee has pointed out that "it does not consider that in every instance where a public authority of a Party to the Convention makes an erroneous decision when implementing the requirements of Art. 4, this should lead the Committee to adopt a finding of non-compliance by the Party, provided that there are adequate review procedures".[66]

As for the compliance of the decision-making process with Art. 6 of the Convention, the Committee found that "the decisions in question are decisions concerning the financing of a specific project" and not to permit a proposed activity. In fact, the Committee states that the EIB "has no legal authority of its own to undertake its own EIA procedure on the territory of a State, as this would constitute an administrative act falling under the territorial sovereignty of the respective State. The Bank has to rely on the procedures undertaken by the responsible authorities of the State. The Committee considers that in general a decision of a financial institution to provide a loan or other financial support is legally not a decision to permit an activity, as is referred to in Art. 6 of the Convention. Moreover, it is to be

[64]The reference number of this communication is ACCC/C/2007/21.

[65]See Findings of the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2007/21 concerning compliance by the European Community with its obligations under the Convention (URL available in http://www.unece.org/env/pp/compliance/C2007-21/DRFcomments/findingsACCC-C-2007-21asadoptedCC-23_advance.doc – consulted the last time at 20 January 2010) – henceforward the Vlora Findings.

[66]See no. 33 of the Vlora Findings.

noted that the decisions on financial transactions were taken by EIB before the Convention entered into force for the European Community".[67]

In this case, one can see the Compliance Committee reviewing the compliance of a body of the EU, more specifically its decision-making procedures, with the Convention. The conclusion is curious – the EU institutions, bodies, offices and agencies, such as the EIB, have "no legal authority of its own to undertake its own EIA procedure on the territory of a State, as this would constitute an administrative act falling under the territorial sovereignty of the respective State", so they have "to rely on the procedures undertaken by the responsible authorities of the State". In this sense, apparently the EU can never be held accountable of non-compliance with Art. 6 obligations, as long as it is not responsible for issuing the decision to permit an activity – only the Member States can. It is another case of the distribution of power between the EU and its Member States which was mentioned in the last case.

The case is also curious because multilateral development banks, such as the EIB or the World Bank are usually considered reviewers of the countries' activities which are funded by them. However, in this case, the Aarhus Convention imposes obligations on them also – procedural obligations and obligations to give access to information – the compliance with which can (and was) reviewed by the Compliance Committee.

17.4.2.3 The "Individual Concern" Standing Criteria Case

Finally, there is also a communication under consideration by the Committee, in which several NGOs allege, amongst other things, that the existing "individual concern" standing criteria for individuals and NGOs to challenge decisions of EU institutions established in the jurisprudence of the European Courts does not fulfill the requirements of Art. 9, (2) to (5), of the Convention. They also allege that the Regulation (EC) no. 1367/2006 does not fulfill the Convention's requirements either because it does not grant a right of judicial review to individuals or entities such as regions and municipalities and because its scope is limited to appeals against administrative acts of individual nature.[68]

One of the main questions is the ECJ interpretation of one of the conditions laid down in Art. 259 (4) TFEU. for the access to the judicial review of legality of EU acts by private persons and the Plaumann case-law, described earlier, as a means to interpret of the expression "direct and individual concern".

The communicants allege that "in reasserting the Plaumann jurisprudence in all the cases concerning environmental matters, the European Courts firmly refuse to allow individuals and NGOs to challenge decisions of EC institutions", because

[67]See no. 36 of the Vlora Findings.

[68]The reference number of this communication is ACCC/C/2008/32.

public interests, such as the environment, are by definition diffuse and collective and cannot therefore fulfil the conditions set out by the Court in the "Plaumann case".

The communicants are concerned that the ECJ case-law will not evolve after Aarhus Convention entry into force – and gave as an example the "EEB and Stichting Natuur en Milieu case".[69]

The fact that the communication did include the compliance of the EU not only through administrative or legislative acts, but also on the case-law or the jurisprudence of the judiciary was supported by the communicants on an earlier decision of the Compliance Committee.[70] Actually, the Committee stated that the state of compliance of a Party with the Convention "is not limited to the wordings in legislation, but also includes jurisprudence of the Council of State itself",[71] and that that "an independent judiciary must operate within the boundaries of law, but in international law the judiciary branch is also perceived as a part of the state. In this regard, within the given powers, all branches of government should make an effort to bring about compliance with an international agreement. Should legislation be the primary means for bringing about compliance, the legislature would have to consider amending or adopting new laws to that extent. In parallel, however, the judiciary might have to carefully analyze its standards in the context of a Party's international obligation, and apply them accordingly".[72] The Committee concluded that "the jurisprudence of the Council of State appears too strict". Thus, if maintained by the Council of State, Belgium would fail to provide for access to justice as set out in Art. 9 (3) of the Convention. By failing to provide for effective remedies with respect to town planning permits and decisions on area plans, Belgium would then also fail to comply with Art. 9 (4).[73]

Another question that arose was related with the new wording of Art. 263 (4) TFEU, which gives standing to private citizens "against a regulatory act, which is of direct concern to them and does not entail implementing measures". This widens substantially the rules on standing because the applicant has no need to show individual concern. However, the communicants have expressed that the problem remains unresolved. First, because the provision only applies to actions brought after 1 December 2009. Second, because of the definition of "regulatory act", which does not include legislative acts [Art. 289 (3) TFEU]. Finally, because there seems

[69]See Case T-236/04 *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v Commission* [2005] ECR II-04945.

[70]See the Findings and recommendations of the Compliance Committee with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice (ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006), hereinafter Belgium Findings.

[71]See no. 37 of the Belgium Findings.

[72]See no. 42 of the Belgium Findings.

[73]See no. 46 of the Belgium Findings.

to be some degree of overlap here with the "sufficient interest" test, which also presumably remains relevant and is not affected by the new Art. 263 wording.

Article 263 retains the requirement for an applicant to show that a decision addressed to another person, or a regulatory act, is of "direct concern" to it. The Courts' case-law provides that for an applicant to be directly concerned by a measure: (1) that measure must directly affect the legal situation of the applicant; and (2) its implementation must be purely automatic and result from Community rules alone without the need for any intermediate measures. The problem remains unresolved.

The communication is still under appreciation by the Compliance Committee, so one cannot discuss the findings of the Committee. However, it is interesting to see that the public can use the communications to the Committee to question the case-law of the ECJ. In that sense, supported by the earlier findings of the Committee, the public can expect to influence the case-law of the European courts and the way in which they interpret the conditions for private persons to stand in the procedure of judicial review of legality of EU acts laid down in Art. 259 (4) TFEU.

The communications to the Committee could be seen, in this case, as a sort of *appeal* of the jurisprudence of the European Courts to a global reviewing body – not a true appeal of a certain case, but a general one, on the consistent interpretation of the ECJ. The case-law of the ECJ is being questioned before a reviewing body of another international organization, which can decide that it is illegal in the face of the Convention – forcing the Courts to decide in another way.

However, one will only be able to appreciate the full consequences of the communication after the decision of the Committee.

17.4.3 The Impact of the Procedure to Review Compliance of the EU to the Convention

The possibility of review of compliance with the Aarhus Convention by the EC – concerning public administrations, legislators and courts – is a development in the field of EU and global administrative law.

The emergence of the Compliance Committee as a global body, with limited powers of review, but with a vast scope of action, may have profound consequences in the relation between EU administrative law and global administrative law. The interconnections that can be traced just by the three communications that have been made are vast and could just be the tip of the iceberg.

The Compliance Committee recognized the special nature of the EU *vis-à-vis* the other Parties because of the specific "distribution of power between the European Community and its Member States". The EU is a special Party, because of its nature. However, it is still bound by the Convention and its obligations in full.

Several new relations emerge. The EU can be held accountable by the Compliance Committee (the review body of a global regime) for poor supervision of the

enforcement of the Convention obligations by the Member States. Member States can be held accountable for non-implementation of the Convention (a global regime), because its correct implementation has become an EU law obligation, by European Courts. The case-law of the ECJ can be questioned before a reviewing body of another organization which can decide that it is illegal in the face of the Convention, establishing the need for another case-law. The principle of consistent interpretation of national law with EU law is complemented by the principle of consistent interpretation of EU law with the Aarhus Convention. Links are formed amongst procedural rights of the citizens established in EU law and in the Convention.

The complexity of the situation is enhanced by the triangular relation established between national laws of the Member States which are Parties to the Convention, the EU law and the Convention. What would happen if EU law's obligations clashed with Convention's obligations? In this sense, the decisions still to come of the Compliance Committee, and the reaction of the EU institutions to those decisions, will be an important way to monitor the relations between the EU legal order and other international or global legal orders.

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Chapter 18
Private Implementation of Global and EU Administrative Law: The Case of Certification in the Climate Change Regime

Georgios Dimitropoulos

18.1 Introduction

Administrative law beyond the state requires a vast participation of private parties in its mechanisms.[1] Private parties in Global and European Administrative Law are mostly involved in rule-making. The same phenomenon also expands to the field of the implementation of administrative law beyond the state. One of the major private implementation mechanisms used by Global and European Administrative Law is the certification system. Climate change law is a field in which the certification system has been used extensively both on the Global and on the European administrative level.

An effort will be made in this article to reveal some of the basic aspects of the relation between Global and European Administrative Law. Its more general objective is to illustrate the similarity of objectives, procedures, structures, regulatory and legitimating tools and, more widely, the common logic behind administrative law beyond the state, be it Global or European Administrative Law.[2] The two new layers of administrative law are following on the same path of evolution and exhibit great similarities to each other. This is all the more so the case in regulatory fields such as climate change which serve genuinely supra-state public goods. They share common goals and objectives. In order to fulfill those goals, they resort to the same or similar regulatory structures, instruments and techniques. One of those techniques is that of private implementation, which leads to the rise of a novel private administration for the common implementation of the Global and the

[1] See generally Cassese (2007), p. 33 ff.; on the model of "private expertise" in administrative law, see Scholl (2005).

[2] On Global Administrative Law, see Kingsbury et al. (2005), p. 15 ff.; Cassese (2005), p. 663 ff.; see also Casini (2006), p. 1944 ff.; Cassese et al. (2008). On European Administrative Law see Schwarze (2005); von Danwitz (2008); Craig (2006); Chiti (2008).

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European Administrative Law. Most importantly, global, European and private administrations are to such a degree intertwined and interlinked, as to form a truly integrated administration.

The procedures of certification in climate change law are laid out in Sect. 18.2 of this article. Sect. 18.3 analyzes the emergence of a new type of administration: private administration as a common administrative structure of Global and European Administrative Law. Sect. 18.4 describes the regulatory tools used by Global and European institutions for the regulation of private administration and draws lessons from these legal tools for the elaboration of a common legitimacy model for administrative law beyond the state.

18.2 Certification in the Climate Change Regime

18.2.1 The Climate Change Regime

Climate change is one of the major concerns of both the international community and domestic politics. Thus, climate change law as part of environmental law has emerged as a new legal and research field. Climate change requires regulatory instruments in order to tackle global warming, a worldwide problem caused mainly by anthropogenic greenhouse gas emissions (GHGs). Because of the worldwide nature of the problem, climate change law is shaped mostly at the global level of the global multilevel system, whereas domestic, European and national, climate change law is essentially induced and predefined by its global counterpart: the climate protection solutions adopted at the global level are transposed to European and national climate change law.[3]

Emission reductions can be achieved anywhere in the world. The logic of the climate change regime is to achieve emission reductions in the most cost-efficient manner. The idea of a reduction anywhere in the world and in the most cost-efficient manner has led to the adoption of genuine mechanisms of Global and European Administrative Law, which differ from traditional administrative law instruments fundamentally. Market-oriented approaches are being transposed into the climate change regime. This has led to a central role for private actors in the climate change regime. Private actors are required to monitor and report the reductions achieved in the emissions coming from their activities and installations. All the existing and proposed programs designed for the reduction of emissions involve some kind of certification or verification of self-collected and self-reported data.[4] Such certification or verification can either be conducted by a public

[3]On climate change law, see Winkler (2006); on global climate change law, see Yamin and Depledge (2004); on European climate change law, see Schulze-Fielitz and Müller (2009).

[4]Rohleder (2006), p. 26. Monitoring, reporting and verification are usually referred to as MRV.

regulatory body or by a third party.[5] Most of the emissions reductions programs, and especially the supra-state programs, are designed to be implemented by a third-party organization.[6] These organizations are private firms specializing in the provision of services in the field of climate change.[7]

A climate change regime has thus been formed, which consists of three administrative levels: the global, the regional and the national; these levels are inextricably bound to each other and to private activities, exhibiting the features of a *global composite and integrated administration*.[8]

18.2.2 The Global Level

18.2.2.1 The Kyoto Protocol

The regulatory environment of the climate change regime at the global level is set out by the United Nations Framework Convention on Climate Change (UNFCCC)[9] and the Kyoto Protocol to the UNFCCC.[10] The Kyoto Protocol sets binding targets for industrialized countries and the European Union for reducing GHG emissions. These are an average 5% against 1990 levels over the 2008–2012 5-year period. While the UNFCCC encourages industrialized countries to stabilize GHG emissions, the Protocol binds them to do so. For the first time in the history of climate change law, Art. 3(1) KP includes Quantified Emission Limitation and Reduction Commitments (QELRC) for industrialized countries. Recognizing that developed countries are principally responsible for the current high levels of GHG emissions in the atmosphere as a result of intense industrial activity, the Protocol places a heavier burden on developed nations under the principle of "common but differentiated responsibilities".

Under the Protocol, countries must meet their targets primarily through national measures. However, the Kyoto Protocol (KP) offers them an additional means of meeting their targets by way of three market-based mechanisms or "flexibility mechanisms".[11] In order to help industrialized or Annex I countries[12] meet their

[5]Rohleder (2006), p. 26.

[6]Third-party certification is also a prerequisite of the design of a climate protection system, in order to guarantee financial flows into the system; cf. Stewart et al. (2009), p. 3.

[7]See *infra* Sect. 18.3.1.

[8]On composite administration, see Cassese (2000), p. 987 ff.; della Cananea (2003). On integrated administration, see Hofmann and Türk (2009b), p. 573 ff.; Hofmann and Türk (2007), p. 253 ff.; Hofmann and Türk (2009a); see also the further-reaching German concept of the "Europäischer Verwaltungsverbund": Schmidt-Aßmann and Schöndorf-Haubold (2005).

[9]ILM 31 (1992), 849.

[10]ILM 37 (1998), 22.

[11]Cf. Streck and Lin (2008), p. 409.

[12]Annex I refers to the Annex to the UNFCCC which lists the countries which agreed to assume binding QELRC.

emissions reduction commitments in a cost-effective manner, the Kyoto Protocol introduces the Joint Implementation (JI), the Clean Development Mechanism (CDM), and International Emissions Trading (IET), which are established under Arts. 6, 12 and 17 of the Kyoto Protocol, respectively. Whereas the International Emissions Trading is a cap-and-trade mechanism,[13] JI and CDM are project-based mechanisms. JI concerns projects among countries with binding reduction commitments under the Protocol, that is Annex I countries.[14]

This section will focus on the CDM.[15] The CDM is a project-based mechanism under which an Annex I Party may receive carbon credits, the so-called Certified Emission Reductions (CERs), for an investment in an emissions-reducing project in a developing country that has not undertaken binding commitments under the KP. Apart from the target of helping industrialized countries accomplish their goals under the KP, the CDM involves developing countries in the emissions reduction objective and promotes the know-how transfer to those countries; above all, it helps them pursue the overall objective of international environmental law, that of sustainable development.[16] The CDM has registered hundreds of projects and is anticipated to produce saleable CERs amounting to billions of CO_2-equivalent tonnes over 2008–2012, that is in the first commitment period of the KP, which can be counted towards meeting Kyoto targets.[17] The CDM allows countries to authorize both public- and private-sector entities to be project participants in CDM-projects.[18]

The CDM confirms the evolution of a Global Administrative Law, as, unlike traditional international law, it allows international institutions to make decisions that directly affect the rights and obligations of private entities, whereas these acts are administrative decisions.[19] Moreover, it operates on the basis of very elaborate procedures in the form of secondary global law.

18.2.2.2 The Certification Procedure

Article 12(3) KP refers to "project activities resulting in certified emission reductions". Articles 12(5) (c) and (8) make moreover reference to "certified project

[13]See Láncos (2008), p. 1625 ff.

[14]It concerns mainly investments of industrialized countries in countries in transition to market economy.

[15]The Kyoto Protocol is set to expire in 2012. Nonetheless, it is estimated that a CDM-type mechanism will also be included in the post-Kyoto regime; on the design of the post-Kyoto regime, see Keohane and Raustiala (2008).

[16]See Art. 12(2) KP; see the critical assertion of Voigt (2008), p. 15 ff.

[17]Examples of CDM projects include renewable energy such as wind parks and rural electrification projects using solar panels, energy efficiency such as the installation of more energy-efficient boilers, and reforestation projects.

[18]Article 12(9) KP; Streck and Lin (2008), at p. 419.

[19]Meijer (2007), p. 875.

activities". The Kyoto Protocol implies the certification of emission reductions and the certification of project activities. As the KP contains only general rules concerning market-based mechanisms, these mechanisms were actually designed by the "Marrakesh Accords",[20] a block of secondary global law adopted by the supreme body of the Kyoto Protocol, the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (COP/MOP).[21] The certification system is stipulated in the Marrakesh Accords as third-party certification, that is as a private certification system.[22] A CDM project cycle is subdivided into several phases, two of which involve third-party certification. The certification procedures are embedded into a CDM project cycle.

In order to qualify, projects have to go through a rigorous and public registration process. The prospective project participant has to complete the Project Design Document (PDD). Before bringing the projects for approval to a Designated National Authority, which has been nominated by the states, project participants have to submit the PDD for validation to a third-party organization, the Designated Operational Entity (DOE). Deviating from the terminology of Art. 12(6) and (8) KP, secondary global law speaks of "validation" instead of "certification" of project activities.[23] A DOE shall review the PDD and any supporting documentation to confirm that the requirements, as set out in Decision 17/CP.7, have been met.[24] This includes carrying out a substantive review of the baseline and monitoring methodology, and ensuring that the CDM project has an adequate monitoring plan to prevent the overstatement of emission reductions. The most important requirement is that of *additionality*.[25] A CDM project must provide emission reductions that are additional to what would otherwise have occurred. A CDM project activity is additional if anthropogenic emissions of GHG are reduced below those that would have occurred in the absence of the registered CDM project activity.[26] The project activity must demonstrate that GHG emissions were reduced against the baseline scenario, a representation of GHG emissions under normal circumstances.

[20]Decisions 16/CP.7 and 17/CP.7, UN Doc. FCCC/CP/2001/13/Add.2.

[21]See Art. 2(1) (b) KP.

[22]The KP, in conjunction with the Marrakesh Accords, establishes three global certification systems. JI makes provision for the certification of projects, whereas CDM makes provision for the certification of both projects and GHG emission reductions. In the context of the JI, there is no need for certification in the phase of the calculation of the GHG emission reductions, since both parties to the KP have an equal interest in a compliant production of Emission Reduction Units (ERUs). The following analysis focuses on the CDM certification procedures.

[23]See Annex para. 35 Decision17/CP.7: "Validation is the process of independent evaluation of a project activity by a designated operational entity against the requirements of the CDM as set out in decision 17/CP.7, the present annex and relevant decisions of the COP/MOP, on the basis of the project design document, as outlined in Appendix B below".

[24]See Annex para. 37 Decision 17/CP.7.

[25]Annex para. 37 (d) Decision 17/CP.7; see Kreuter-Kirchhof (2005), p. 233.

[26]Annex para. 43 Decision 17/CP.7; see also Art. 12(5) (b) KP.

Once the project has been validated, the DOE is to submit the project to the CDM Executive Board (EB) for *registration*. The request for registration takes the form of a validation report including the PDD, the written approval of the host Party, and an explanation of how it has taken due account of comments received.[27] Registration is the formal acceptance by the CDM EB of a validated project as a CDM project activity. It is also the prerequisite for verification, certification, and the issuance of Certified Emission Reduction credits related to that project activity.[28]

An operating CDM project has to calculate and monitor the emission reductions it actually generates. The project enters the *monitoring and reporting* phase. The monitoring and reporting of emission reductions are conducted by the project participant. The results of this monitoring are summarized in a report. The data is also to be certified.[29] For that purpose, monitoring and reporting is supplemented by *verification*. The project developer contracts an independent auditor to verify the emission reductions of the project. This is also a DOE, nonetheless different from the one that validated the project design.[30] Verification is the periodic independent review and *ex post* determination by the DOE of the monitored reductions in anthropogenic emissions of GHG that have occurred as a result of a registered CDM project activity during the verification period. If the data is verified, the DOE has to assure, to certify in a report that, during a specified time period, a project activity has indeed achieved the reductions in anthropogenic emissions of GHG as verified.[31]

The verification and certification reports of the verifying DOE constitute the basis on which the Executive Board issues CERs.[32] A CER is a tradable environmental commodity that can be sold on the international carbon markets[33] and can be counted towards meeting Kyoto targets.

18.2.2.3 The Certifying Body

The CDM involves a validation body and a verification body. In the KP, these are referred to as "operational entities", whereas Decision 17/CP.7 refers to them as

[27]Annex para. 40 (f) Decision 17/CP.7.

[28]Annex para. 36 Decision 17/CP.7.

[29]Cf. Annex para. 53 ff. Decision 17/CP.7.

[30]Annex para. 27 (e) Decision 17/CP.7.

[31]Annex para. 61 Decision 17/CP.7.

[32]See Annex para. 1 (b) Decision 17/CP.7: "A 'certified emission reduction' or 'CER' is a unit issued pursuant to Art. 12 and requirements thereunder, as well as the relevant provisions in these modalities and procedures, and is equal to one metric tonne of carbon dioxide equivalent, calculated using global warming potentials defined by decision 2/CP.3 or as subsequently revised in accordance with Article 5".

[33]Victor and House (2004), p. 56 ff. speak of a "new currency", which can be bought and sold on the global market. It can be traded, for example, in the EU Emissions Trading System; see *infra* Sect. 18.2.3.1.

"designated operational entities".[34] They are both certification bodies of the type described below.[35] The CDM project cycle involves certification bodies at two distinct phases of its implementation. A DOE validates proposed CDM project activities, and a different DOE verifies and certifies that reductions in anthropogenic emissions of GHG have actually taken place.[36]

According to *Stewart et al.*, four types of organizations come into play as possible operational entities:[37] international institutions, national institutions, the private sector or a combination of those organizations. The Marrakesh Accords, but also the previous practice of those activities, has led to the implementation of the Protocol by the private sector. All DOEs are private certification companies, often multinational firms, which specialize in the provision of environmental auditing services.[38] A DOE is selected and paid by the project participant to carry out the aforementioned tasks; the two parties are under a contractual arrangement with each other.[39] Thus, both the constitution and the operation of a DOE are based on private law and only partly on public international law.

An operational entity has to be a legal entity, that is either a domestic legal entity or an international organization, and to be able to provide documentation of this status.[40] As DOEs fulfill public tasks, Decision 17/CP.7 sets several organizational administrative law-type requirements for the operation of those bodies that reach up to the level of the guarantees for a government agency. These are mostly requirements of technical and financial competence, and neutrality and impartiality requirements as set out in Appendix A Decision 17/CP.7.

18.2.3 The European Level

18.2.3.1 EU ETS

The EU Member States have agreed to accomplish their international emission reduction commitments together, and have shared those commitments amongst

[34]Designation is an international administrative act delivered by the COP/MOP; see Art. 12(5) KP: "Emission reductions resulting from each project activity shall be certified by operational entities to be designated by the Conference of the Parties serving as the meeting of the Parties to this Protocol, on the basis of:. . ."; *infra* Sect. 18.4.1.1.

[35]*Infra* Sect. 18.3.1.

[36]Annex para. 27 (a) and (b) Decision 17/CP.7; Art. 12(5) KP.

[37]Stewart et al. (2000), p. 81 ff.

[38]Cf. Green (2008), p. 34: "Most DOEs are private companies, often large risk management firms, which specialize in functions such as standardization, certification, verification, inspection and testing. A small number are non-profit organizations".

[39]See Annex para. 37 Decision 17/CP.7; Annex para. 62 Decision 17/CP.7.

[40]Appendix para. 1 (a) Decision 17/CP.7.

themselves under the so-called "burden sharing agreement".[41] Directive 2003/87/EC[42] establishes a new EU-wide artificial market for GHG emissions allowances,[43] so as to help EU Member States comply with their international obligations. This system is not a credit-producing system but an emissions trading system. The EU ETS is the largest multi-country, multi-sector GHG emissions trading system worldwide, nonetheless restricted to the trading of carbon-dioxide (CO_2) emission reductions. It is a cap-and-trade system providing for free allowances assigned to operators from the overall emissions cap as determined in National Allocation Plans (NAP). Through the so-called "Linking Directive",[44] which amended the EU ETS directive, CERs were eligible for use in the first phase of the EU ETS (2005–2007), while both CDM and JI credits are eligible for the second phase (2008–2012).[45]

18.2.3.2 The Certification Procedure

Directive 2003/87 establishes a scheme for GHG-allowance trading within the EU in order to promote reductions of GHG emissions in a cost-effective and economically efficient manner.[46] By means of Directive 2003/87 and the Monitoring and Reporting Guidelines (MRG),[47] EU law introduces the certification system in order to guarantee those objectives.

Since 1 January 2005, no installation is allowed to carry out any of the activities listed in Annex I of Directive 2003/87 resulting in emissions specified in relation to that activity, unless its operator holds a *greenhouse gas emissions permit*.[48]

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[41]Decision 2002/358/EC (Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfillment of commitments thereunder OJ L 130/1, 15.05.2002). On the so-called "bubbles," see Art. 4 KP.

[42]Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275/32, 25.10.2003.

[43]EU ETS draws on the experience of relevant programs in the USA and especially the "U.S. SO_2 program"; cf. Rohleder (2006), at p. 27; on a comparison between the EU ETS on the one hand and relevant US American and Australian programs see also Kruger and Egenhofer (2006), p. 5 ff.; cf. also OECD (2004).

[44]Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms, OJ L 338/18, 13.11.2004.

[45]The EU ETS directive has been revised to include the aviation sector.

[46]See Art. 1 subpara. 1 of Directive 2003/87.

[47]Commission Decision of 18 July 2007 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council (notified under document number C(2007) 3416), (2007/589/EC).

[48]See Arts. 4, 5 and 6 of Directive 2003/87; see also the exclusions in Art. 27 of the same directive.

A national competent authority shall issue a GHG emissions permit granting authorization to emit greenhouse gases from all or part of an installation if it is satisfied that the operator is *capable of monitoring and reporting emissions*.[49] The Member States shall ensure that each operator of an installation or aircraft actually monitors and reports the emissions from that installation over each calendar year, or from the aircraft which it operates, to the competent authority after the end of that year.[50] Similar to the monitoring and reporting phase of the CDM, these actions are carried out by the operators, whereas they are complemented by independent third-party *verification* of self-reported emissions data.[51] The objective of the verification is to ensure that emissions have been monitored in accordance with a monitoring methodology and that reliable and correct emissions data will be reported pursuant to Art. 14(3) of Directive 2003/87.[52] Emissions from each activity listed in Annex I shall be subject to verification.[53] The certification procedure follows along the lines of the emission reductions verification of the CDM. The verification process shall take into consideration both the monitoring report and the monitoring during the preceding year. It shall address the reliability, credibility and accuracy of the monitoring systems and of the reported data and information relating to emissions.[54] In carrying out his or her task, the verifier shall conduct a site visit, when appropriate, to inspect the operation of meters and monitoring systems, conduct interviews, and collect sufficient information and evidence.[55] The verifier shall be given access to all sites and information in relation to the subject of the verification.[56] The verifier shall prepare a *report* on the validation process stating whether the monitoring report is satisfactory. This report shall specify all issues relevant to the work carried out. A statement that the monitoring report is satisfactory may be made if, in the verifier's opinion, the total emissions are not materially misstated.[57]

[49]Article 6(1) subpara. 1 of Directive 2003/87; on monitoring and reporting see Art. 14 of the same directive. By 31 December 2011, the Commission shall adopt a regulation for the monitoring and reporting of emissions. See also Annex IV Directive 2003/87 (Principles for Monitoring and Reporting Referred to in Art. 14(1)).

[50]Article 14(3) of Directive 2003/87.

[51]Article 15 of Directive 2003/87 contains provisions concerning verification and accreditation; see also Annex V RL 2003/87 and Annex I Section 10.4 MRG (see also Annex I Section 2 para. 5 (l): "'verification' means the activities carried out by a verifier to be able to provide a verification opinion as described in Art. 15 and Annex V of the Directive 2003/87/EC"); cf. Rohleder (2006), at p. 26.

[52]Annex I Section 10.4.1 subpara. 1 MRG; see also Kruger and Egenhofer (2006), at p. 5, 6 ff. At the same time, verification serves as an effective and reliable instrument on the part of the operator for the improvement of performance in monitoring and reporting emissions; cf. the principle "Improvement of performance in monitoring and reporting emissions"; Annex I Section 3 MRG.

[53]Annex V para. 1 of Directive 2003/87.

[54]Annex V para. 2 of Directive 2003/87.

[55]Annex I Section 10.4.2 (c) MRG.

[56]Annex V para. 4 of Directive 2003/87.

[57]Annex V para. 11 of Directive 2003/87.

18.2.3.3 The Certifying Body

In spite of the fact that the decentralized nature of the EU ETS leaves great leeway to the state for its implementation,[58] Directive 2003/87 and the MRG organize the certification system on a private basis, opting for the system of third-party verification.[59] Instead of the Member State administrations or the European administrative apparatus, the verification of the carbon-dioxide emission reductions is conducted by private certification companies. They have the last word concerning the report on the facilities. The third-party verifiers are set up under private law, whereas bodies set up under public law are not excluded. They partly overlap with the firms operating validation and verification operations under the Kyoto Protocol. They are also contracted by the operator under a private law contract.

Because of the fact that the private verifier substitutes for national administrations, Directive 2003/87 in conjunction with the MRG provides for minimum competency requirements for the verifier. They are laid down in Annex V para. 12 of Directive 2003/87 and resemble to the competence, neutrality and impartiality standards for the DOEs in the context of the CDM.[60]

18.3 The Rise of Private Administration and the Common Global and European Administrative Structure

18.3.1 The Certification Infrastructure: A Global Private Infrastructure

The certifying body plays a key role in the context of the climate change regime. The CDM, the JI, the EU ETS, as well as several other national and sub-national emissions trading and emission-reductions credit generating initiatives, make use of the same type of organizations for validation and verification activities.[61] They are in most cases private firms. The certification system was developed in the market, through industry and market self-regulation.[62] The state and the new forms of global and supranational public authority use the system in order to accomplish

[58]Cf. Art. 10 of Directive 2003/87; Kruger and Egenhofer (2006), at p. 5 ff.; Epiney (2002), p. 583.

[59]Kruger and Egenhofer (2006), at p. 7. *Cf.* also Art. 14(2) of Directive 2003/87 and Annex Section 1 para. 5 (m) MRG: "'verifier' means a competent, independent, accredited verification body or person with responsibility for performing and reporting on the verification process, in accordance with the detailed requirements established by the Member State pursuant to Annex V of the Directive 2003/87/EC".

[60]See also Annex I Section 10.4.2 subpara. 1 MRG.

[61]Green (2008), at p. 23.

[62]Benedetti (2004), p. 675; Scholl (2005), at p. 112.

their own regulatory objectives.[63] Its potential is being used immensely by European and Global Administrative law, which have given it an autonomous position in the contemporary administrative law arsenal. The certification mechanism is being promoted by the law beyond the state to several regulatory fields.[64] The EU has been a pioneer in that respect, as it was the first one to use the system for the public regulation of product safety.[65] Several products and product categories, from toys to medicinal products to construction products, require certification by a private party as a prerequisite in order to enter the European internal market.[66] The certification system replaces the system of administrative authorization, without leaving product safety to sheer market self-regulation without prior control.[67] This new approach to regulation has been adopted by European environmental law and especially by sustainability law. Some of the fields in which the certification system has been introduced are eco-management of organizations,[68] ecodesign of products[69] and organic production.[70]

Private certification mechanisms have also made their appearance at the global administrative level. Apart from the climate change regime, several certification mechanisms are to be found in the field of sustainable development. The absence of a general (international public law) framework concerning sustainable consumption and production has led to the institutionalization of several private governance regimes dealing with environmental and social certification and accreditation. As they perform regulatory functions and since they have developed elaborate internal management procedures resembling and partly mimicking the internal structures of international organizations, they have to be perceived as global administrative actors.[71] Such certification mechanisms extend in several fields of sustainable production.[72] The most developed field is that of forest certification and the most

[63]On its Anglo-Saxon origin cf. Di Fabio (1996), p. 65; Merten (2005), p. 152; Merten (2004), p. 1216.

[64]See Dimitropoulos (forthcoming).

[65]Röhl (2000); Röhl (2005), p. 153 ff.

[66]See generally Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, OJ L 218/82, 13.8.2008.

[67]On those three regulatory strategies, see Eifert (2006), Sect. 19.

[68]Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC, OJ L 342/1, 22.12.2009.

[69]Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast), OJ L 285/10, 31.10.2009.

[70]Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, OJ L 189/1, 20.7.2007.

[71]See Meidinger (2006), p. 47 ff.

[72]See Meidinger (2008), p. 259.

important actors in this field are the Forest Stewardship Council (FSC) and the Programme for the Endorsement of Forest Certification schemes (PEFC).[73] The most prominent private governance social regime is that of Social Accountability International (SAI). Its standard SA8000 is based on the intergovernmental standards of the International Labour Organization and provides a tool for their implementation through private certification.

It is the same type of private certifiers, and also, in some cases, interestingly enough, the same organizations, coming to implement those standards in the different regulatory regimes, fields and administrative levels. There are multinational certification companies providing certification services in most fields and at both global and European level, such as Bureau Veritas, TÜV, SGS, Lloyd's. Moreover, in all fields and levels they are in most cases set up under private law and they come to implement the respective rules and standards under a private law contract, which is signed between them and a natural or legal person wishing to fulfill its obligations under the respective regime, for example the project participant in the CDM and the operator in the EU ETS, and paying the costs of the service provided by them. Public certification organizations are not excluded but are an exception. They can be found in sensitive regulatory fields such as medical devices.

In addition, as we can observe in the context of the climate change regime, certification is carried out in more or less the same way. Similar certification procedures and similar organizational requirements apply to the certifiers. The main reason for this is the fact that public regulations follow along the lines of certification as implemented in the market and outside the public regulatory frameworks. This best practice is consolidated in global private ISO standards[74] and is copied by global, European and national regulators.

The certifiers have formed a worldwide network of auditors, validators and verifiers providing a unique combination of global and local expertise. They have created a global private *certification infrastructure*. This infrastructure, initially created to serve purely private purposes, is being increasingly used for public regulatory purposes, as it is adopted by public global, European and national governance systems.

18.3.2 Private Administration

18.3.2.1 Private Implementation in Administrative Law Beyond the State

The traditional concept of international law is based on state consent and state implementation of an international obligation. Moving on to Global Administrative

[73]Meidinger (2006), p. 47 ff.; Guéneau (2009), p. 14 ff.

[74]See also *infra* Sect. 18.4.1.3.

Law, the same rule applies. The system of implementation is organized in a decentralized way, with the states being as a rule responsible for the implementation of Global Administrative Law. Decentralized implementation is also the canon of European Administrative Law.[75]

The new fields of Global and European Administrative Law dealing with genuinely global problems such as climate change law cannot be left to the discretion of the states. This leads to the need to reallocate the relevant administrative functions and tasks to global and EU actors. On the one hand, in the regulatory fields described – at both global and European administrative levels – the private certification infrastructure implements the global and European climate change law in place of and substituting national administrations. On the other hand, the function of implementation is not being passed on to administrative organs of the respective level beyond the state. The partial failure of the model of international bureaucracy has led to the rise of new forms of global administration such as transnational networks and private bodies.[76] Whereas transnational networks are mainly designed as rule-making bodies, private bodies can be either rule-making or rule-implementing authorities. CDM, JI and EU ETS feature a prominent role for non-state actors. KP and EU ETS opt for a *sui generis deconcentrated administrative system,*[77] avoiding the further bureaucratization of global and European bodies.[78] The main objective is to enhance the overall efficiency of the system.[79]

The implementation of the relevant administrative law is "delegated" to private actors. Such "delegation" is also to be found at the level of rule-making in the context of standardization, where ISO and IEC at the global level, and CEN and CENELEC at the European level, set out rules and standards for several fields of everyday life. This delegation is not a delegation in the sense of national administrative law or in the sense of the delegation of public authority as is to be found in other cases such as at the global level with the "NGO execution".[80] We are faced with a new phenomenon, a new form of implementation of Global and European Administrative Law. Instead of the national, supranational and international public administrations, a new type of *private implementation* emerges for the implementation of the climate change regime and other regulatory regimes.

[75]Schmidt-Aßmann (2004), Chapter 7, marginal no. 7 ff.

[76]See Battini (2008), p. 188 ff.

[77]Dimitropoulos (forthcoming) Chapter 3 A.II.4.c.; see generally, on decentralization and deconcentration on the international plane, Tietje (2001), p. 136 ff.; Battini (2008), p. 181 ff.

[78]The climate change regime could have organized centralized systems with the CDM EB and the European Commission being responsible for the authorization of projects and data.

[79]Cf. also Rohleder (2006), at p. 28.

[80]See, e.g., UNDP (2001), p. 12.

18.3.2.2 Administratization of the Private Certification Infrastructure

Validation is comparable to an authorization, the only difference being its implementation by a private certification body.[81] In general, certification replaces the traditional authorization schemes without creating international authorization schemes. Certification of products, services, projects, emission reductions, etc., is a functional equivalent to a state approval and the certification bodies are functional equivalents to state authorities.

Except for the functional equivalence, certification procedures are similar to procedures stipulated in national Administrative Procedure Acts. A proceduralization of the private activity is set in place in order to counter-balance the abdication of the public execution of climate change law rules. Moreover, several disclosure and other transparency requirements apply to them.[82] In addition, internal organizational requirements are set in place in order to achieve the same goal. These requirements resemble standards required for public authorities and governmental agencies. In addition, certification bodies have an obligation, by virtue of the respective legal texts, to foster a very close cooperation with public authorities.[83]

Functional equivalence, administrative law-type procedures, internal organizational requirements and administrative cooperation are indicative of the rise of a new phenomenon in administrative law. It is the phenomenon of "administratization"[84] of the private sphere and of private law. Administratization is part of a wider trend towards the rise of private authority in global and European governance.[85] At those levels, private parties such as NGOs and private firms break the frame in which they traditionally exist and operate and take over regulatory roles and administrative functions. *The evolving global certification infrastructure is deployed as a global and European administrative structure*. The certification infrastructure is also administratized.

Administratization leads only to a partial publification of private administration. This new type of administration retains its private nature. Even though the combination of the word "private" with the word "administration" sounds like a paradox, it is the result of a blurring of the divide between public and private law, especially in the domain beyond the state.[86] Private administration lies between the spheres of state and society, between public and private, between national and supra-national. It does not become part of the global or European public administration, but retains its autonomy. Indications point to the direction of the evolution of a *tertium*

[81]Cf. Ehrmann (2006), p. 412.

[82]*Infra* Sect. 18.4.3.

[83]Cf., e.g., Annex para. 38 Decision 17/CP.7.

[84]See Cassese (2010), p. 178, 189.

[85]On the vast literature concerning the rise of private authority/power in global governance, see Green (2010); Cashore et al. (2004); Mattli and Büthe (2005); Bruce Hall and Biersteker (2002). On the European level see Chalmers (2006), p. 59 ff.

[86]See Cassese (2005).

between public administration and private activity. The proof of this statement is the fact that private administration does not apply public law, but a mix of public and private law on the one hand, and global, supranational and national law on the other. Administrative law is no longer monopolized by public law![87]

18.3.3 Harmonized Implementation Through a Common Administrative Structure

Global and European climate change law share, in the context of a more general climate change regime, a *common objective*: they need to strike a balance between global climate protection and cost-efficiency. As the common challenge for all systems is to develop certification and verification mechanisms and processes that are credible and efficient, common principles and processes shall apply to all those structures.[88] The instrumentalization of the certification infrastructure as private administration is novel for the global and the European level of the climate change regime. In their wish to circumvent national administrations and not take on the responsibility of implementation, both Global and European Administrative Law use the same implementation technique. Independent certification, either within or outside of a regulated reporting structure, provides credibility and a level of assurance in the validity of the reported data.

Private certifiers implementing climate change law are common to both the global and the European level and private administration is common to both Global and to European administrative law. Private agents very often use a single verifier in order to comply with obligations under both the KP and the EU ETS. The best way to achieve consistent, coherent and homogeneous implementation of climate change law is through the deployment of the infrastructure of certification bodies. The genuinely supra-state purposes of the KP and the EU ETS can be better achieved through private implementation. As a result, private administration grows as a common administrative structure for both Global and for European Administration. The global certification infrastructure is deployed as a global and European administrative structure at the same time. The use of private administration

[87]Cassese (2010), at p. 174: "Lastly, it would be odd to examine public law now, when the boundaries between public and private have proved to be so unstable. This is a consequence of, for example, the expansion and then reduction of the public sphere; the increasing penetration of public law into the private sphere; and the conceptualization of administrative activity. This movement between the two poles, the public and the private, is characteristic of administrative law (although not of all public law), to the extent that both public and private are essential parts thereof. It can no longer be said – as it once could – that administrative law is a branch of public law. Focusing attention on public law thus runs the risk of losing sight of one of the characteristics features of the public arena today: the mixture of public and private elements".

[88]Cf. Rohleder (2006), at p. 26.

leads to a harmonized implementation of administrative law beyond the state, be it Global or European Administrative Law.

18.4 The Regulation of Private Administration

In its largest sense, regulation can be divided into self-regulation and government or public regulation.[89] Because of the private nature of the administration evolving beyond and without the state, public administration develops control instruments for the regulation of the certification infrastructure (see Sects. 18.4.1.1 and 18.4.1.2). Public regulation can be either regulation by the state or regulation by public authorities beyond the state such as the CDM EB and the European Commission. Both Global and European Administrative Law possess the same tools to regulate the common private administration. Public regulation is external to the actors involved. In the context of the certification infrastructure external regulation is achieved not only through public regulation but also through external *private* regulators (see Sect. 18.4.1.3). Much of the regulation of the certification bodies is also achieved through mechanisms of self-regulation (see Sect. 18.4.2). In the administrative space beyond the state, legal regulation leads to a common legitimating model for the private global and European administrative structure (see Sect. 18.4.3).

18.4.1 External Regulation

18.4.1.1 Incorporation

As stated above, certification has evolved through a market process. Recognizing the advantages of private self-regulation, public power has adopted the certification system utilizing it for the fulfillment of several public goals. Incorporation as a form of regulation is also to be found in the climate change regime. Both the KP and the EU ETS use the private certifiers already existent on the market in order to better fulfill the goals of climate protection. The act of incorporating the certification infrastructure into the international climate change regime is an international administrative act, and it is called *"designation"*.[90] The certification bodies, or operational entities in KP parlance, are designated as Designated Operational Entities (DOEs) by the COP/MOP after having been accredited by the CDM

[89]The latter can be further subdivided into the administrative system of direct public control and the judicially enforced system of private rights; see Posner (2007), Sect. 13.1, at p. 389.

[90]See Annex para. 3 (c) Decision 17/CP.7.

EB.[91] The act of incorporation into European climate change law is that of accreditation.[92]

The incorporation of the certification infrastructure in the context of the climate change regime, on both the global and the European level, leads to the adoption of the *system of regulated self-regulation* in that context.[93] This is an idea stemming from European product safety law and being passed over to global and European climate change law. On the one hand, the KP and the EU ETS use market forces to achieve the desired effects.[94] On the other hand, the overall system is organized on the basis of public international and European law and on secondary global and European law. The private activity is framed by Global and European public law. After having been incorporated into the public regime, certification bodies are partly subject to the regulation of the respective global, supranational and national laws.[95]

18.4.1.2 Accreditation

The major instrument for the regulation of the certification infrastructure is accreditation. Accreditation is an act similar to certification with the function of ensuring the competence of the certifier. Accreditation has evolved as an instrument parallel to certification. Even though it was an instrument of private self-regulation in its origins, it has evolved into a public law instrument for controlling private certification activities. Accreditation is now almost exclusively reserved to public administration.[96] In the context of GAL and EAL, one has to depart from a broad concept of public administration. The body responsible for the accreditation of operational entities at the global level is the CDM EB,[97] which forms part of the international bureaucracy of the KP. DOEs must apply for accreditation to the EB,[98] and they

[91]On accreditation see *infra* Sect. 18.4.1.2

[92]See *infra* Sect. 18.4.1.2.

[93]See Hoffmann-Riem (1996), p. 300 ff.; cf. also Trute (1996), p. 950 ff.

[94]On the KP see Kreuter-Kirchhof (2005), p. 1554, 1556.

[95]One has to keep in mind that certifiers are based in the territory of a state.

[96]See ISO/IEC 17011/2005-02, Introduction, Section 3.2: "The authority of an accreditation body is generally derived from government". On private standardization as a form of external regulation of the certification bodies see *infra* Sect. 4.1.3.

[97]Annex para. 5 (f), 20 (a) Decision 17/CP.7. The CDM EB is further responsible for making recommendations to the COP/MOP for the designation of operational entities, in accordance with Art. 12(5) KP. The same applies to all three certification procedures in the context of the Kyoto Protocol.

[98]Appendix A Decision 17/CP.7 in conjunction with secondary global law of the CDM EB lays down the accreditation procedure; see "Procedure for Accrediting Operational Entities by the Executive Board of the Clean Development Mechanism (CDM)" (Version 10.1), EB 56 Report Annex 2, 1; "CDM Accreditation Standard for Operational Entities" (Version 02), CDM, EB 56 Report Annex 1, 1.

need to be accredited for both validation and verification. DOEs are only permitted to validate or verify projects within those sectoral scopes for which they are accredited.

Centralized global accreditation is, nonetheless, not very common in the context of certification. In most regulatory fields, accreditation is carried out in a decentralized way by national accreditation authorities. However, the global administrative level of the climate change regime does not trust the national administrative apparatus in order to perform the task of controlling the controllers.[99] On the EU level, because of the enhanced trust among the European public administrations, accreditation is performed in a decentralized way by the national accreditation authorities, established under Regulation 765/2008/EC.[100] The scope of this Regulation is not restricted to product safety law but is intended to cover all accreditation tasks in the EU. In addition, and long before the adoption of the Regulation, a guidance document prepared by the European Co-operation for Accreditation details a harmonized approach to the accreditation of verification bodies under the EU ETS Directive and the MRG.[101] Accreditation is mandatory for all certification bodies wishing to become verification bodies under the EU ETS and the MRG. In the context of the EU ETS, accreditation also plays the role of incorporation of the certifier into the European climate change regime.

Accreditation is the typical instrument for the regulation of the certification infrastructure provided by global and European law. They moreover possess complementary instruments. Certifiers need to be periodically re-accredited.[102] If the accreditation body ascertains that a certifier is no longer competent to carry out a specific activity or has committed a serious breach of its obligations, the former shall take all appropriate measures to restrict, suspend or withdraw the accreditation certificate.[103]

[99]On control of the controller see Eifert (2006), at Sect. 19, marginal no. 92 ff.; on trust in public law see Schmidt-Aßmann and Dimitropoulos (2011).

[100]Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ L 218/30, 13.8.2008. Directive 2003/87 needs to be amended in order to be adapted to the new accreditation Regulation; see also Annex I Section 10.4.1 subpara. 1 MRG.

[101]European Co-operation for Accreditation, EA Guidance for Recognition of Verification Bodies under EU ETS Directive, EA-6/03: 2010 Mandatory Document, January 2010 rev03.

[102]Every 3 years under global law (see Annex para. 5 (f) (i), para. 20 (d) Decision 17/CP.7.) and every 5 years under EU law.

[103]See Annex para. 5 (f) (i) Decision 17/CP.7; Art. 5(4) Regulation 765/2008. No accreditation has so far been revoked in the context of the CDM; cf. Green (2008), at p. 42.

18.4.1.3 Private External Regulation

The certification procedure and organizational requirements for certification bodies are to be found in the CDM and in Directive 2003/87. These norms show great similarity to each other. Except for the congruence of tasks and goals, this similarity can also be explained in another way. The global and European juridification of the certification norms of the climate change regime and the certification infrastructure as a whole draw from a third source. They are prescribed to the public law sources as non-binding standards by the International Organization for Standardization (ISO). This organization has issued a set of standards, the ISO/IEC 17000 series, for the operation of certification,[104] then adopted at the European level by *Comité Europeén de Normalisation* (CEN) and *Comité Europeén de Normalisation Electrotechnique* (CENELEC).

Even though those standards have no binding force, in practice they are followed by certification bodies and are adopted in the normative texts of global and European law, and thus they play a major role in steering the certification infrastructure. The regulative effect of private standardization is probably even more important than that of public regulation. As a result, ISO and CEN emerge as private regulators of the certification infrastructure.

18.4.2 Self-Regulation

Even though private certification bodies are competitors on the global and regional markets for certifiers, they build *groups of certification bodies*.[105] Such groups have been formed on both the global and the regional level. On the global level, certification bodies have created the Independent International Organization for Certification (IIOC).[106] On the European level, the European Federation of Associations of Certification Bodies (EFAC) is a cross-sectoral coalition of certification bodies that links membership to the requirement of accreditation. It does not gather the certification bodies themselves, only national associations of certification bodies. This gives the certification structure the form of a pyramid.

In addition, there are sector-specific groupings of certification bodies, such as the International Personnel Certification Association (IPC) and the International Certification Network (IQNet Association). In the context of GHG emission reductions certification, there is the global grouping International Emissions

[104]See also, specifically for the climate change regime, ISO 14064 and ISO 14065; see Boileau (2007a); Boileau (2007b), p. 6 ff.

[105]See Röhl and Schreiber (2006), 44 ff.

[106]See also the International Register of Certified Auditors (IRCA); for more information, see http://www.irca.org/ (last visited 30.9.2010).

Trading Association (IETA).[107] Participation in that group is not restricted to certification bodies; instead, it also gathers other interested parties, such as CDM project participants.

The building of groups reveals the administrative nature of the certification activities. In terms of GAL, the groups of certification bodies are transnational regulatory networks.[108] They provide a forum for coordination and cooperation for both certifiers and for other interests involved in certification. Their overall aim is to harmonize certification and verification worldwide by harmonizing its implementation and practice. These groups have developed several self-regulatory instruments. For example, they publish manuals with rules and standards concerning the operation of certification.[109] One of the major instruments of self-regulation is the *peer reviews* of certification bodies. Certifiers undertake peer assessments for each other in order to guarantee the equivalence of the bodies and to harmonize the implementation of certification.

18.4.3 The Legitimacy of Private Administration

Beyond the positive factors leading to the adoption of private administration by global and European administration, it is very easy to identify in this novel type of administration a legitimacy gap. This has a double source. The legitimacy problems of its private nature are additional to the legitimacy problems of its global origin. The private nature of the certification infrastructure leads to a lack of electoral legitimacy as in the case of the normally public nature of administration. There is no connection to a democratic legitimating subject such as a demos. Even the model of international legitimacy cannot be applied. The certification infrastructure is unaccountable in terms of democratic legitimacy. Its legitimacy needs to be traced to other sources. Traditional models of legitimacy fail to provide an answer. The development of a common administration for the GAL and EAL makes a *common legitimating model* for the global and the European administration indispensable.

Administrative law itself can provide the answer to the question of administrative legitimacy. The mechanisms of administrative law are capable of developing a model of pure administrative legitimacy, in contrast to the traditional transmission-belt model, which has a political background, as it is based on the chain delegations running from the people, through the parliament and government to the administration. Modern administrative law develops new legitimating forms and instruments, in order to provide legitimacy in milieus where constitutional and electoral legitimacy are completely absent. Hans Christian Röhl has tried to develop such an

[107]For more information see http://www.ieta.org (last visited 30.9.2010).

[108]On this type of global administration, see Kingsbury et al. (2005), at p. 21.

[109]See, e.g., IETA, *CDM Validation and Verification Manual* (VVM). The VVM was later on adopted by the CDM Executive Board.

administrative legitimacy model for new administrative structures such as the certification infrastructure. With a view to the legitimacy of the notified certification bodies in product safety law, Röhl tries to develop a new legitimacy model based on the idea of trust and confidence among the involved administrative actors.[110]

In my view, administrative legitimacy in the global and European domain is and ought to be provided by administrative *legal* instruments.[111] The rule-of-law principle is very well established at the EU level.[112] Moreover, as a result of the juridification of the global legal order, a global rule of law has emerged as a principle in this order.[113] The idea behind an administrative legitimacy based on the rule of law is that the rule of law at the levels beyond the state absorbs some of the functions of the democratic principle transforming it into a meta-principle.[114] This meta-principle plays not only the role of safeguarding legality but also the role of compensating for the lack of a global democracy. Especially at the levels beyond the state the distinction between the formal and the substantive elements of the rule of law acquires a vital role.[115]

18.4.3.1 Formal Legitimacy

The formal side of the global and European rule of law achieves formal legitimacy for private administration. Formal legitimacy is similar to and partly broader than "legitimacy through procedure" (*Legitimation durch Verfahren*).[116] It is achieved through the mere existence of law in spaces where law was typically lacking, as it is the case in the global and European administrative space and in the domain of the private sphere. Formal legitimacy is very important especially for the global level, where there is no form of global democracy.[117]

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[110]See Röhl (2000), at p. 44 ff. (see *ebd*., 51: "Modell einer an Vertrauensstrukturen orientierten demokratischen Legitimation"); Röhl (2005), p. 172 ff.; Röhl (2006), p. 1078 ff.; see also Röhl (1996), p. 499 ff. Cf. also Sydow (2004), p. 248 ff.; Trute (2006), Sect. 6 marginal no. 115 ff.; Franzius (2009), p. 121 ff.; see also on the global level Eifert (2008), p. 329 ff.

[111]That is also why legitimacy models based on the idea of the "output" shall be rejected.

[112]See Art. 2 TEU.

[113]See Cassese (2006a), p. 36 ff.; see also Cassese (2006b), p. 9: "One of the most astonishing features of the global legal order is the speed with which it has developed principles in order to discipline global administrative proceedings by the rule of law".

[114]See Dimitropoulos (2008); see in more detail Dimitropoulos (forthcoming), at Chapter 3 C.II.

[115]On the formal and substantive notions of the rule of law see Grimm (2009), p. 598; Craig (1997), p. 467 ff.; cf. also Schmidt-Aßmann (2004), at Chapter 2 marginal no. 2; Harlow (2006), p. 197 ff.

[116]Luhmann (1969).

[117]See, e.g., Kingsbury et al. (2005), at p. 16 ff.: "In order to boost their legitimacy and effectiveness, a number of hybrid public-private and purely private standard setting and other regulatory bodies have also begun to adopt administrative law decision making procedures and practices";

It is achieved mainly through the institutionalization of *procedures*, *procedural rights* and *internal control mechanisms* in the global and in the European legal orders. Legal rules are being increasingly created in those orders, filling in the preexistent normative vacuum. DOEs shall comply with global primary, secondary and tertiary law[118] and with the applicable laws of the Parties hosting CDM project activities when carrying out their functions.[119] For the operation of certification, and despite its private nature, there are several procedural rules at both the global and the European level, as described in the relevant sections of the article.[120] German legal theory speaks of a *private procedure* and of a *private procedural law*.[121] The institutionalization of procedures is coupled with the provision of procedural rights.[122] They are traditional administrative law rights, such as the duty to give reasons, the right to be heard and access to documents, giving affected parties the right to take part in the procedure. For example, the DOE shall inform project participants of its determination on the validation of the project activity.[123] It shall also explain the reasons for non-acceptance if the project activity, as documented, is deemed not to fulfill the requirements for validation.[124] Among the major instruments of internal control are *reports* and *reviews*. Especially in the field of climate change law, these are among the most important regulatory and legitimating instruments of the administrations.[125] Moreover, review mechanisms play a very important role as internal control mechanisms. Registration by the executive board shall be deemed final 8 weeks after the date of receipt by the executive board of the request for registration, unless a Party involved in the project activity or at least three members of the executive board request a review of the proposed CDM project activity.[126] A similar review mechanism is provided for during the phase of the issuance of CERs.[127]

Cassese (2006c), p. 60 ff.; Cassese (2008), p. 238: "However, judicial respect for the *règle de droit* confers a legitimation upon global bodies that makes up for their democratic insufficiency"; Schmidt-Aßmann (2006a), p. 263 (concerning mostly the informal "legislative structures" such as the Basel Committee on Banking Supervision, ISO etc.); Zaring (2004), p. 24 (concerning the Basel Committee); Grant and Keohane (2004), p. 14: "Hence claims to legitimacy at the global level depend on inclusiveness of state participation and on general norms of fairness and process".

[118]Annex para. 26 Decision17/CP.7.

[119]Annex para. 27 (c) Decision17/CP.7.

[120]*Supra* Sects. 18.2.2.2 and 18.3.2.

[121]Hoffmann-Riem (1994), p. 625; Schmidt-Aßmann (1996), p. 38 ff.; see also Appel (2008), Sect. 32, p. 801 ff.

[122]See, e.g., Annex para. 21, 23 Decision 17/CP.7.

[123]Annex para. 40 (e) Decision 17/CP.7.

[124]Annex para. 40 (e) (ii) Decision 17/CP.7.

[125]See, for example, Art. 21 of Directive 2003/87; see also the annual activity reporting obligation of the DOEs to the EB (Annex nr. 27 (g) Decision17/CP.7).

[126]Annex para. 41 Decision17/CP.7.

[127]Annex para. 65 Decision 17/CP.7.

18.4.3.2 Substantive Legitimacy

The substantive side of the global and European rule of law achieves substantive legitimacy for private administration. Substantive legitimacy is achieved through the institutionalization of good governance mechanisms in the work of the global, European and private administration. Good governance values such as *transparency*, *participation* and *accountability* create the necessary link between the administration and the persons being governed. This link is achieved through the involvement of the civil society, of the general public, in the work of the administration.[128] The best-developed good governance mechanism is transparency. All the documentation of the administrative organs of the climate change regime, including certifiers, is made public and is also available on their websites. For example, according to Art. 15a of Directive 2003/87, Member States and the European Commission ensure that all decisions and reports relating to the quantity and allocation of allowances and to the monitoring, reporting and verification of emissions are immediately disclosed in an orderly manner ensuring non-discriminatory access.[129] The same applies, and even to a greater extent, to the documents of the CDM, including validation, verification and certification reports.[130] Global law goes in some aspects even further than European law in that it provides also for open meetings for the bodies.[131] As to participation, according to Annex nr. 37 b) Decision 17/CP.7, project participants have to invite comments by local stakeholders, provide a summary of the comments received, and send a report to the DOE on how due account was taken of any comments.[132] The EU Treaty, as amended by the Treaty of Lisbon, includes similar provisions concerning participation that could be used in the future in order to further "democratize" private administration.[133] These are mostly forms of deliberative participation, introducing elements of deliberative democracy into the global and the European administration. According to Annex para. 26 Decision 17/CP.7 DOEs shall be accountable to the COP/MOP through the EB. Nonetheless, accountability mechanisms towards the general public are generally lacking.[134] In the context of the CDM, this role can

[128]A commonly used term is that of the "stakeholder"; see Annex para. 1 (e) Decision17/CP.7: "'Stakeholders' means the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity"; see also Art. 3 (i) of Directive 2003/87: "'the public' means one or more persons and, in accordance with national legislation or practice, associations, organisations or groups of persons".

[129]See also Art. 17 of Directive 2003/87. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of the applicable laws, regulations or administrative provisions.

[130]See, e.g., Annex para. 5 (i), (j), (m), para. 40 (b), (c) Decision 17/CP.7.

[131]See, e.g., Annex para. 16 Decision 17/CP.7.

[132]See also Eddy (2005), p. 70 ff.

[133]Article 10(3), 11(2), (3) TEU.

[134]On the accountability mechanisms in the context of the CDM and especially in relation to the DOEs see Green (2008), at p. 38 ff.

be played by the national courts, which guarantee access to the general public.[135] The same applies in the field of the European climate change regime with the additional guarantee of the European Court of Justice. The global level is in need of a fortification of its accountability mechanisms in the form of, for example an Inspection Panel similar to the World Bank Inspection Panel or an Ombudsman, for example the Compliance Advisor/Ombudsman of the World Bank Group.[136]

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