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I. STATES AND GLOBAL ADMINISTRATIONS IN CONTEXT

I.1 Beyond the State: The Emergence of Global Administration

Lorenzo Casini

1. *Background: The Irresistible Rise of International Organizations*

The proliferation and differentiation of international organizations (IOs) and of their activities have been viewed as a challenge (and opportunity) for international law since the 1860s or earlier. In the late 19th and early 20th centuries many of these issues were considered part of an "international law of administration" (Martens, 1883), or "international administrative law" (Kazanski, 1902; Reinsch, 1909; Borsi, 1912; Battini, 2003; Cossalter, 2010), and a large subset of the IOs existing at the time were analysed under the label of "international administrative unions".

> The qualification of an institution as international administrative union was originally meant to emphasize its non-political (in the meaning of technical/administrative) nature and that it was merely exercising co-ordinating functions on administrative matters. The reference to administrative matters means that the institutions in question deal with matters that are dealt with by the administration on the national level. Another distinguishing factor is that many of the international administrative unions were initiated by private groups or national administrative agencies. For example, the World Tourism Organization (UNWTO) was initially established through official tourist publicity organizations. Given the predominant approach of the 19th and the early 20th centuries concerning subjects of international law it was commonly held that international administrative unions were not to be considered as subjects of international law. (Wolfrum, 1995)

In spite of this, however,

> International organizations (or IOs) – intergovernmental entities established by treaty, usually composed of permanent secretariats, plenary assemblies involving all member states, and executive organs with more limited participation – are a twentieth-century phenomenon having little in common with earlier forms of institutionalized cooperation, including those in the ancient world." (Alvarez, 2006, 324)

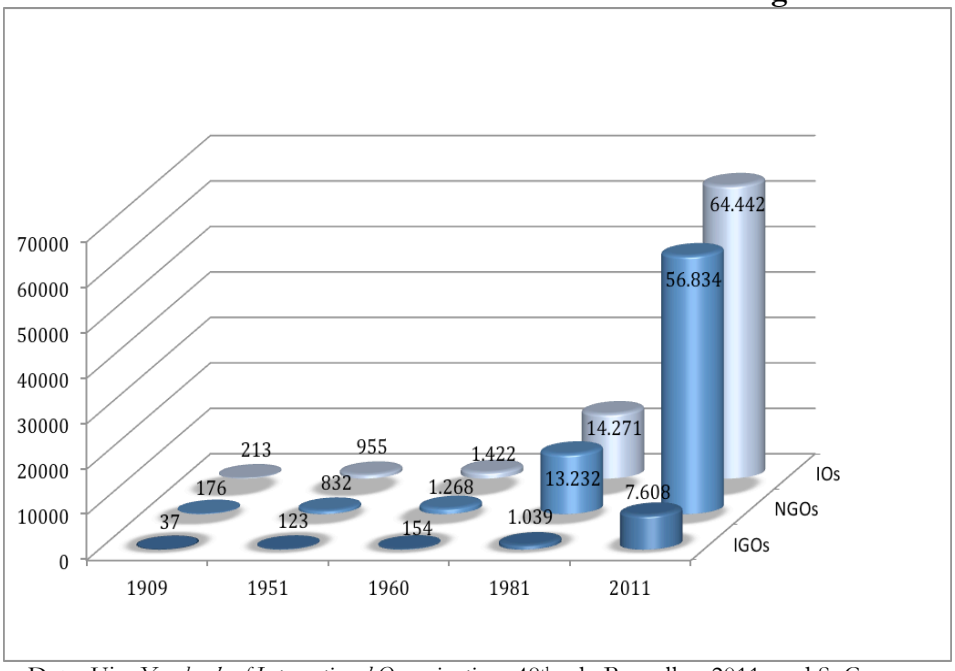
It was only after the Second World War, therefore, that IOs began growing significantly in number, and that a field of international institutional law (or the law of international organizations) developed, typically oriented toward forms of cooperation that go beyond the traditional, austere "law of co-existence" (Friedmann, 1964); although standard international relations theory does suggest that IOs and other international institutions can have significance even under realist conditions of inter-state relations (Klabbers, 2009).

> It would seem that international organizations are becoming increasingly interesting as topics for academic study, and that together with the study of international organization (or global governance, to use a more fashionable term), the study of the law of international organizations too is increasingly recognized as a discipline worth engaging in. This is largely so for two reasons. One is that the rules and regulations developed by or under auspices of international organizations are becoming increasingly visible as influencing our daily lives. While it took us little time to realize what impact EC law could have on domestic law, we have gradually come to the realization that EC law is not alone in having an impact on domestic law or, in a straightforward way, on our daily lives. Many livelihoods may be affected by single decisions coming out of the IMF; the protesters against the WTO meeting in Seattle, in December 1999, realized all too well how grandiose the influence of WTO law on each and every one of us is, directly or indirectly, actually or potentially; our working lives will be influenced, to a greater or lesser degree, by the activities of the ILO; and as many have found out the hard way in Kosovo, NATO too can have a serious impact on human life.
>
> This raises, or should raise, obvious questions as to the precise scope of activities of particular organizations, the means by which they acquire their powers, the transparency of their decision-making process, and the democratic and judicial control over their activities. Indeed, more generally, very legitimacy of the existence and activities of international organizations is at issue. This dovetails with a second reason why the law of international organizations, as a discipline, is of considerable (and increasingly recognized) interest, and that is the feeling that the image of international organizations, at least among international lawyers, is undergoing some change, and not necessarily for the better. Traditionally, international organizations were heralded as the harbingers of international happiness, embodying a fortuitous combination of our dreams of "legislative reason" and the idea that everything international is wonderful precisely because it is international: our "international project", as David Kennedy has so felicitously called it.

> Yet, this sense of international organizations as inherently good seems to be dissipating, partly no doubt as a result of the increased visibility of the impact of the work of international organizations on our daily lives, partly perhaps also because Big Government has, since the years of Thatcher and Reagan, been on the defensive. And if governments represented Big Government, then organizations represented Even Bigger Government. (Klabbers, 2001, 287 et seq.).

From the 1960s onwards, therefore, IOs have been proliferating and differentiating and, with the end of the Cold war and the rise of globalization, their growth expanded even faster. The figure below clearly shows this trend.

Figure 1
Historical Overview of the Number of International Organizations



Data: Uia, *Yearbook of International Organizations*, 48th ed., Bruxelles, 2011, and S. Cassese, "Relations between International Organizations and National Administrations", in *IISA, Proceedings, XIXth International Congress of Administrative Sciences* (Berlin, 1983).

As a consequence of this development, legal scholars have been examining different types of IOs and proposing different classifications. Numerous taxonomies have been put forward, focusing on the structure, functions, and legal nature of IOs.

The principal distinction remains between those IOs that have States as their members (i.e., intergovernmental organizations (IGOs)) and those that do

not (i.e., non-governmental organizations (NGOs)); however, with over 60 thousands bodies to deal with, more nuance is required. A more complex approach can be found in the classification adopted by the *Union of International Associations* (UIA) in its *Yearbook of International Organizations*: 15 sub-types of IOs are identified, including federations of international organizations; universal membership organizations; intercontinental membership organizations; regionally defined membership organizations; organizations emanating from places, persons, proprietary products or other bodies; or organizations having a special form, including foundations and funds. Each sub-type has additional further specifications (see generally http://www.uia.be/types-organization-type-i).

Classifying IOs is, of course, not only relevant for statistical purposes, but also for the academic goal of "organizing knowledge" (Klabbers, 2009). The diversity in functions of IOs, however, often implies differences in structure, powers and relationships with States. Not surprisingly, therefore, one of the most widespread criteria of classification is functional in nature, divided further into three sub-criteria (the depth of cooperation that is the IO's mission to bring about; the scope of this cooperation; the means used to effect it) (Virally, 1977). According to this criterion, three main distinctions between IOs can be identified:

> First, greater harmony and cohesion within a group of states appears to offer institutional opportunities to *closed* organizations (for example, regional organizations) which are beyond reach of organizations with a *universal* vocation. Secondly, *supranational* organizations create relations between different authorities and subjects of their member states, whereas in other, *intergovernmental* organizations only national governments cooperate. Thirdly, their specialized knowledge and limited purpose may give powers to *special* or *technical* organizations which *general* organizations lack (Schermers and Blokker, 2011).

Two different concepts of the role of international organizations have further been distinguished: the first is based upon a management-oriented, functionalist and progressive understanding; the second looks to the idea of the international organization as a "classical agora". The first concept

> presupposes two things: first, that institutionalized cooperation between independent states will contribute to the solution of common problems and second, that increased cooperation through international organizations will lead to a better world". It comes from the origin of this field of study. In fact, "historically, international organizations have often, perhaps always, predominantly been conceptualized as entities endowed with a single task: the management of common problems. Organizations, so the standard story goes, are really the extensions of states, doing those things that states cannot do on their own. […] In short, the concept that dominates in the literature is a concept

> of an international organization as endowed with tasks, a concept of an entity created by states to do the sort of things states cannot do (or might be reluctant to do) on their own, for whatever reason: manage an international waterway, monitor human rights violations, provide loans so as to stimulate economic development, facilitate smooth industrial relations, et cetera. Even the management of peace and security can, on this view, be reduced to, indeed, a managerial task, something best left to experts. States and organizations are each others' extensions, sharing functions, tasks and legitimacy, and eventually become all but indistinguishable from each other.
>
> […] There is, and always has been, a second concept of international organization. This is the concept of the international organization as a classical agora: a public realm in which international issues can be debated and, perhaps, decided. Many have recognized, however implicitly often, that there is this dimension as well to international organizations, and about as many tend to scorn it. It leads to the organization being (no more than) a platform for discussion, where things cannot just get done, and just cannot get done. […]
>
> The agora concept signifies a less progressive, less optimistic, less modernist vision on international organizations. On this view, international organizations are not created to solve any particular problems, much less to redeem mankind. Instead, they are created as fora where states can meet, exchange ideas, and discuss their common future, not necessarily with a view to solving problems, or indeed even reaching an outcome, but merely for the sake of debate itself. (Klabbers, 2005).

Not surprisingly, therefore, the complexity of the field has triggered further attempts to classify IOs by recalling the notion of international administrative law (from which the idea of global administrative law has developed). For instance, international regulatory bodies can be divided into three main types: A) public international organizations, which include UN bodies an specialized agencies, regional IGOs and supranational organizations; B) international courts and tribunals; and C) transgovernmental networks, such as the OECD or the G-20 (Kinney, 2002).

> International regulation is now so extensive that many scholars have recognized that regulatory authority no longer resides in only, or chiefly, national or local government, but rather is shared by a combination of entities including governments, transgovernmental networks, and public international organizations, which constitutes a complex system of international governance […]
>
> Public international organizations are analogous to domestic administrative agencies in that they are identifiable bodies with structures and responsibilities established in law, i.e., treaties and other intergovernmental agreements. In general, their membership must be comprised chiefly of nation states. They are generally established by treaty or other international agreement that specifies their structure, responsibilities, and powers. Public international organizations use many administrative procedures for the execution of their responsibilities.

> Further, as a general matter, while public international organizations engage in legislative and adjudicative activity and networks engage in policy making, there is considerable variety in the processes each entity uses in executing these functions (Kinney, 2002, 419 and 422).

The rise of global networks, in particular, has demonstrated that the proliferation of IOs has often been accompanied not only by increased differentiation in organizational structure, but also by the growing complexity of many regimes. There are many elements to this complexity: the increased density of norms and scope of mandates; the multifaceted relationships between IOs themselves, and between them and other actors; and the simple increase in the number of States participating in IOs (the WTO, for instance, currently has more than 150 Member States; in the original GATT 1947, there were 23). In some cases, networks of IOs acting together have gone beyond inter-agency co-ordination and cooperation, leading to the development of new institutional forms.

One such development occurs, for instance, when States and IOs themselves create other specialized agencies or committees: take for instance, the International Agency for Research on Cancer, established in 1965 as an extension of WHO, which has, however, its own governing bodies; or the well-known Codex Alimentarius Commission. A second example is the creation in IOs of mechanisms or even specific entities to link national administrative bodies together, exemplified by the Organization for Economic Co-operation and Development (OECD)'s system of National Contact Points (NCPs) under the Organization's *Guidelines for Multinational Enterprises*. A third concerns the increasing practice of IOs in contracting with private entities, or, more ambitiously, the creation of public-private partnership mechanisms.

> IOs are not merely the repository of state practices or the delegated agents of states. Their own practices matter and their actions have normative consequences beyond those that are explicitly delegated to them. IOs are new lawmaking actors in their own right and their normative impact cannot be reduced to those of their member states.
>
> It is important to recognize as well that IOs breed. They proliferate, interact and reproduce themselves through multiple subsidiary organs. They sometimes even purport to establish other institutions that are ostensibly independent from themselves, as the Security Council purported to do when it established two ad hoc war crimes tribunals. In regimes such as those dealing with arms control or human rights, entire organizational charts need to be produced to keep track of the sub-bodies now charged with their interpretation or enforcement. (Alvarez, 2007, 597 et seq.).

The result of this irresistible rise is that today the activities of IOs cover fields as diverse as "forest preservation, the control of fishing, water regulation, environmental protection, standardization and food safety, financial and accounting standards, internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labour standards, antitrust regulation, regulation and finance of public works, trade standards, regulation of finance, insurance, foreign investments, international terrorism, war and arms control, air and maritime navigation, postal services, telecommunications, nuclear energy and nuclear waste, money laundering, education, migration, law enforcement, sport, and health" (Cassese, 2012).

And this also explains why IOs had to find new ways in which they could develop.

> States develop from and around a center. Global administrative institutions develop through mutual connections from peripheral points, in federative or associate forms.
>
> The simplest and most common way that global administrative institutions develop is when states associate in order to establish an ultra-state body; like when the UN international organizations arise from agreements between states but also promote other agreements. For example, the International Maritime Organization has promoted agreements in the areas of security, protection of the marine environment, and the maritime transport of nuclear materials. In addition to states, sub-state organs may also join to establish international bodies. National bodies for the regulation of financial markets are associated in the IOSCO, national insurance regulating bodies come together in the IAIS, the International Competition Network (ICN) brings together national competition authorities, the Financial Stability Forum (FSI), promoted by the finance ministries and central banks of the G7 countries, brings together finance ministers and heads of the central banks.
>
> A third type of global organization is comprised of neither states, nor of lower level, sub-state entities, but of other global organizations, acting alone or together. For instance, the Commission on Phytosanitary Measures was established by the FAO, and the International Centre for Settlement of Investment Disputes was established by the World Bank. In other cases, different global organizations get together to establish another global organization. The Financial Stability Institute (FSI) was set up in 1999 by the Bank for International Settlements and the Basel Committee on Banking Supervision. The Codex Alimentarius Commission was established by the FAO and the World Health Organization (WHO). The World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD) together established the International Trade Centre." (Cassese, 2005, 674-675)

2. *The Activities of International Organizations as Form of Administration*

In dealing with IOs and their functions, international institutional law has perhaps not, on the whole, been particularly effective in providing a deep structure for the operational or administrative-type activities of IOs (although there are some exceptions to this). Scholarly writings on international institutional law have contributed much on constitutional issues concerning the competences of IOs and their various organs, on the relationships between them and their member States (Sarooshi, 2005; Alvarez, 2006), and on staff issues. Legal problems relating to decision-making process within IOs (Cox and Jacobson, 1973; Von Bernstorff, 2008; Schermers and Blokker, 2011), and to intra-organizational matters such as the relationships between IO headquarters and their field offices, have been studied much less. In some ways, this tracks a similar phenomenon that occurred in domestic administrative law during the 20th century: for a long time, administrative lawyers focused mostly on the acts – and review of the acts – of public bodies, without considering the ways in which they operate and their internal organizational framework. Since the 1950s, however, greater attention has been paid to administrative procedures and institutional transformations (Cassese, 2000).

For these reasons, it has long been recognized that insights from administrative law, and from public law more generally, may provide some conceptual resources in order to better frame the law and practice of international organizations. It is not surprising that certain formal and operational features of IOs may be similar to those found in national administrations. The functionalist approaches mentioned above, for instance, overlap with national law theories insofar as the public function of administrative action (the public interest, identified and regulated by law) justifies application of public-regarding administrative law rules to the conduct of administrative actors (Virally, 1974). In this way, it becomes possible to identify certain activities as "administration" in theoretical terms (this is the German *Begriff der Verwaltung*), but it remains both difficult and unnecessary to attempt a unitary definition in practical terms. To conceive of administration as functionally oriented towards achieving a public goal produces variability in the delimitation of the public sphere: there is not, therefore, one single definition, but rather a range of notions of what can constitute "public administration".

More generally, the practice of IOs also displays some parallels with earlier national experience concerning such matters as the proliferation and fragmentation of public bodies; the growing use of private law instruments; the increase in administrative rulemaking (a major feature of the US New Deal, addressed in the Administrative Procedures Act of 1946); and the establishment

of multiple field offices (a feature of the French administrative system). Any straightforward transposition from state legal systems to the complex practices of intergovernmental institutions in global governance is challenged, however, by fundamental differences between these enterprises (Sarooshi, 2008; Kingsbury and Casini, 2009; von Bogdandy et al, 2010): "full development of international law as *public* international law appears hardly feasible without building on national administrative legal insights and doctrines elaborated in the past century"; but of course "this does not advocate drawing all too simple 'domestic analogies': the differences between domestic institutions and international institutions are too important." (von Bogdandy et al, 2010, 24).

Moreover, that many important activities of IOs can be regarded as administrative in nature does not suggest the existence of a general global public administration; there is no global government or global parliament, nor are there real global equivalents of the other structures within which national administrations are nested. Nevertheless, some normative demands and procedural principles are sufficiently common across diverse IOs to suggest a unified field may be discernable: transparency in rule-making; due process (in certain cases including notice-and-comment, hearings, and reason-giving requirements) in decisions that directly affect private parties; review mechanisms to correct errors and ensure rationality and legality; and in addition to review, a variety of other mechanisms to promote accountability. These are among the key sets of issues in the exploration of the unified field of legal practice and study mow referred to as global administrative law (GAL).

Contemporary practice of many IOs, in fact,

> can be understood and analyzed as administrative action: rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management. Domestic law presumes a shared sense of what constitutes administrative action, even though it may be defined primarily in the negative-as state acts that are not legislative or judicial-and even though the boundaries between these categories are blurred at the margins. Beyond the domain of the state, no such agreed functional differentiation prevails; the institutional landscape is much more variegated than in domestic settings. Yet many of the international institutions and regimes that engage in "global governance" perform functions that most national public lawyers would regard as having a genuinely administrative character: they operate below the level of highly publicized diplomatic conferences and treaty-making, but in aggregate they regulate and manage vast sectors of economic and social life through specific decisions and rulemaking. Conceptually, we believe, administrative action can be distinguished from legislation in the form of treaties, and from adjudication in the form of episodic dispute settlement between states or other disputing parties. As in the domestic setting, administrative action at the global level has both legislative and adjudicatory elements. It includes rulemaking, not in the form of treaties negotiated

> by states, but of standards and rules of general applicability adopted by subsidiary bodies. It also includes informal decisions taken in overseeing and implementing international regulatory regimes. As a matter of provisional delineation, global administrative action is rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties (Kingsbury, Krisch and Stewart, 2005, 17).

Many administrative law principles are actively embraced in particular IOs, and these principles provide a basis for serious discussion and critique in the work of other institutions (see chapter III). Some of the demands made by reference to administrative law principles, however, are unrealistic and potentially counter-productive: for example, too much accountability to the wrong people can be pathological; immense and perhaps insuperable problems arise in seeking to ensure the adequate representation or direct participation of civil society-type actors and their interests, often rendering compromises in this regard inescapable (at the global level, participatory rights should be accorded with regard to the different nature of actors involved, which can be either private or public (such as States and domestic administrations) or both;) "notice and comment" requirements for rule-making can facilitate the capture of the process by special interest groups; and an entitlement to a lengthy hearing and appeal may risk "ossifying" procedures and dissuade an underfunded and overstretched agency from acting at all (Kingsbury and Casini, 2009).

> International institutions constitute another arena for the evolution of administrative law. In recent years, more and more legislative discretion has been delegated not to domestic agents but to international – both regional and global – institutions. Often the same domestic groups that influence legislators to delegate authority to the domestic executive use their weight to induce their governments to join an international institution that enjoys decisionmaking powers vis-a-vis its member states However, since such institutions do not have the paradigmatic division of powers that characterizes democracies – legislative, executive, and judicial branches – the characteristics of international administrative law differ from domestic administrative law. As a result, certain principles of domestic administrative and constitutional law will not necessarily apply to international bodies. For example, the requirement that courts must be established by primary legislation, a requirement found in many domestic constitutions that reflects important democratic guarantees provided by the legislative process, is often irrelevant in the context of an international body, whose constitution and procedures rely to a lesser extent on a legislative body. Nonetheless, to the extent that treaties assign responsibilities and delegate decisionmaking powers to treaty bodies, issues of international administrative law similar to issues of domestic administrative law will arise. As in domestic administrative law, the administrative law of an international institution will result from enactments of the state parties (in the treaty establishing the institution), from various kinds of inputs of their executive organs, and from decisions of their adjudicative bodies. The principal-

> agent tensions that exist between the lawmaker and the executive in the domestic arena are also found in the international arena between the state parties and the different treaty-bodies and between the parties within each of the treaty-bodies. Hence, like domestic administrative law, which reflects the domestic political balance of power, the law constraining the discretion of the various actors within the international institution will reflect the specific balance of powers between the state parties and the balance of power within each international institution. (Benvenisti, 2005, 320-321).

The increasing diversity and scope of the activities of IOs gives rise to a number of legal issues and implications that can be usefully addressed through an administrative law framework. The growth in functions and capacities raises specific normative pressures concerning information (demands for active transparency and access to information, but also demands for confidentiality and privacy, and for legal or political controls on the gathering and use of policy-shaping information) and more general pressures for review of administrative-type actions, and for heightened accountability with consequences for regimes of liability and immunity. Furthermore, the proliferation of IOs and other institutions exercising public power or authority in global governance, accompanied by various forms of institutional differentiation and decentralization as well as complex field operations, has intensified the need for principles to structure the relations amongst these different actors. Such principles might be thought of as constitutional, or as general principles of public law, or more pragmatically as elements of co-ordination, but in many cases they are principles of administration. This administrative perspective has the further advantage that it enables analysis of practices already occurring in IOs (and insufficiently addressed in international law scholarship) which reflect changing patterns in contemporary management practices and philosophies more generally, such as new public management (steering-not-rowing, user charges, separation of funders from providers of services), or outsourcing and governance-by-contract:

> [T]he large number of norms, the development of rules and principles, and the rise of courts all confirm the high degree of institutionalization (or legalization, as American scholars like to say) of the global administrative system. This stands in direct relation to the greater efficacy of global decisions in targeting national citizens, organizations, and corporations. The more that global organizations widen their scope of action beyond states and domestic public organizations, the more that it becomes important to ensure respect for the rule of law, the principle of participation, and the duty to give a reasoned decision. These procedures are important in order to ensure the protection of citizens, organizations, and corporations, not only in their relations with states and other national public

> powers, but also in their relations with the new global public powers. (Cassese, 2005, 694).

Within this framework, the traditional mechanisms based on State consent as expressed through treaties or custom are simply no longer capable of accounting for all global activities. A new regulatory space is emerging, distinct from that of inter-State relations, transcending the sphere of influence of both international law and domestic administrative law: this can be defined as the "global administrative space". IOs have become much more than instruments of the governments of their Member States; rather, they set their own norms and regulate their field of activity; they generate and follow their own, particular legal proceedings; and they can grant participatory rights to the actors, both public and private, affected by their activities. Ultimately, they have emerged as genuine global public administrations.

Global administration, therefore,

> is of growing significance as both a result and a shaping feature of global ordering. Global administration can have serious effects on individuals and their rights, and on possibilities of national or local democracy or autonomy, as well as other deeply held values. Understanding the processes and trajectories of global administration thus has substantial practical and normative importance. Such an undertaking is rendered challenging by the massive volume, polycentricity, and obscurity of the interactions which constitute this administration. The patterns of power and authority in global administration are much less structured than those underpinning major parts of many domestic administrative systems. Institutional differentiation is less complete, roles are not clearly assigned, hierarchies are not highly specified, and bright lines do not exist between the spheres of administration and legislation or between administrative and constitutional principles and review authorities (Kingsbury and Donaldson, 2011).

One of the key factors in identifying the administrative nature of the organization and activities of these global regulatory institutions is the absence of any effort to make them legislative or judicial in nature (within the traditional conceptual structures of international law); and this alone gives rise to particular problems in terms of their legitimacy and accountability. In other words, the structures, procedures and normative standards for regulatory decision-making applicable to global institutions (including transparency, participation, and review), and the rule-governed mechanisms for implementing these standards are beginning to form a specific field of legal theory and practice: that of global administrative law.

3. *Types of Global Administration*

Once it is accepted that the activities of IOs can be viewed as a form of administration, it is possible to identify different types of global institutions.

A first type includes global administration by *formal intergovernmental organizations*. This is the model traditionally adopted by States in setting up international institutions. Examples here are the United Nations, WHO, ILO, UNICEF, or the World Intellectual Property Organization (WIPO). Although the institutional design of such IOs has been studied for many decades, the kinds of activities that have become common for these bodies in recent years display features similar to administrative action. Take for instance, the various forms of recommendations, guidelines, best practices, technical advice, findings, conclusions, committee rules, and other normative products issued by IOs: this has triggered an increasing demands for transparency, reason-giving, review, and in some cases participation or accountability, in relation to these instruments; different agencies take widely different approaches to such demands, and there is often uncertainty about the exact legal framework applicable to this kind of activities is, and about what procedural standards are – or ought to be – required. Other examples include emergency actions by IOs, such that of WHO in relation to the SARS crisis, and the field operations of many global bodies, whether conducted through permanent field offices, sending visiting teams from headquarters, or contracting with other public or private agencies to provide services.

A second type of global administration refers to *hybrid public-private organizations and private bodies exercising public functions*. Both States and IOs increasingly form and operate through formalized partnerships with private commercial and civil society entities (Bull and Mc Neill, 2007). For example, the Global Fund has close links with the World Health Organization, but is, in formal legal terms, a Swiss Foundation. Its Board is comprised of donor and recipient states and representatives of groups affected by HIV and other infectious diseases that the Global Fund combats; it has a sophisticated independent review system, and ties to some very large funding sources such as the Gates Foundation. Other examples come from the Internet Corporation for Assigned Names and Numbers (ICANN), the World Anti-Doping Agency (WADA), the private Stewardship Councils for forest products an marine products (comprised of industry and civil society members) and the International Organization for Standardization (ISO). This type of global administration, therefore, encompasses both hybrid public-private or fully private bodies exercising public functions. These institutions can be defined negatively as not formal intergovernmental organizations. In more positive terms, they represent a

very interesting example of how the use of private law instruments to fulfil public functions is widespread also at the international level.

A third type of global administration is delivered by *transgovernmental and transnational networks*. These are less structured forms of governance, where relationships between States, IOs and/or other actors are less formalized, although they can be even more effective than in the context of traditional IGOs. Examples of this kind of network are offered by the G-8 and the Basel Committee: "Transgovernmental networks" can be defined as "all the different ways that individual government institutions are interacting with their counterparts either abroad or above them, alongside more traditional state-to-state interactions". Therefore, a network is "a pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the 'domestic' from the 'international' sphere". (Slaughter, 2004, 14 et seq.).

In particular,

> three core factors – technological innovation, the expansion of domestic regulation, and the rise of globalization – have promoted the development of networks. These factors have surprisingly long histories, however. Indeed, the transnationalism/"sovereignty at bay" debates of the 1970s presaged much of the current debate over networks. But each factor appears to be intensifying in the 21st century, creating greater incentives for regulators to cooperate with their peers.
> The development of networks, however, is not evenly distributed, either in geographic or issue-area terms – just as globalization itself is not evenly distributed. Networks are most apparent among regulatory officials, though they can also be found among judges and legislators. Networks are concentrated among the wealthier, more industrialized states that possess complex administrative states. The development of networks across policy areas especially varies due to differing functional imperatives. (Raustiala, 2002, 16).

Other examples are provided by public-private networks, in which the actors involved also include private entities: e.g., the International Conference on Harmonization (ICH). Therefore, the term "networks" here indicates both fully public – or transgovernmental – networks, and hybrid public-private networks.

A fourth – and final – type of global administration goes beyond the concepts of institution and networks and includes more *complex forms of governance*, such as hybrid, multi-level or informal global regulatory regimes. Such cases are characterized by composite mechanisms and procedures involving several actors at the international and at the domestic levels. Examples are global and national proceedings under the International Patent Cooperation Treaty; mutual recognition in the field of free movement of professionals; and the decision-making procedures in the governance of fisheries and forestry, in the World

Heritage Convention, and in the clean development mechanism and emissions trading. This type of global administration is the most sophisticated: the fulfilment of public functions is ensured through the creation of a set of principles, rules and institutions operating both internationally and nationally.

This taxonomy does not pretend to offer the sole possible perspective. Rather, it can be usefully integrated and compared with other classifications, such as the one based on

> [f]ive main types of globalized administrative regulation […]: administration by formal international organizations; administrations based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administration by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions (Kingsbury, Krisch and Stewart, 2005; Kingsbury and Donaldson, 2011).

Comparing these taxonomies, the "distributed administration" category of the latter would essentially fall under the label of complex forms of governance in the former. Further complications can arise, as categories of hybrid intergovernmental-private arrangements and private institutions can be merged, and trans-governmental networks can be treated together with hybrid public-private networks. Today the public-private divide is blurred, and it is difficult to find networks or regimes that do not display any degree of hybridization at all: in the field of private finance, for instance, there are several State and EU agencies that interact with banks, insurance companies, and stock markets. As a matter of fact, structured interactions between public authorities and private actors often represent a key feature of "harmonization networks", i.e.

> networks of public regulatory authorities (at times in collaboration with private partners) that are in the business of harmonising their domestic rules, setting standards or other norms (Wessel and Berman, in Pauwelyn, Wessel and Wouters, 2012).

Finally, these four types may often overlap and combine between each other: an IGO can be part of a complex form of governance and/or it can be part of a network; a public-private institution can act as a key player in a transnational network. In addition, the borders between these categories (as with most, if not all, such classifications of IOs) "are just as vague" because "practice is more multifarious than these distinctions may suggest" (Schermers and Blokker, 2011). Nevertheless, the taxonomy outlined at the start of this section can provide a suitable basis for distinction of four different forms of

administration currently operating in the global arena: "as long as it remains clear that classification has the function of organizing knowledge, but no greater ambition," classification may be a useful exercise but "in a very important sense, for the lawyer, each international organization is unique, based as it is on its own constituent document and influenced as its development will be by peculiar political configurations" (Klabbers, 2009).

It seems clear, therefore, that institutional differentiation is an important feature of contemporary IOs, and of contemporary global governance on a wide range of issues more generally. This phenomenon has both a horizontal dimension – (relating to relations between IOs and other global actors) and a vertical one (the relationships between IOs, States and national administrations). Most IOs can be now studied along these coordinates: in the WTO, for instance, we find both the vertical dimension of the relations between the WTO and its members' domestic administrations, and the horizontal dimension manifested in the recognition by the WTO of regulatory standards set by other global regulatory bodies (under the TBT and SPS agreements). Furthermore, the proliferation and differentiation of IOs lead to the multiplication, on one hand, of IO field offices, and, on the other, of new specialized domestic bodies (this often happens with hybrid public-private regimes, such as ISO, and internet or sports governance).

Nevertheless, from the organizational perspective, it seems possible to identify some basic features common to all these different institutions.

> The organizational structure of global organizations can usually be broken down into four parts: a collegial body, usually referred to as an assembly, in which all of the participants-states, other national organizations, and international organizations-are present; a more restricted collegial body, usually called a council, whose members are elected by the assembly; an executive body, called secretariat, made up of regular employees of the organization; and committees, generally made up of functionaries of national administrations.
>
> The structures vary from one organization to another. There are some, for instance, that do not have their own secretariat. The Basel Committee on Banking Supervision is provided for by the Bank for International Settlements, and the Paris Club committee (1956) is supported by the French Finance Ministry. Other global organizations have additional regional or decentralized apparatuses. Still others are constituted in the form of a "group". This is the case of the World Bank Group, which made up of five different institutions – the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).
>
> While states have a stable division of powers between their different organs, global institutions have, at most, a division of functions between the different organs.

> And there are even organs that are made up of the same participants but have different capacities and perform different tasks. Within the WTO, this is the case of the General Council, the Dispute Settlement Body, and the Trade Policy Review Body.
>
> The lines distinguishing participants from non-participants and States from private organizations (governmental and non-governmental organizations, to use the common terminology) are also unclear. In the International Civil Defense Organization (ICDO), both affiliated members and associated members without the right to vote participate. In the IAIS, observers such as insurance companies, associations thereof, practitioners, and consultants participate. There are many governmental organizations that admit non-governmental organizations as members: the UPU, ITU, WMO, ILO, WIPO, and the International Civil Aviation Organization (ICAO). In the ICAO, for example, the International Air Transport Association, the Airports Council, the International Federation of Airline Pilot's Associations, and the International Council of Aircraft Owner and Pilot Associations all participate. Finally, many global organizations accept unions of States (mainly the European Union) as a member. The WTO, ICDO, and the International Olive Oil Council all do this.
>
> As we move farther away from the state, the line between public and private becomes more and more unclear. From the organizational standpoint, the global legal order does not follow a single model. It is instead an example of "adhocracy," in the sense that it adapts to the functions to be performed, sector by sector. Functions, organizations, the internal balance of powers, and the relationship between public and private all vary according to specific needs. (Cassese, 2005, 678 et seq.)

Lastly, the scope and differentiation of IOs and their activities is accompanied by a multiplicity of rules, principles, decisions, soft law, and non-legal norms. In some cases, this spread of normative functions has led to the creation of complex sectoral legal orders, which often display distinctive features. Take, for instance, the case of the "world order" in the public health sector: on the one hand, although the WHO was conceived in 1948 as a normative organization with powers to adopt conventions and make binding regulations (Arts. 19 and 21 of the WHO Constitution), it has engaged in explicit law-producing functions much less than many other agencies; on the other hand, global public health law inevitably encompasses norms produced in many different functional sectors, such as food safety, arms control, environment, trade, and human rights, and many of these sectors have norm-producing institutional structures quite separate from the WHO. The fact is that the activities of IOs, and of the other actors in complex governance regimes, as of national public bodies, must be managed not simply by formal norms, but by a dynamic process of regulation. Treaty law (like legislation at the national level) is not sufficient. The regulatory approach focuses on process, the direction of change, gradual improvement rather than instant results, and is dynamic rather

than static. Law in such regulatory processes does not occupy the whole field; and is generated through accretion, accumulation, and shifting, with dialogue among multiple regimes (Cassese, 2010).

Important elements of administrative law are central to structuring all these processes: transparency, participation, due process, reason-giving, review, accountability. And this is what the hundreds of examples collected in this casebook aim to demonstrate.

4. *References*

- J.E. ALVAREZ, "International Organizations: Then and Now", 100 *American Journal of International Law* 324 (2006);
- J.E. ALVAREZ, *International Organizations as Law-makers*, Oxford (2005);
- J.E. ALVAREZ, "Governing the World: International Organizations as Law-makers", 31 *Suffolk Transnat'l L. Rev.* 596 (2007-2008);
- C.F. AMERASINGHE, *Principles of the Institutional Law of International Organizations*, Cambridge, 2nd ed. (2005);
- J.-B. AUBY, *La globalisation, le droit et l'État*, Paris, 2nd ed. (2010);
- M. BARNETT, M. FINNEMORE, *Rules for the World. International Organizations in Global Politics*, Ithaca (2004);
- S. BATTINI, *Amministrazioni senza stato. Profili di diritto internazionale*, Milano (2003);
- J. VON BERNSTORFF, "Procedures of Decision-Making and the Role of Law in International Organizations", 9 *German Law Journal* 1939 (2008);
- A. VON BOGDANDY, R. WOLFRUM, J. VON BERNSTORFF, P. DANN, M. GOLDMANN (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law*, Heidelberg (2010);
- L. BOISSON DE CHAZOURNES, L. CASINI, B. KINGSBURY (eds.), Symposium on *Global Administrative Law in the Operations of International Organizations*, 6:2 *International Organizations L. Rev.* (2009);
- U. BORSI, "Carattere ed oggetto del diritto amministrativo internazionale", *Riv. Dir. Int.* 384 (1912);
- B. BULL, D. MC NEILL, *Development Issues in Global Governance. Public-Private Partnerships and Market Multilateralism*, Abingdon (2007);
- L. CASINI, "Diritto amministrativo globale", in S. CASSESE (ed.), *Dizionario di diritto pubblico*, Milano (2006);
- S. CASSESE, "Relations between International Organizations and National Administrations", in *IISA, Proceedings, XIXth International Congress of Administrative Sciences*, Berlin (1983);

- S. CASSESE, *La Construction du droit administratif France et Royaume-Uni*, Paris (2000);
- S. CASSESE, "Administrative Law without the State? The Challenge of Global Regulation", 37 *New York University Journal of International Law and Politics* 663 (2005);
- S. CASSESE, "The Globalization of Law", 37 *New York University Journal of International Law and Politics* 973 (2005);
- S. CASSESE, "Is There a Global Administrative Law?", in A. VON BOGDANDY *et al* (2010).
- S. CASSESE, *The Global Polity. Global Dimensions of Democracy and the Rule of Law*, Editorial Derecho Global / Global Law Press, Sevilla (2012);
- S. CHESTERMAN, "Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law", 14 *Global Governance* 39 (2008);
- P. COSSALTER, *Preface*, in S. CASSESE, *Au-delà de l'État*, Bruylant (2010);
- R.W. COX, H.K. JAKOBSON (eds.), *The Anatomy of Influence. Decision Making in International Organizations*, New Haven (1973);
- D.C. ESTY, "Good Governance at the Supranational Scale: Globalizing Administrative Law", 115 *Yale Law Journal* 1490 (2006);
- W. FRIEDMANN, *The Changing Structure of International Law*, New York (1964);
- R.B. HALL, T.J. BIERSTEKER (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge (2002);
- P. KAZANSKY, "Théorie de l'administration internationale", 9 *Revue Générale de Droit International Public* 353 (1902);
- D. KENNEDY, "Three Globalizations of Law and Legal Thought: 1850-2000", in D.M. TRUBEK, A. SANTOS (eds.), *The New and Economic Development: A Critical Appraisal*, Cambridge (2006);
- B. KINGSBURY, "The Administrative Law Frontier in Global Governance", 99 *ASIL Proceedings* 143 (2005);
- B. KINGSBURY, N. KRISCH, R.B. STEWART, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* 15 (2005);
- B. KINGSBURY, L. CASINI, "Global Administrative Law Dimensions of International Organizations Law", 6 (2) *International Organizations* 319 (2009);
- B. KINGSBURY, M. DONALDSON, "Global Administrative Law," in *Max Planck Encyclopedia of International Law*, Oxford (2011);
- E. KINNEY, "The Emerging Field of International Administrative Law: Its Contents and Potential", 54 *Administrative Law Review* 415 (2002);
- J. KLABBERS, *An Introduction to International Institutional Law*, Cambridge University Press, Cambridge, 2nd ed. (2009);

- J. KLABBERS (ed.), *International Organizations*, Aldershot, Ashgate (2005);
- J. KLABBERS, "Two Concepts of International Organizations", 2 *International Organizations Law Review* 277 (2005);
- J. KLABBERS, "The Life and Times of the Law of International Organizations", 70 *Nordicj Int'l L.* 287 (2001);
- J. KLABBERS, A. WALLENDHAL (eds.), *Research Handbook on the Law of International Organisations*, Cheltenham, Edward Elgar (2011);
- B. KOREMENOS *et al*, "The Rational Design of International Institutions", 55 *International Organization* 761 (2001);
- F.F. MARTENS, *Le droit international actuel des peuples civilisés*, (1883);
- C. MÖLLERS et al. (eds.), *Internationales Verwaltungsrecht*, Mohr Siebeck, Tubingen (2007);
- K. NEUMEYER, *Internationales Verwaltungsrecht, Verlag für Recht und Gesellschaft,* Munich, Zurich, vol. 1, 1910, vol. 2, 1922, vol. 3 I, 1936, vol. 3 II, 1930, vol. 4, 1936;
- J. PAUWELYN, R. WESSEL, J. WOUTERS (eds.) *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, Oxford (2012);
- K. RAUSTIALA, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", 43 *Va. J. Int'l L.* 16 (2002-2003);
- P. REINSCH, "International Administrative Law and National Sovereignty", 3 *AJIL* 1 (1909);
- A. RILES, "The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State", 56 *Am. J. Comp. L.* 605 (2008);
- P. SANDS, P. KLEIN, *Bowett's Law of International Institutions*, London, 5th ed. (2001);
- D. SAROOSHI, "The Role of Domestic Public Law Analogies in the Law of International Organizations", 5 *International Organizations* 237 (2008);
- D. SAROOSHI, *International Organizations and Their Exercise of Sovereign Powers*, Oxford (2005);
- H. SCHEPEL, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford (2005);
- H.G. SCHERMERS, N.M. BLOKKER, *International Institutional Law, Unity Within Diversity*, Leiden, 5th ed. (2011);
- F. SEYERSTED, *Common Law of International Organizations*, Leiden-Boston (2008);
- A.-M. SLAUGHTER, *A New World Order*, Princeton (2004);

- *Symposium* on *Perspectives on the Law of International Organizations as a Separate Field of Study*, 5 *International Organizations Law Review* 141 (2008);
- M. VEC, *Recht und Normierung in der Industriellen Revolution: Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung*, Frankfurt (2006);
- M. VIRALLY, "Definition and Classification: A Legal Approach", 29 *Int. Soc. Sci.* 58 (1977);
- M. VIRALLY, "La notion de fonction dans la théorie de l'organisation internationale", in *Mélanges offerts à Charles Rousseau: La communauté internationale*, Paris (1974), p. 277 et seq.;
- J.H.H. WEILER, "The Geology of International Law – Governance, Democracy and Legitimacy", 64 *Zeitschrift für Ausländisches Recht und Völkerrecht* 547 (2004);
- R. WOLFRUM, "International Administrative Unions", in 2 *Encyclopedia of Public International Law* 1041 (first edition, R. BERNHARDT (ed.), 1995), and in the second edition (R. WOLFRUM (ed.)).

I.A THE NOTION OF STATE AND ITS DISCONTENTS: CRISIS OR EVOLUTION?

I.A.1 The Concept of the State in Globalization: The Case of the Environmental Cooperation Commission of the North American Free Trade Agreement (NAFTA)

Ming-Sung Kuo

1. *Background*

To alleviate the concerns over the possible undermining of national environmental regulations resulting from the yet-to-be-ratified NAFTA, Canada, Mexico, and the United States (US) negotiated and signed the North American Agreement on Environmental Cooperation (NAAEC) as a side agreement to NAFTA (see § III.D.4 "Reasonableness and Proportionality: The NAFTA Binational Panel and the Extension of Administrative Justice to International Relations", by M. Macchia) when it came into effect in 1994. Since 1994, the NAAEC has become the institutional mechanism through which the three countries collaborate in protecting North America's environment.

To ensure that the liberalization of trade and economic growth in North America do not lead to the downward harmonization of national environmental laws, the NAAEC established the North American Commission on Environmental Cooperation (CEC). The CEC's goals include the addressing of regional environmental concerns, the prevention of potential trade and environmental conflicts, and the promotion of the effective enforcement of environmental law.

In order to achieve these general goals, the CEC comprises a Council, a Secretariat, and a Joint Public Advisory Committee. The Council is the CEC's governing body composed of cabinet-level (or equivalent) representatives of each State Party (Party). Its assigned tasks include the oversight of the Secretariat, the approval of the annual work program and budget, and the development of recommendations on a number of important regional environmental issues. In

addition, the Council is also charged with cooperating with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA. The Council is required to meet once a year and is required to hold public meetings during the course of its regular sessions. The Secretariat, headed by an Executive Director, who is appointed jointly by the three governments, provides technical, administrative, and operational support to the Council. The Executive Director is responsible for the appointment and supervision of the professional staff of the Secretariat. The third component of the CEC is the Joint Public Advisory Committee (JPAC), comprising five citizens from each Party. The JPAC advises the Council on any matter within the scope of the NAAEC, and is required to meet at least once a year.

Alongside this tripartite institutional framework, the Council creates a trilateral North American Working Group on Environmental Enforcement and Compliance (EWG). Its primary objective is to facilitate the dialogue between environmental enforcement, customs, and intelligence officers from Canada, Mexico, and the US on issues pertinent to trade and environmental law enforcement, enhancing linkages among North American environmental and wildlife enforcement agencies and exploring alternative approaches to addressing regional issues. EWG membership includes officials from the environmental, wildlife, and other appropriate enforcement agencies from these three Parties. According to its website, the EWG "stands at the critical interface between trade and environmental law compliance and enforcement in North America", and "seeks to build cooperation and collaboration to stop illegal shipments of regulated materials that may adversely affect human health or the environment, and to expedite the movement of legal materials across borders. To do this, the EWG organizes forums for the exchange of information, best practices, training, intelligence-sharing, and the formation of partnerships with key enforcement stakeholders. The EWG also seeks to strengthen judicial training to ensure that the judiciary is equipped with expertise in the environmental law context and that the courts respond to environmental offenses with fairness and consistency."

2. *Materials*

- North American Free Trade Agreement, 1994 (http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=ALL);
- North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States

and the Government of the United States of America, 1993 (http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567);
- Commission for Environmental Cooperation - JPAC Public Forum - North America's Energy Future (http://www.cec.org/Page.asp?PageID=1115&AA_SiteLanguageID=1);
- Commission for Environmental Cooperation – The Council (http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=207&BL_ExpandID=154);
- Commission for Environmental Cooperation – Committees (http://www.cec.org/Page.asp?PageID=122&ContentID=2682&SiteNodeID=207&BL_ExpandID=154);
- Commission for Environmental Cooperation - Joint Public Advisory Committee (http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=208&BL_ExpandID=91);
- Commission for Environmental Cooperation – Secretariat (http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=206&BL_ExpandID=92);
- Commission for Environmental Cooperation – Citizens submissions on enforcement matters (http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=210&BL_ExpandID=156);
- Commission for Environmental Cooperation – Consultation and Resolution of Disputes (http://www.cec.org/Page.asp?PageID=122&ContentID=2734&SiteNodeID=567);
- Ten Years of North American Environmental Cooperation – Report of the Ten-year Review and Assessment Committee (http://www.cec.org/Storage/79/7287_TRAC-Report2004_en.pdf).

3. *Analysis*

As an international organization established under the NAAEC, the CEC's functions can be divided into three categories. First, it operates as a mechanism whereby "any nongovernmental organization or person […] residing or established in the territory of a member state" may make a submission to the Secretariat, claiming that a Party "is failing to effectively enforce its environmental law." If this complaint meets criteria set out in the NAAEC, the Secretariat can make a recommendation to the Council that it warrants the

development of a factual record. The Council can, by a two-thirds vote, direct the Secretariat to develop a factual record. Once completed, the Secretariat submits the factual record to the Council and the Council may, again by a two-thirds vote, decide to make that record public.

Known as "Citizen Submissions on Enforcement Matters (SEM)," this process is not adversarial, and nor is the Secretariat a court. As its website notes, "[t]he CEC Secretariat cannot make determinations or "rulings" on the merits or demerits of assertions raised in a submission, including whether a Party may be failing to effectively enforce its environmental law. Rather, the CEC Secretariat is an independent and neutral body tasked with efficiently administering" the SEM process. There is no further remedy for the submitter and no further duty on the member state that was the subject of the factual record under the SEM process, notwithstanding the contents of the factual record. Nevertheless, the SEM process encourages the effective enforcement by the Parties of their domestic environmental law.

Second, the CEC institutionalizes the consultation and resolution of disputes among the Parties concerning the enforcement of their domestic environmental law. Any Party "may request in writing consultations with any other Party regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law." If consultation does not resolve the issues, then a special session of the Council can be requested; and, should that fail to produce a solution, any Party may request an arbitral panel, which the Council may convene by a two-thirds vote.

If the Council decides to do so, the panel will produce an initial report that will contain findings of fact as well as a determination by the panel as to whether there has been a persistent pattern of failure to effectively enforce environmental law. If such a finding is made, the panel proposes an action plan to remedy the non-enforcement. Following a comment period, the final report is published five days after being transmitted to the Council. If the action plan is not adhered to, sanctions can include fines. In the event that the monetary assessments are not paid, separate domestic sanctions and enforcement mechanisms in each Party will be launched to address other Parties' failure in the enforcement of environmental law.

Third, the CEC facilitates cooperation among member states through its extensive cooperative work program. Specifically, the annual work program and budget is developed in the first instance by the Secretariat and must ultimately be approved by consensus by the Council. The structure of the CEC allows for the public provision of outside advice to the Council through the JPAC and domestic national advisory committees on the annual program and budget. Such guarantees of public input reflect the Parties' emphasis on the importance of

public participation in conserving, protecting, and enhancing the environment. The projects carried out under the annual work program of the CEC address major areas of concern in the North American environment, including biodiversity and ecosystems, pollutants and health. Other cooperative projects cover matters such the collection, evaluation, and dissemination of data and information; enforcement cooperation and law; capacity building; and education.

In addition, the CEC also provides a forum for trilateral cooperation among officials, including those in different disciplines, and encourages dialogue between disparate communities. In this way, it encourages dialogue between trade and environment officials, providing a forum for cooperation on issues where trade and environmental policies meet and adding normative flavors of environmental values to the trade-centered NAFTA.

Taken together, the CEC provides innovative tools for achieving the NAAEC's goal of addressing regional environmental concerns, preventing potential trade and environmental conflicts, and promoting the effective enforcement of environmental law. While the institutionalized consultation and resolution of disputes among Parties concerning the enforcement of their domestic environmental law remains within the arbitral model, which traditionally is the main mechanism in the enforcement of international agreements, the SEM process hints at new developments in transnational regulation. Through the SEM process, private citizens and organizations are capable of making a contribution to the enforcement of national environmental law, which is no longer a matter purely for domestic law enforcement. Rather, the enforcement of national environmental law forms part of the agenda of international administration under the CEC. Notably, the SEM process does not result in any formal sanctions for the failure to effectively enforce domestic environmental law. Nevertheless, it is expected that simply developing a factual record of a failure to effectively enforce domestic environmental law, and making it accessible to the public, will put pressure on Parties to address the concerns raised in the SEM process. Moreover, with private citizens and nongovernmental organizations involved, the SEM process opens up the enforcement of domestic environmental law to private monitoring. In addition, the CEC adopts diverse regulatory tools, including data collection and information sharing, in making sure that environmental regulation in North America will not succumb to the risk of downward harmonization as a result of the establishment of a free trade zone comprising Canada, Mexico, and the US. The CEC's scope is not limited to domestic law enforcement, but extends to capacity building, personnel training, and education, which should pave the way for further harmonization on environmental regulation.

It is noteworthy that, as a trilateral forum in which officials in different disciplines are linked together and dialogue occurs between disparate communities, the CEC corresponds to certain new trends in transnational regulation, reflecting the disaggregation of the state and the hybridization of governance in the age of globalization. While the NAAEC's primary goal is reducing the negative effects on the environment that result from NAFTA, it does not create new international obligations for the three member states. Rather, it focuses on the enforcement of existing domestic environmental regulations through the CEC. In this way, the NAAEC elevates domestic law enforcement to the transnational level, while officials responsible for domestic environmental regulation also take on the function of transnational regulation through their participation in the CEC. In addition, through the SEM process and the provision of outside advice to the Council through the JPAC, the CEC's underlying governance framework indicates a hybrid administration underpinned by private participation.

4. *Issue: Toward a New Sovereignty?*

The CEC appears to be a success story of sovereign states cooperating to tackle cross-border issues, and underlines the emergence of the "disaggregated state". It thus seems to suggest that transnational problem-solving has taken the place of traditional sovereignty as the primary concern in international relations, heralding, perhaps an era of "new sovereignty" (see Section I.B of this Chapter, on "Formal Intergovernmental Organizations" and, in particular, § I.B.1 "Material Limits to the Power of the United Nations Security Council: Between Law and Politics", by J. Arato, as well as Sections I.C and I.E on, respectively "Hybrid Public-Private Organizations and Private Bodies exercising public functions" and "Complex Governance Forms: Hybrid, Multi-Level, Informal"). Upon closer inspection, however, the picture of the CEC regime at the core of the North American environmental regulation is more complicated than the notion of the disaggregating state suggests.

On the one hand, the CEC pragmatically adopts innovative regulatory tools and organizational forms in seeking to avoid downward harmonization as a result of the liberalization of trade between Canada, Mexico, and the US. Nevertheless, the Council, the CEC's governing body, composed of the highest-level environmental authorities from the three Parties, is intergovernmental in nature. On the other hand, the NAAEC, the CEC's underlying agreement, was meticulously drafted in such a way as to reject any suggestion that state sovereignty would be compromised by its provisions.

As noted above, the NAAEC is concerned about the enforcement of existing domestic environmental law without adding any new international obligations. In this way, the coming into effect of the NAAEC simply facilitates the implementation of existing regulatory frameworks in the three member states. No regulatory practices were to be impacted by the NAAEC (provided, of course, that they were compliant with the relevant national law). Notably, as an area of so-called "social regulation", environmental regulation has enormous bearing on the allocation of resources and is always a politically contentious issue. Creating new responsibilities environmental obligations at the international law not only increases the political cost of ratifying the international agreement concerned, but risks appearing as an illegitimate encroachment on a state autonomy's to decide on the politically sensitive issues surrounding the allocation of resources.

Moreover, all the NAAEC's regulatory frameworks are designed to achieve their goals by focusing on practices, rather than on binding legal rules. With regard to the SEM process, the CEC cannot make determinations or "rulings" on the merits or demerits of assertions raised in a submission. Also, there is no further remedy for the submitter and no further duty on the member state that was the subject of the factual record under the SEM process, notwithstanding the contents of that record. In this way, while the SEM process encourages the effective enforcement by the member states of their domestic environmental law, there is ultimately no overt challenge to national sovereignty inherent this process.

The deliberate and careful decision to keep sovereignty intact becomes more apparent in terms of the CEC's role in facilitating cooperation among member states through its extensive cooperative work program. Consensus by the Council, an intergovernmental body, is required for decisions on the CEC's annual work program and budget; and the undertakings assumed under cooperative work programs have no binding effect on Parties. The legal character of these undertakings is, therefore, questionable.

Even the impact on sovereignty of the institutionalized processes of consultation and dispute among Parties is tightly controlled. Compared to the SEM process, there is a remedy if a government chooses to allege that another government is not enforcing its environmental law. While the SEM process relies on the power of persuasion, public participation, democracy, and accountability, the dispute resolution procedure as discussed above includes legal sanctions. Even so, standing in the dispute resolution procedure is granted only to a State Party and the test is a strict standard: there must be a "persistent pattern of failure […], to effectively enforce" an environmental law that has an impact on trade, which stands in contrast to the simple "failure to effectively enforce an

environmental law" standard applied in the SEM process. Moreover, the arbitral panel, perhaps the key "legal" element of the dispute resolution procedure, is appointed by the government representatives in the Council. The 2004 report of the ten-year review notes that "[a]fter a decade, [the dispute resolution procedure] has not yet been applied and there appears to be little prospect that it will be in the foreseeable future as there is no manifested interest among Parties to invoke it." As of 2012, the institutionalized consultation and dispute resolution mechanism remains entirely unused since its inception.

While the NAAEC effectively leaves the sovereignty of the three State Parties intact, it appears to affect their behavior in more subtle ways that relate to Parties' commitment to public participation, transparency, and cooperation by consensus on issues where they have determined there is an overall benefit in pursuing regional action. There are signs that the regional approach to issues of common environmental concern of the NAAEC and the CEC has been successful in changing behavior of states, through the application of institutional structures and process requirements that may not exist in more broadly multilateral approaches. From this perspective, the NAAEC and the CEC seem to suggest the emergence of a new form of sovereignty, as the state undergoes a process of disaggregation and governance frameworks take on a hybrid character in seeking to effectively tackle transnational regulatory issues in the age of globalization.

However, as the role of the CEC is effectively restricted to facilitating the dissemination of information and to building institutional capacity through training and educational programs, it seems that States are not yet convinced by the benefits of regional environmental protection to the extent that they would be willing to give up a degree of sovereignty over their choices with respect to their domestic environments. As a result, the overall effect of the NAAEC and the CEC on the improvement of environmental regulation in North America is limited. As one of the most advanced regional arrangements outside the project of European integration, the case of the NAAEC and the CEC suggests that sovereignty still plays a key role in transnational governance even despite the great transformation of the state in the globalizing world.

5. *Further Reading*

a. M. FITZMAURICE, "Public Participation in the North American Agreement on Environmental Cooperation", 52 *International and Comparative Law Quarterly* 333 (2003);

b. J.H. KNOX, "A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission", 28 *Ecology Law Quarterly* 1 (2001);
c. D.L. MARKELL, J.H. KNOX (eds.), *Greening NAFTA: The North American Commission for Environmental Cooperation*, Stanford (2003);
d. D.L. MARKELL, "Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process", 30 *North Carolina Journal of International Law and Commercial Regulation* 759 (2004);
e. K. RAUSTIALA, "International 'Enforcement of Enforcement' Under the North American Agreement on Environmental Cooperation", 6 *Virginia Journal of International Law* 721 (1995);
f. S. RICHARDSON, "Sovereignty, Trade and the Environment –The North American Agreement on Environmental Cooperation", 24 *Canada-United States Law Journal* 183 (1998);
g. A.M. SLAUGHTER, *A New World Order*, Princeton (2004).

I.A.2 The Notion of "Statehood": The Palestinian National Authority's Attempt to Bring a Claim Against Israel Before the International Criminal Court

Yoav Meer

1. *Background*

In January 2009, the Palestinian National Authority ("PNA") lodged a declaration with the International Criminal Court ("ICC") (see also § V.1, "The ICC's Office of the Prosecutor and Transitional Justice: Article 53 of the Rome Statute and the Balance between Opportunity and Accountability", by R. Urueña). It declared that pursuant to Article 12(3) of the Rome Statute ("the Statute"), it accepts the exercise of jurisdiction by the Court over its territory. Article 12(3) enables non-member states to accept the Court's jurisdiction on an ad hoc basis with regard to a specific situation even without being parties to the Rome Statute. The Declaration followed Operation Cast Lead, in which Israeli Defense Forces attacked targets in the Gaza Strip during December 2008 and January 2009. Israel's declared aim was to stop rocket fire into Israel by Hamas. The PNA's goal in lodging the Declaration was to allow the ICC to examine whether violations of international criminal law had occurred during the operation. It should be noted that the PNA did not explicitly assert a claim to statehood. The request was limited to an investigation by the ICC of alleged war crimes committed since July 1 2002 in the Palestinian territory.

2. *Materials and Sources*

a. ICC, Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements (http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/decision%20not%20to%20proceed/palestine/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20national%20auth

ority%20meets?lan=en-GB);

b. Situation in Palestine: Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements (http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282852/PALESTINEFINAL201010272.pdf);

c. ICC website (http://www.icc-cpi.int/);

d. Rome Statute (http://untreaty.un.org/cod/icc/statute/english/rome_statute%28e%29.pdf).

3. *Analysis*

The main legal question is that of the PNA's statehood. As Article 12(3) explicitly addresses states, the first legal threshold for the PNA was to show that it is indeed a state, at least for the purposes of Article 12(3). In the absence of such status, and given that Israel is not a party to the Rome Statute, the ICC Prosecutor cannot initiate an investigation against Israel or Israeli soldiers as he does not have jurisdiction over the matter. However, the Prosecutor may obtain jurisdiction from an external source, as will be further elaborated below.

The question at this point is one of interpretation. Advocates of a functional approach argue that as "state" has no ordinary meaning, Article 12(3) should be interpreted broadly, thus allowing the PNA to fall within its ambit. That would be consistent with the purposes of the Statute: ending impunity through the exercise of complementary international jurisdiction by an international criminal court. They suggest the PNA is a state in at least two meaningful ways: it enjoys exclusive territorial title and it exercises criminal jurisdiction in that territory. By contrast, a narrow interpretation of the Article would leave the Palestinians without any available remedies. They would be denied access to justice and to other accountability mechanisms. As Israel is not a party to the Statue and no other state would be able to grant jurisdiction to the ICC, a zone of impunity zone would be created in the West Bank and the Gaza Strip. Conversely, accepting the Declaration would strengthen the rule of law and ensure accountability for alleged violations committed by Israel. It would empower the ICC as an institution and improve future deterrence.

Critics of the functional approach argue that there is an ordinary meaning for "state", and that this ordinary meaning should be used. Examining the PNA through this lens, it seems that it does not meet the generally-recognized criteria for statehood. Accordingly, Article 12(3) is inapplicable. Any other determination by the ICC or the Prosecutor would be ultra vires, as such powers – recognition

of statehood – were given neither to the Court nor the Prosecutor by the Statute. Furthermore, some international law scholars suggest that the Oslo Accords (the interim agreements signed in the mid-1990s between Israel and the PNA in an attempt to allow self-governance for the Palestinians and reach a peaceful resolution to the Israel-Palestinian dispute) deny PNA jurisdiction over Israelis. The Oslo Accords allowed for Palestinian self-governance, including the exercise of criminal jurisdiction in certain territories. However, under the Accords such jurisdiction cannot be exercised over Israeli nationals. If that is indeed the case, then the argument goes as follows: Since the PNA never had jurisdiction, it cannot delegate it to the ICC. Therefore, such action would be without substance: The PNA cannot give to another what it never had. However, it may be argued that considering the seriousness of the alleged crimes, that immunity provided by the Oslo Accords in the 1990s does not apply. The Oslo Accords were not meant to create a waiver from such crimes. In addition, the PNA has not exercised effective control over Gaza for a number of years. Since 2005, it is Hamas that acts as the de facto governmental authority in Gaza. The PNA, the political entity that lodged the Declaration, is not the entity that exercises criminal jurisdiction in Gaza. Therefore, one might argue that the PNA has no standing in any event. It simply cannot be seen as the appropriate entity to bring such requests before the ICC since it has no powers over Gaza. In any case, the argument mentioned earlier that a rejection of the Declaration would create a zone of impunity in Gaza and the West Bank is unjustified. Israel is currently conducting investigations and military personnel are being brought to trial before both civil and military tribunals. Under the principle of complementarity, it may seem prudent for the ICC to refrain from any action until these proceedings have been completed.

An acceptance by the ICC of the Declaration would be an implied recognition of the statehood of Palestine, or at least an important step in that direction. Its significance would be intensified as it would be seen as a decision of a prominent global-judicial body. Also, if the ICC accepts jurisdiction, this may be seen as a breach of the Rome Statute. The powers given to the ICC by its Member-States do not include recognition of statehood or adjudicating on delicate matters of that sort. Arguably, the ICC, including the Office of the Prosecutor, lacks the necessary institutional legitimacy and credibility to make such decisions and determinations.

4. *Issues*

This case encompasses two main issues. The first is whether the PNA is a state for the purposes of Article 12. Any decision in this regard will not be limited to

the PNA alone; it may have a spillover effect on other quasi-state political entities. If the ICC positions itself as an easy-path arbitrator for such claims, other political entities seeking recognition, such as Taiwan, Kosovo, South Ossetia, and Abkhazia, may approach it, hoping to take advantage of the quick and easy path to statehood. The second is whether the ICC, and more specifically, the Office of the ICC Prosecutor, is the most suitable body to make that determination. The first is highly complex and multifaceted and is well beyond the scope of this contribution. The second issue is more important in the GAL context as it raises questions of institutional legitimacy and accountability (see Chapter III on "Global Administrative Law Principles" and, in particular, Secion III.A on "Legality, Impartiality and Review"), along with the issues of global separation of powers and checks and balances. Pursuing that path, I do not wish to discuss the PNA's claim to statehood. Rather, in this section, I want to draw the reader's attention to the institutional aspects. The question, then, is not "what should the decision be?"; rather, it is "who should decide?".

As will be outlined below, in addition to the Prosecutor, several other organizations/organs may resolve this question. Some of them are more suitable, both normatively and institutionally, to tackle such issues. They enjoy more legitimacy and suffer less from a democratic deficit. First, within the ICC, the Prosecutor may refer the question to the Pre-Trial Chamber. The Pre-Trial Chamber is composed of no less than six judges. Proceedings are carried out in front of a single judge or a three judge bench. Under Article 15, if the Prosecutor finds that there is reasonable basis for the commencement of an investigation, he or she shall seek authorization to do so from the Pre-Trial Chamber. The Pre-Trial Chamber then examines the request and supporting materials. The Pre-Trial Chamber could then address the question of ICC jurisdiction over the matter while examining the merits of the Declaration. Furthermore, Article 18 provides the Prosecutor the option to refer the investigation to a state. Given Israel is still in the process of investigating the events that took place during Operation Cast Lead, the Prosecutor could – and according to many experts should – allow it to finalize its conclusions before moving forward with its own investigation. Under the principle of complementarity, this line of action seems appropriate. The Prosecutor may choose to wait until procedures in Israel have ended or until the ICC has ascertained that Israel is unwilling or unable to adequately handle the inquiry. Should the Prosecutor findIsraeli actions insufficient in this regard, he can approach the Pre-Trial Chamber as provided for in Article 18(6). The Chamber may then grant permission to pursue extraordinary investigative steps despite Israel's ongoing treatment. In the PNA case, the Prosecutor could have passed the decision on to the Pre-Trial Chamber in either of these ways. In such a case any decision would have been made by a judicial organ, rather than an

executive. It seems more appropriate for a determination on such a controversial matter to be taken by the ICC's judicial organ, rather than the Prosecutor.

Additionally, it is theoretically possible that the Assembly of State Parties ("ASP") has the capacity to engage in such matters as well. The Assembly may amend the provisions of the Statute, introduce changes to some procedural rules, suggest an interpretation of Article 12(3), or "perform any other action", thus allowing the PNA to bring forward its Declaration. In reality, however, it is hard to believe that the ASP would take such action.

Furthermore, outside the realm of the ICC, the Security Council ("SC") may provide a source of jurisdiction (on SC see also § I.B.1 "Material Limits to the Power of the United Nations Security Council: Between Law and Politics", by J. Arato, and § I.B.2 "The reform of the UN Security Council: GA Decision 62/557", by A. Averardi), either independently or following a petition from the Prosecutor. Pursuant to Article 13(b), the Security Council may refer a situation to the Prosecutor. The Prosecutor may also approach the SC (as he did with Sudan), seeking its guidance or referring the question to it. With or without the Prosecutor's cooperation, the SC may render a decision under Chapter VII, referring the situation to the ICC. Such a decision will confer jurisdiction upon the Court even in the absence of state consent. This would be one way in which jurisdiction over the events of Operation Cast Lead could be granted without deciding the question of whether or not the PNA is in fact a state. There is no statehood requirement for Council-referred situations. More doubtfully, if the SC does not act, it is possible the General Assembly could step in and initiate an investigatory procedure. Although this is not explicitly provided for in the Statute, building upon General Assembly "Uniting for Peace" Resolution 377, one might argue that because the Security Council is refraining from taking any action in the matter, the General Assembly may do so in its place. This is an unlikely and unprecedented option.

5. *Further Reading*

a. A. PELLET, "The Palestinian Declaration and the Jurisdiction of the International Criminal Court", 8 *J.I.C.J.* 981 (2010);
b. Y. RONEN, "ICC Jurisdiction over Acts Committed in the Gaza Strip", 8 *J.I.C.J* 3 (2010);
c. Y. SHANY, "In Defence of Functional Interpretation of Article 12(3) of the Rome Statute", 8 *J.I.C.J* 329 (2010).

I.A.3 GAL and the Domestic Regulatory State: Challenges from the South

Rene Urueña

1. *Background*

The end of the 1980s saw two crucial transformations take place worldwide: the first, of course, is globalization. The second is much less studied in traditional legal scholarship, and yet is intimately connected to the very notion of globalized public law: the rise of the regulatory state.

The 1970s had witnessed the crisis of the idea of the "positive state" – that is, the state whose claim to legitimacy was the provision of welfare to its citizens, and which was called upon to intervene in the economy according to Keynesian logic, understanding as part of its mandate that it had to play an active role in income redistribution. This model was severely criticized both by politicians (such as Margaret Thatcher in the UK and Ronald Reagan in the US) and scholars (such as Milton Friedman), who saw in it an inefficient system that privileged public bureaucracies over private initiative, thus hampering competition and innovation. As a result, the 1980s saw a worldwide wave of privatization, liberalization, and welfare reform – a process generally referred to as "the rise of the regulatory state" by political scientists.

If liberalization was a key aspect of this process, why is it called the "regulatory state"? This issue is central to understanding the implications for global administrative law of this development. The privatization and liberalization of certain sectors of the economy (most importantly, public utilities) would mean, in the pure orthodoxy of economic theory, that only free-market competition should be allowed to set the prices of, say, water supply or electrical power. Most governments and scholars, though, were not willing to go that far in their ambitions; most were aware that competition in the newly liberalized public utilities sectors could be affected by market failures – for example, monopolies, information asymmetries, externalities, and the so-called "tragedy of the commons", where access to public goods cannot be left to the forces of the free market, but instead needs to be regulated (for the discipline of public services in the European Union, see § VIII.8 "Public Services in Europe: The *Kattner* Case", § VIII.9 "Public Services and Transboundary Cooperation (Regulation no. 1082/2006)", and § VIII.10 "Making Administrations Work: Digitalizing Public Services in Europe", by G. Delledonne). However, the old tools of the positive

state seemed ill-suited to the task of addressing market failures in the public utilities sector: redistribution, macroeconomic stabilizations, budgetary allocations, taxing and spending seem futile when the goal was to prevent failures in these newly liberalized markets. Such failures had to be addressed and prevented through public law rules intended to control the market; that is, through regulation. Therefore, the process of liberalization actually triggers a need for "re-regulation" at a different level: as privatization of public utilities occurs, a market emerges, as does the need to regulate that market. If no market exists, no regulation is needed. Hence, the label of "regulatory state" is attached to this model of governance.

The rise of the regulatory state triggered the emergence of a specific kind of institution, mostly unknown until that moment: the independent regulatory agency, focused on utilities. This agency, a rule-based, technocratic institution, designed specifically to be independent from political powers, became the embodiment of the new mode of governance. Domestic regulatory agencies such as the Water Services Regulation Authority (OFWAT) in the UK, and the myriad Utilities Commissions existing in the US at the state level are examples of this kind of institution.

2. *Materials and Links*

- World Bank, Water resources Management, *World Bank* Policy Paper 12335 (1994). (http://documents.worldbank.org/curated/en/1994/03/438920/water-resources-management);
- World Bank, 'Water Resources Sector Strategy: Strategic Directions for World Bank Engagement', World Bank Policy Paper 28114 (2004) (http://documents.worldbank.org/curated/en/2004/01/3030614/water-resources-sector-strategy-strategic-directions-world-bank-engagement);
- CESCR, General Comment 15: The Right to Water, U.N. Doc .E/C.12/2002/11 (http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94);
- WTO, Portal on water (http://www.wto.org/english/tratop_e/serv_e/gats_factfiction8_e.htm);
- OFWAT webpage (UK) (http://www.ofwat.gov.uk);
- National Association of Regulatory Utility Commissioners webpage (US) (http://www.naruc.org);

- Asociación de entes reguladores de agua potable y saneamiento de las Américas (http://www.aderasa.org);
- ICSID, *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, (http://www.iisd.org/pdf/2005/AdT_Decision-en.pdf);
- ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22. Final Award. July 24 2008 (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67);
- CIEL et al, Petition for Amicus Curiae Status in Case No. ARB/05/22 before the International Centre for Settlement of Investment Disputes (http://www.ciel.org/Publications/Tanzania_Amicus_1Dec06.pdf);
- ICSID, *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentina*, Award, ICSID Case No ARB/97/3. November 21, 2000 (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=shoDoc&docId=DC548_Sp&caseId=C159);
- ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision of the ad hoc Committee on the Application for Annulment of the Award, ICSID Case No. ARB/97/3 July 3 2002. (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC552_En&caseId=C159);
- ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision of the ad hoc Committee on the Application for Annulment of the Award, ICSID Case No. ARB/97/3 October 8 2010 (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC550_En&caseId=C159).

3. *Analysis*

The rise of the regulatory state became entangled with globalization and economic integration. During the 1990s, the mindset underlying the regulatory state was adopted by the newly liberalized economies in Eastern Europe and Latin America – sometimes voluntarily, sometimes under the strong political pressure of conditionality arrangements imposed by multilateral financial institutions. Perhaps the most evident manifestation of this trend was the widespread adoption of the independent regulatory agency: one developing state after the other created their own version of regulatory agencies focused on

utilities, closely modeled after the equivalent agencies in the Global North, and encouraged by the World Bank. The trend towards global regulatory convergence in this area was well on its way.

Another factor driving such convergence was foreign investment in public utilities. Indeed, investment in this sector requires access to considerable capital: sunk costs are enormous, and profits are received only after several years of operation. As a result, privatization of utilities in developing countries often meant that financially strong multinational corporations, often from the Global North, would access the newly created markets – and press for converging regulation in the different places where their investment occurred, in order to make investment easier and reduce transaction costs.

This trend also meant that many issues related to public utilities fell under international economic law in the 1990s. Water supply became an issue under the World Trade Organization's General Agreement on Trade in Services (GATS) (see § III.D.5 "National Regulatory Autonomy within the GATS: The *Gambling* Dispute", by M. De Bellis), and foreign investment in utilities became increasingly protected by a growing network of bilateral investment treaties (BITs). As a result, utilities regulation was necessarily adapted by some developing countries in order to comply with these new international obligations. By the same token, these states became wary of litigation, either before the WTO's Dispute Settlement Body (on this mechanism, see §§ I.E.11 "Compliance and the Post-Retaliatory Phase in the WTO: *US/Canada – Continued Suspensions*", and III.A.3 "*WTO Hormones*: Impartiality and Local Interests", by G. Bolaffi; § III.C.2 "The Disclosure of Information: Anti-Dumping Duties and the WTO System", by M. De Bellis; § III.D.2 "Global Procedural and Substantial Limits for National Administrations: The *EC-Biotech* Case", by D. Bevilacqua; § IV.4 "When SPS Applies to Apples. The *Japan – Apples* and *Australia – Apples* WTO Disputes", by F. Fontanelli; § V.9 "Spreading the WTO Dispute Resolution System: Cotton, High-Tech Products, and Developing Countries", by J. Langille) or an investment arbitration tribunal, and reformed elements of their regulation in order to prevent expensive processes initiated by multinational utilities corporations or their home states in the Global North.

These combined factors created important pressure towards the convergence of utilities regulation in developing countries – a process triggering a transnational framework characterized by the transplant of the theories, rules and institutions of the regulatory state from the Global North to the South.

4. *Issues: The Asymmetrical Architecture of Global Administrative Law*

GAL is able to make a significant contribution to addressing some of the most pressing questions involved in the rise of the Regulatory State in the South. At the same time, this process poses interesting challenges to the global administrative law project as a whole. Both of these angles interact to sketch an asymmetrical blueprint of global regulation, where global principles are often misread when applied in domestic settings.

Now, the regulation of public utilities in the South is a global undertaking, in which international institutions and transnational expertise interact, on a daily basis, with domestic regulatory agencies and courts. For example, the expansion of investment law has led to situations where domestic utilities regulation has been effectively reviewed by international investment arbitration tribunals – as evidenced by Argentina's wave of investment litigation in the late 1990s. Global limits on the autonomy of the domestic regulatory agencies enter into play in this context, as does the global judicial review of national decisions – all issues with respect to which GAL has much to contribute in order to better understand the rise of the regulatory state in the South.

This process also poses interesting challenges to global administrative law as a project. Indeed, GAL shares many of concerns embedded in the regulatory state, originally in a purely domestic setting. Transparency, accountability, legitimacy, participation, judicial review – all these were issues that emerged as the positive state was being transformed in Global North in 1980s, and were then transplanted to the Global South a decade later (see Chapter III, "Global Administrative Law Principles").

As a consequence, when thinking about the role and possibilities of GAL in the developing world, it is useful to bear in mind that there already is a regulatory state in the South which shares many of GAL's concerns, and which is also identified in the South as the offspring of a neo-liberal agenda pushed by multilateral financial institutions in the 1990s. Thus, a notice-and-comment procedure in a domestic regulatory agency may be read, from the perspective of the South, either as a question of enhancing democracy by applying global principles of participation and transparency to domestic institutions (a standard GAL approach), or as the legacy of institutional changes imposed via conditionality by multilateral financial institutions.

This may point to broader issue. As they enter the domestic setting, many global principles (even if they are merely procedural) become part of the domestic context. These principles are read, misread and deployed on the basis of purely parochial rationales. As a result, the architecture of global regulation reveals itself as deeply asymmetrical: transparency as interpreted by, say, the

Colombian Commission of Water Supply Regulation is something completely different from the same principle as read by the Water Supply Authority elsewhere. As global administrative law principles become increasingly effective at the domestic level, a new asymmetrical architecture is bound to emerge: the same principle will have a different shape in different places, and will be deployed differently, for differing domestic purposes.

The concerns that are shared by the regulatory state scholarship and GAL trigger one final challenge to the latter. As noted above, states in the Global North have for decades tackled many of the concerns derived from the rise of the regulatory state. Consequently, a wealth of both scholarship and policy alternatives have been developed, in both the US and Europe, in order to address many such concerns – notice-and-comment procedures, for example, or the conceptual apparatus of "multilevel governance", to name but a couple. The availability of such prior know-how poses a crucial normative question for the GAL project: to what extent should global administrative law draw inspiration from these experiences in the Global North?

Of course, much know-how exists in US- and Europe-based administrative law treatments of the challenges posed by the regulatory state. And many of these answers are directly relevant and applicable to similar issues at the global level. For the purposes of global governance, much can be learned from these experiences – regardless of their origin. But the question remains: is GAL strengthened or weakened in its global ambitions by being overly reliant on the lessons learned from the experience of regulatory state in the North?

5. *Further Reading*

a. K. BAKKER, *Privatizing Water: Governance Failure and the World's Urban Water Crisis*, Ithaca, N.Y. (2010);
b. N. CHNG, "Regulatory Mobilization and Service Delivery at the Edge oft Regulatory State", 6 *Regulation & Governance* (2012);
c. Y. DEZALAY, B.G. GARTH, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*, Chicago (2002);
d. V. FOSTER, *Ten Years of Water Service Reform in Latin America: Toward an Anglo-French Model*, The International Bank for Reconstruction and Development/The World Bank (2005);
e. H. HABER, "Regulating for Welfare: A Comparative Study of "Regulatory Welfare Regimes" in the Israeli, British, and Swedish Electricity Sectors", 33 *Law & Policy* (2011);

f. D. KENNEDY, "The "Rule of Law," Political Choices, and Development Common Sense", in D.M. TRUBEK, A. SANTOS, *The New Law and Economic Development: a Critical Appraisal* (ed.), Cambridge (2006);
g. D. KENNEDY, "Three Globalizations of Law and Legal Thought", in D.M. TRUBEK, A. SANTOS, *The New Law and Economic Development: a Critical Appraisal* (ed.), Cambridge (2006);
h. G. MAJONE, "From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance", 17(2) *Journal of Public Policy* 139 (1997);
i. B. MORGAN, N. DUBASH, "Understanding the Rise of the Regulatory State in the Global South", 6 *Regulation & Governance* (2012);
j. B. MORGAN, "Comparative Regulatory Regimes in Water Service Delivery: Emerging Contours of Global Water Welfarism?", *Comparative Research in Law & Political Economy Research Paper Series*, 4 (2008);
k. B. MORGAN, "*Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services*", Cambridge (2011);
l. M.M. PRADO, "Bureaucratic Resistance to Regulatory Reforms: Contrasting Experiences in Electricity and Telecommunications in Brazil", 6 *Regulation & Governance* (2012);
m. C. RODRÍGUEZ-GARAVITO, "Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America", in Y. DEZALAY, B. GARTH (eds.), *Lawyers and the Rule of Law in an Era of Globalization*, New York (2011);
n. A.K. THIRUVENGADAM, P. JOSHI, "Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Indian Telecom Regulation", 6 *Regulation & Governance* (2012);
o. R. URUEÑA, "The Rise of the Constitutional Regulatory State in Colombia: The Case of Water Governance" 6 *Regulation & Governance* (2012).

I.B FORMAL INTERGOVERNMENTAL ORGANIZATIONS

I.B.1 Material Limits to the Power of the United Nations Security Council: Between Law and Politics

Julian Arato

1. *Background*

Questions about the competences of the United Nations Security Council have abounded since the body's emergence from its cold-war hibernation. The issue has become increasingly heated as the UNSC asserts more and more powers, across a broader and broader sphere. Particularly resonant examples include the establishment of "ad hoc" (but more or less standing) tribunals for the prosecution of international crimes in the Former Yugoslavia (ICTY) and Rwanda (ICTR), and more recently the promulgation of general norms to combat terrorism (Resolutions 1267 and 1373) and nuclear proliferation (Resolution 1540). These later Resolutions do not target particular situations in specific countries, but apply globally with indefinite duration; as such they resemble veritable global legislation more than executive "measures" (for some examples see Chapter 5 on "Judicial Globalization" and, in particular, § V.1 "The ICC's Office of the Prosecutor and Transitional Justice: Article 53 of the Rome Statute and the Balance between Opportunity and Accountability", by R. Urueña; V.2 "The International Criminal Court and Africa, or A Story of Persecutory Delusion", by F. Fontanelli; § V.4 "Special Tribunal for Lebanon – Responsibility, Justice and Global Rules: Somewhere "in Between"", by E. Dunlop; § V.5 "The African Union's Ambivalent Engagement with the International Criminal Court", by T. Reinolds).

Two kinds of challenges have arisen in response to the Council's expanding assertions of authority: on the one hand it has been contended that the Council is acting in excess of its powers in its adoption of general techniques to fulfill its functions (e.g. the establishment of international tribunals with

compulsory jurisdiction over individuals, or the enactment of "legislative" measures); on the other hand, allegations have emerged that certain of the Council's particular resolutions are *ultra vires* in so far as they transgress specific limitations on the UNSC's sphere of competence – in particular respect for human rights.

Just what can the Council do within its mandate of having "primary responsibility for the maintenance international peace and security?" (Article 24) Do any provisions of the Charter explicitly limit its competence to pursue its primary function? And even if so, can any other constituted body assert with authority that the Council has acted in excess of its authority, and declare with finality that the impugned actions are *ultra vires*, null and void? Or does the Council enjoy *Kompetenz-Kompetenz* – the competence to authoritatively decide the full extent of its own competences? Given the binding nature of Council action under Chapter VII, these questions are of palpable gravity.

2. *Materials and Sources*

- U.N. Charter (http://www.un.org/en/documents/charter/);
- Resolution 827 (1993) adopted by the U.N. Security Council at its 3217th meeting, on 25 May 1993 [on establishment of the International Criminal Tribunal for the Former Yugoslavia] Res. 827, U.N. Doc. S/Res/827 (1993) (http://daccess-ods.un.org/TMP/1948024.33252335.html);
- Resolution 955 (1994) adopted by the U.N. Security Council at its 3453rd meeting, on 8 November 1994 [on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal] Res. 955 U.N. Doc. S/Res/955 (1994) (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement);
- Resolution 1267 (1999) adopted by the U.N. Security Council at its 4051st meeting on 15 October 1999 Res. 1267, U.N. Doc. S/Res/1267 (1999) [on the situation in Afghanistan] (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement);

- Resolution 1373 (2001) adopted by the U.N. Security Council at its 4385th meeting, on 28 September 2001 [on threats to international peace and security caused by terrorist acts] Res. 1373, U.N. Doc. S/Res/1373 (2001) (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement)
- Resolution 1540 (2004) adopted by the U.N. Security Council at its 4956th meeting, on 28 April 2004 [on non-proliferation of weapons of mass destruction] Res. 1540, U.N. Doc. S/Res/1540 (2004) (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement);
- Resolution 1904 (2009) adopted by the U.N. Security Council at its 6247th meeting, on 17 December 2009 Res. 1904, U.N. Doc. S/Res/1904 (2009) [on the situation in Afghanistan] (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement);
- Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, 1992 I.C.J. Rep. 114 (1992) (http://www.icj-cij.org/docket/index.php?p1=3&p2=2#1992);
- Kadi I (CFI), T-315/01, *Yassin Abdullah Kadi v. Council of the European Union*, 2005 E.C.R. II-3649.
- Kadi I (ECJ), Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi et al. v. Council of the European Union*, 2005 E.C.R. II-3649 & II-3533.
- *Al-Jedda v. U.K.*, Eur. Ct. H.R., No. 27021/08 [2011].

3. *Analysis*

The international lawyer's first instinct is usually to scour the Charter for an express demarcation of the extent of (and limits to) the Council's powers. For one in search of limits, however, a rigorous textual exegesis will not bear particularly satisfying fruit.

The Council's powers under the Charter are sizeable. The Charter does expressly delineate the UNSC's powers, and establishes certain limiting principles on the exercise of these powers. However its language is highly open-textured, rendering the grant of power extremely broad in potential, and the textual limits both narrow and malleable. The Charter delegates to the Council "primary

responsibility for the maintenance of international peace and security" (on these aspects, see Chapter VII "Global Dimensions of Democracy", particularly Section VII.A, "Promoting Democracy and Human Rights Globally" and Section VII.D, "Global Security"). To that end it may take substantive decisions (Articles 25-28 and 48) so long as these satisfy certain voting requirements (an affirmative vote of nine members, including either the concurrence or abstention of the P5)(Article 27). Under Chapter VII, by determining the existence of a "threat to the peace, breach of the peace, or act of aggression", the Council may *inter alia* recommend or decide on "measures not involving the use of armed force" (Article 41), or even authorizing the use of such force in extreme cases (Articles 42-47). Decisions of the Council are binding on members (Articles 25 and 48), and in the event of any conflict between obligations arising under the Charter (including under decisions of the UNSC), their obligations under the UN Charter shall prevail (Article 103).

Any textual limits on the Council's sphere of action derive from Article 24(2), which provides that the "Security Council shall act in accordance with the Purposes and Principles of the United Nations". These Purposes (Article 1) and Principles (Article 2) appear to establish textual limitations on the power of the Council. Yet only a handful of these Purposes and Principles have any salience. The only relevant "purposes" are Article 1(2) requiring "respect for the principle of equal rights and self-determination of peoples", and Article 1(3) "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". The only potentially relevant limiting "principle" is Article 2(7): "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…" Yet, it goes on, "this principle shall not prejudice the application of enforcement measures under Chapter VII".

The supposed limitations of Articles 1 and 2 are framed in broad language that does little to prevent the Council from determining for itself its own appropriate sphere of action (under the rubric of maintenance of peace and security) and what counts as a "measure" in terms of fulfilling its function. Only 2(7) could have arguably barred the Council from employing legislation as a means *per se*, or from establishing tribunals with binding jurisdiction over individuals within and across State lines; but the Article expressly exempts UNSC action under Chapter VII from its strictures. The only real textual limit, *prima facie*, derives from Articles 1(2) and 1(3) – meaning that the Council cannot enact particular measures that would clearly qualify as a failure to respect self-determination, equality, human rights, and fundamental freedoms without

discriminatory distinction. But at most they constitute only extremely vague and malleable outer limits on what particular UNSC measures would pass muster.

The difficulty of identifying a logical or linguistic rationale for considering UNSC action to be invalid under its mandate is exponentially compounded by the absence of any reviewing authority. The formal terms of the Charter do not grant any organ the competence to review the Council's actions, nor have any asserted such a power in practice. Under the loose delegation in the formal terms of the Charter, as confirmed by the *travaux préperatoires* and institutional practice, the Council decides its own competences in the last instance. Within its limitless bailiwick of international peace and security, the Council possesses *Kompetenz-Kompetenz* in both the judicial (because no one else can authoritatively interpret or invalidate its decisions) and the legislative sense (because no one can alter its competences through statute or amendment without the consent of the five Permanent Members (P5)). In other words, even if it appears that a Council decision manifestly exceeds its delegated powers, or otherwise violates the Purposes and Principles of the Charter, there would be no one to authoritatively pronounce such invalidity.

4. *Issues: Challenges to the Council's Powers, and their Legal and Political Weight*

The first major question is whether there are any real legal limits to the Council's powers to act in the name of maintaining international legal peace and security, irrespective of textual ambiguities? Yet even if not, account must be taken of the fact that the Council has engaged in considered *self-regulation* – particularly in response to the myriad challenges to its assertion of legislative powers in the context of international terrorism in dubious conformity with international human rights law. Thus the second question, parallel but separate to the first, is when and to what extent might the Council be expected to regulate itself?

Valiant attempts have emerged, in recent years, to articulate legal constraints on the Council's powers. These have come in a variety of flavors, of which four stand out in particular: one mainly within academia, and the other three in judicial fora.

The first type of challenge is immanent to the text of the Charter, and as such it is the most direct. It seizes on the possibility that Articles 1 and 2 pose outer limits on the sphere of action of the UN as a whole, and thus on any of its individual organs. Wherever the substantive boundary actually lies, by this view, any measure taken by a UN organ in breach of it would be *ultra vires*, null and void. Resolutions 827, 955, and 1267 have all been challenged in this vein, especially in light of Article 1(3). Resolutions 827 and 955 have been challenged

as transgressing the fundamental principle of *nullem crimen sine lege* by providing for the punishment of international crimes for which there had not yet been individual criminal responsibility under international law; 1267 been challenged for violating, *inter alia*, the suspects' right to property, the right to a fair trial, and the freedom of movement. However this entire line of argument faces an uphill battle: as noted above, in light of the vague phrasing of Articles 1 and 2 it becomes very difficult to say with certainty whether and when any particular Council Resolution has violated the limit on the Council's powers; more significantly there is no central authority to determine the validity of Council action in this regard (other than the Council itself). Though the challenge has emerged in various legal filings, it has not yet been successful in a Court of law; for the time being, its champion remains the academy.

A second challenge has arisen that appeals to international legal standards external to, and over and above the Charter regime – most famously in the judgment of the Court of First Instance of the European Union (CFI) in *Kadi I* (see § VIII.1 "Relations between Global Law and EU Law" and § VI.B.6 "Bringing to an End International Commitment: *Medellin v. Texas*" by E. D'Alterio; see also § III.B.1 "The War on Terror and the Rule of Law: *Kadi II*", by M. Savino). In considering the validity of Resolution 1267, the CFI declared that the Council could in no event act in violation of peremptory norms of international law (*jus cogens*). This slim set of norms, the argument goes, are uniquely positioned over and above the Charter (including Article 103); as such the UNSC's delegated powers cannot be understood as permitting their transgression.

In overturning the CFI's *Kadi I* judgment, the ECJ adopted a third type of challenge. The ECJ's approach is purely internal to its own jurisdiction – the legal order of the EU. The Court refused to pass judgment upon the validity of 1267 as such; instead it chose to review the EU Member States' legislation implementing the Resolution for conformity with European law. States are under international obligations, the Court agrees, but these obligations can never be implemented in a fashion that would entail the transgression of the law of the European Community – the ECJ will strike down any offending implementing legislation.

Most recently, the European Court of Human Rights (ECtHR) has taken a fourth approach, based not on validity and conflict, but rather on interpretation and harmony (on ECtHR, see § VI.B.11 "The Italian Expropriation Case: Incorporating the ECHR into National Legal Orders" and VI.A.2 "Conflicts of Norms and Conflicts of Jurisdiction in the Fight Against Terrorism", by M. Pacini; § VI.B.12 "The Italian Constitutional Court, the ECHR, and the Enactment of an 'Interpretative Act'", by F. Fabbrini; § VIII.17 "The Relationship Between the

ECHR and EU Law, the Presumption of Equivalent Protection Revisited and the End of Mutual Trust in the EU Asylum System: The *M.S.S.* Case", by D. Gallo). In its judgment in *Al-Jedda*, the Grand Chamber considered whether Britain, engaging in military operations in Iraq under the authority of the UNSC (Resolution 1546), was authorized to forgo its usual obligations under the European Convention on Human Rights (ECHR). Rather than deal with the question in terms of the validity of the Council's Resolution, or the primacy of the Resolution or the ECHR, the Court adopted an interpretive canon presuming that Council Resolutions are, absent clear and express language, consistent with human rights. At paragraph 102, the Court states that it:

> "considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law."

The importance of these challenges by regional courts must be put into proper perspective. From a purely legalistic point of view, concerned above all with validity and the conflict of norms, these challenges cannot reach either the legal powers of the Council or the validity of its enactments (in a truly authoritative sense). As the ECJ alone explicitly recognizes, each type of challenge can only have binding legal effect within the challenging Court's limited jurisdiction: at most, the CFI could only have declared 1267 invalid within the borders of Europe; at most the ECtHR's interpretative presumption can only have force within the parties to the Council of Europe. And yet the challenges *are* significant, and indeed have at least a potential to affect, shape, and limit the power of the UNSC in a more political sense: because they can undermine the legitimacy of the Council's actions.

From the political point of view, these regional rulings represent reasoned non-compliance, framed in legal terminology (threatened in the case of the CFI, actual in the case of the ECJ, and somewhere in between in the case of the ECtHR's interpretive approach). The challenge of large-scale regional non-compliance can affect the capacities of the UN Security Council quite dramatically. Unlike the modern state, the United Nations maintains no monopoly on the legitimate use of force over those it governs. In spite of the broad delegation of powers to the UN, the Council must rely upon states to implement its decisions. Compared to the state, the UNSC must depend upon

legitimacy in far greater proportion to the threat of coercion. Thus the possibility of widespread non-compliance poses a serious threat to the capacities of the Council and the UN Organization as a whole.

Though the Council may have all the juridical competence in the world, it cannot expect states to bow their heads and comply with its every whim. As a result of the position of the United Nations in the ultimately state-centric international legal system, the Council cannot act in a vacuum. It must be responsive to challenges by the mighty governed. It is forced to react in the face of a stark non-compliance challenge to its authority by a major bloc, as with the ECJ's decision in *Kadi* which invalidated the implementation of Resolution 1267 in 25 European countries (including two permanent members of the Security Council). Ian Johnstone rightly characterizes the problem in terms of legitimation. "While it may be possible to act coercively against a handful of holdouts", he writes, "broad compliance cannot be compelled if the majority of UN members view the Security Council as having acted illegitimately". And indeed the Council has had some success in mitigating non-compliance through attempts at legitimation. For example, in the case of 1373 the Council faced a deepening sag in compliance culminating in 2003. t was only able to reverse the trend by adjusting its practices with a view towards legitimation; this meant, *inter alia*, engaging in sustained attempts at public justification and providing opportunities for affected States not represented on the Council to express their views.

Thus even in the absence of clear and effective legal limitations on its competences, the Council may find its sphere of action politically constrained where it fails to adequately legitimate its demands for compliance. In the absence of any hard legal stricture, or democratic accountability, the Council turned to experimentation with techniques familiar to global administrative law to achieve greater legitimacy at the expense of a degree of its discretion. One recent example of such self-limitation is its creation of an ombudsman through Resolution 1904, capable of reviewing an individual's listing on the rolls of the 1267 terrorist-sanctions regime (the consequence of which includes the freezing of the individual's assets and the imposition of a travel ban upon him or her). In other words, faced with the threat of significant non-compliance, the Council may turn to impose a variety of legitimation techniques, including the auto-limitation of its discretion through submitting itself to some degree of accountability mechanisms – not necessarily in response to any clear positive legal obligation to do so, but at least in the interest of achieving higher legitimacy and better compliance.

In light of the importance of legitimation and compliance on the international plane, the Council cannot be understood as wielding truly boundless political power. Nevertheless, its extremely open-ended legal power is not and

cannot be sufficiently constrained by the political threat of non-compliance. Sovereign equality aside, states are not all created equal. On the one hand the possibility of non-compliance is uneven and irregular. On the other, the members of the Council, especially the P5, may simply not care about non-compliance, or at least not about all failures to comply. With some rare exceptions like the *Kadi* scenario, the Council is generally not politically accountable to those states threatening or engaging in non-compliance. Unless the threat is so severe that it would outweigh the value (to the members of the Council) of the compliance actually achieved, it may not be enough to push the UNSC to revisit its desired approach.

5. *Further Reading*

a. J.E. ALVAREZ, *International Organizations as Law-makers*, 199 Oxford (2005);
b. J. ARATO, "Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations", 10 *Int'l J. Const. L.* (I.CON) (forthcoming 2012);
c. E. DE WET, *The Chapter VII Powers of the United Nations Security Council*, 348, 51, Oxford (2004);
d. T. FRANCK, "The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?", 86 *AJIL* 519 (1992);
e. I. JOHNSTONE, "Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit", 102 *AJIL* 275 (2008).

I.B.2 The Reform of the UN Security Council: GA Decision 62/557

Andrea Averardi

1. *Background*

Article 7 of the UN Charter establishes that the principal organs of the United Nations are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat.

Under Chapter VII of the Charter, the Security Council has the primary responsibility for the maintenance of peace and security, in accordance with the principles and purposes of the United Nations (see also § I.B.1 "Material Limits to the Power of the United Nations Security Council: Between Law and Politics", by J. Arato). According to Article 25, all UN Member agree to accept and carry out the decisions of the Security Council. The Security Council is certainly the most powerful body of the UN; while other organs of the UN make recommendations to Member States, the Council alone has the power to take decisions which Member States are obligated to implement. Today the Security Council has grown beyond its initial function as a political forum, establishing a complex regime to enforce its decisions and passing both general and specific resolutions.

The Council is composed of fifteen members, divided into five permanents members and ten non-permanent members. The original five permanent members were the United States, United Kingdom, Republic of China (Taiwan), Union of Soviet Socialists Republics and France: the major powers that had emerged victorious from the second world war. In 1973, Taiwan was replaced by the People's Republic of China and, in 1991 the USSR by Russia; making the current five permanent members the United States, the United Kingdom, China, Russia and France. Decisions on substantive matters require nine votes, including the concurring votes of all five permanent members: this is the rule of "great Power unanimity". Due to this rule, each of the five permanent members has a power of veto over matters to be voted on by the Council. The ten non-permanent members, on the other hand, are elected to the Council by the UN General Assembly for a two-year term, and they are meant to be representative of the five different regions of the world (Africa, Western Europe, Latin American and Caribbean, Asia and Eastern Europe). The non-permanent members do not share the veto power with the permanent members.

Since the foundation of the UN in 1945, the possibility of reforming the Security Council has been frequently discussed, but Member States have always been unable to agree on changes to its size, membership and working methods. Even though there have been many calls for such reform, only a very few changes have been made over the last six decades. The veto power has always been the biggest obstacle to the reform of the Council; indeed, such reform would require an amendment of the Charter, which can itself be blocked by veto by any of the permanent members. It is a widespread belief that the Security Council is no longer representative of today's world, as it reflects the outdated geopolitical realities of the 20th century and does not provide for equitable geographical representation. Thus, there today exists a broad consensus among all Member States on the necessity of implementing major reforms to the Council. In order to overcome its anachronistic composition, a majority of Member States agree that the Council needs to be developed in accordance with the radical transformations in world politics that have taken place since the San Francisco Conference in 1945.

In 1993 the General Assembly decided to establish an "Open-Ended Working Group", to consider all aspects of the question of increasing in the membership of the Security Council and other related matters. Even though the "Open-Ended Working Group" worked for nearly twenty years on the Security Council membership reform, no remarkable results were achieved.

Facing the reforming complexities in this field, it was clear that something had to be done in order to break the deadlock. With the adoption of General Assembly Decision (GA) 62/557, in September 2008, Member States decided to start intergovernmental negotiations on the Security Council reform in an informal plenary of the General Assembly. Thus, Member States moved the debate from the Working Group, which had been largely ineffective, to the General Assembly. With Decisions GA 63/565 and 64/568, passed in September 2009 and September 2010 respectively, Member States decided to "immediately continue intergovernmental negotiations on Security Council reform in informal plenary of the General Assembly", as mandated by General Assembly decision 62/557.

2. *Materials*

- Charter of the United Nations, Articles 24 – 26 (http://www.un.org/en/sc/repertoire/functions_and_powers.shtml#rel1);
- Repertoire of the Practice of the Security Council (http://www.un.org/en/sc/repertoire/overview.shtml);

- GA Resolution 48/26, establishing the *Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council* (http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/48/26&Lang=E);
- GA Decision 62/557 (http://www.un.org/ga/search/view_doc.asp?symbol=a/62/49%28vol.III%29&Lang=E);
- GA Decision 63/565 (http://www.un.or./ga/search/view_doc.asp?symbol=a/63/49(vol.III)(SUP)&Lang=E);
- GA Decision 64/568 (http://www.un.org/en/ga/president/65/issues/101025-SCRdecision.pdf);
- Letter dated 29 November 2010, from the Chair of the Intergovernmental Negotiations on Security Council reform (http://www.un.org/en/ga/president/65/issues/scr291110.pdf);
- Letter dated 18 October 2010 from the President of the General Assembly to all Member States regarding an informal plenary meeting of the General Assembly on the Intergovernmental Negotiations on Security Council reform to be held on 21 October 2010 (http://www.un.org/en/ga/president/65/letters/scr181010.pdf).

3. *Analysis*

The objective of GA Decision 62/557 is to achieve a negotiated solution to the issue of Security Council reform. The Decision identifies the basis for the intergovernmental negotiations and five key issues of discussion: "categories of membership; the question of the veto power; regional representation; size of an enlarged Security Council and working methods of the Council; and the relationship between the Council and the General Assembly".

The ambitious aim is to achieve comprehensive reform of all aspects of the Security Council, resulting in a more democratic, equitably representative, transparent, effective and accountable" body. The guiding principles for the negotiations include, *inter alia*, "respect for the sovereign equality of Member States; ensuring equitable geographical distribution on the Council; strengthening the democratic underpinning of the Council; enhancing its accountability to the membership; and increasing the opportunity for Member States to serve on the Security Council. Furthermore, the Decision expressly provides for the

commencement of "intergovernmental negotiations in informal plenary of the General Assembly […] seeking a solution that can garner the widest possible political acceptance by Member States". Nevertheless, it contains no definition of what is to be considered the "widest possible political acceptance".

The economic crisis of recent years dramatically highlighted how far the current UN Security Council composition is from reflecting contemporary geopolitical realities. But, despite the clear necessity of reforming the Council, the indication from the first rounds of intergovernmental negotiations underlined, once again, how difficult is to achieve a serious reform of this body.

Most of Members States have simply confirmed the positions that they have adopted for years. The Group of Four (G4) (composed of Germany, Japan, India and Brazil) is, along with the Africa Group, still seeking permanent representation on the Council. On the other hand, the "Uniting for Consensus" (UFC) group (composed, amongst others, of Italy, Spain Argentina and Mexico) supports only an expansion of non-permanent members; while the five permanent Members reject the possibility of anything more than a modest expansion. Some consensus has been reached on few other issues, such as the necessity to reform the working methods of the Council, in order to make it more transparent and accountable, but not on the key issue of the enlargement.

Even though Decision 62/57 moved the discussion beyond the deadlock of the Working Group, by providing a common basis for negotiations, decisive progress on Security Council reform still must be achieved.

4. *Issues: Toward a More Transparent and Legitimate Council?*

The Security Council has grown beyond its initial role and today frequently performs important legal functions, as it establishes binding rules (both general and particular in scope) and oversees the implementation of its decisions, acting as legislator, judge and executive.

As mentioned previously, the Council's current membership and its working methods do not reflect the geopolitical realities of the 21st century. Despite the agreement of many Member States that reform of the Council is more urgent than ever, it is still uncertain how such reform might be achieved. GA Decision 62/57 identifies the basis for intergovernmental negotiations and the key issues for discussion, but political and procedural obstacles that have stymied the process over the last few decades, remain unchanged. GA 62/57 Decision therefore exemplifies, once again, how difficult the path to reform is.

However, the issue of Security Council reform gives rise to some other relevant questions concerning the role and the working methods of the Council.

The last reform efforts began in late 2008, at the beginning of the financial and economic crisis. The great global instability of the last few years has increased attention on global governance issues and on multilateral political institutions (see Section I.D, "Intergovernmental and Transnational Networks"). Is that possible that, because of the lack of representativeness of the Council, the world's attention will shift from the UN to other institutions, such as the G-8, G-14 or G-20? Moreover, the Council represents a classical, inter-state, consent-based model of international law: Is there a more general crisis of that kind of traditional multilateral institutions within global governance? On the other hand, the Council has grown beyond its classical functions, acting frequently as a legislator, a judge or an executive, but there is no formal process for reviewing its decisions; the ultimate sanctions on its authority remain political. In this regard, would not the Council be more legitimate and effective by submitting itself to the rule of law? Considering how difficult is to reach an agreement on the question of membership reform, might it be possible to shift the focus of reform efforts on to mechanisms to improve the transparency and the accountability of the Council?

5. *Further Reading*

a. S. CHESTERMAN, "The Security Council and the Rule of Law. The Role of the Security Council in Strengthening a Ruled based International System". Final Report and Recommendations from the Austrian Initiative (http://www.iilj.org/research/documents/UNSC_and_the_Rule_of_Law.pdf);
b. B. CRONIN, I. HURD (eds.), *The UN Security Council and the politics of international authority*, London, New York (2008);
c. P.G. DANCHIN, H. FISCHER (eds.), *United Nations reform and the new collective security*, Cambridge, New York (2010);
d. A. KUGEL, "Reform of the Security Council – A New Approach?", FES NY Briefing Paper 12, September 2009 (http://www.cic.nyu.edu/staff/docs/kugel/06696.pdf);
e. K. MANUSAMA, *The United Nations Security Council in the post-Cold War era : applying the principle of legality*, Leiden, Boston (2006);
f. E. MARTINI, "Restarting negotiations for the reform of the Security Council", Documenti IAI 1008, May 2010 (http://www.iai.it/pdf/DocIAI/iai1008.pdf);
g. K.A. MINGST, M.P. KARNS (eds.), *The United Nations in the 21st Century*, Boulder (2007);

h. J.N. PIROZZI, "The European Union and the Reform of the United Nations: Towards a More Effective Security Council?", Mercury E-Paper no. 13, November 2011 (http://www.iai.it/pdf/Mercury/Mercury-epaper_13.pdf);

i. N. RONZITTI, "The reform of the UN Security Council", Documenti IAI 1013, July 2010 (http://www.iai.it/pdf/DocIAI/iai1013.pdf);

j. J. TAUBMAN, "Towards a theory of democratic compliance: Security Council legitimacy and effectiveness after Iraq", 37 *New York University Journal of International Law and Politics* 161 (2004-2005).

I.B.3 International Specialized Agencies and the Question of Accountability to Beneficiaries of Aid: A Case Study of the United Nations Children's Fund (UNICEF)

Elizabeth Hassan

1. *Background*

UNICEF was created by the UN in December, 1946 to provide food, clothing and health care to children in Europe. In 1953, the UN General Assembly (GA) made UNICEF a permanent organ of the UN. Thus, what started as a response to the plight of children in post-WW II Europe gradually metamorphosed into a global mandate covering all areas of child survival and development including health, education, protection, and emergencies, especially in conflict and post conflict regions. After the adoption of the Convention on the Rights of the Child (CRC) in 1989 by the GA, UNICEF adopted the CRC as its guiding document and started applying a human rights-based approach to its operations. The CRC, its Optional Protocols, as well as the Millennium Development Goals provide the legal basis for UNICEF's work. Today, UNICEF has presence in approximately 190 countries which gives it a generally global character.

UNICEF conducts its programmes through partnerships. Its primary partners are host governments because programmes are carried out within their jurisdictions and because UNICEF's work serves to complement the efforts of these states. Before commencing work in any country, it signs a Cooperation Agreement with the government and develops a Situational Analysis (SitAn) which contains an assessment of the problem that needs to be addressed; an analysis of the major causes; the strategies to be employed; and the goals of the project. These two documents provide the basis for UNICEF's intervention in any country.

One of the areas that UNICEF has been most active is in its campaign on child survival. Speaking in relation to this, Jen Banbury of UNICEF USA stated that "UNICEF's main goal has been to reach as many children as possible with smart, low-cost solutions to counter the biggest threats to their survival". Thus, one critical problem the Organization has consistently tried to combat is child mortality which is rampant in most developing and under-developed countries.

The basic strategies used are: first, identification of the top child killer diseases; and second – because most of these diseases are preventable – carrying out massive immunization campaigns against them. Most times, the campaigns also involve immunizing pregnant women so as to provide maximum protection to the unborn babies.

These immunization campaigns have had a significant impact on child mortality. In Chad, for instance, a joint immunization campaign with the government covering polio, measles, meningitis and tetanus reached approximately 2.5 million children under five years of age helping to bring down the reported number of polio cases from 64 in 2009 to 26 in 2010. In Nigeria, a 95% decline was achieved following a national programme which brought down the number of polio cases from 388 in 2009 to 21 in 2010. Other countries have experienced significant increases in the number of children who benefit from immunizations. In 2010, UNICEF introduced the *meningococcal-A* vaccine in Mali, Niger and Burkina Faso, which was used to immunize about 20 million people. The 2010 Annual Report shows that an aggregate of about 170 million children were immunized against measles and 1 billion children against polio with vaccines worth about $757 million. Consequently, child mortality has dropped from 37,000 children per day in 1991 to 24, 000 per day in 2009.

The acceptance and credibility that UNICEF currently enjoys are largely products of the successes it has recorded in providing these essential services to beneficiaries. However, several scandals occurred during the last decade that caused a lot of outcry and brought the Organization under close scrutiny, leading to significant criticism. One such incident occurred in Nigeria in 2004, when a study conducted by Dr. Haruna Kaita, a pharmaceutical scientist and Dean of the Faculty of Pharmaceutical Sciences of the Ahmadu Bello University in Zaria, Kaduna State, revealed that UNICEF's polio vaccines were contaminated with sterilizing agents. Dr. Kaita was reported to have taken samples of the vaccine used to India for analysis using WHO-recommended technologies like Gas Chromatography (GC) and Radio Immuno Assay. The analysis revealed evidence of serious contamination and showed that the vaccine was harmful, toxic, and laced with chemicals that have a direct effect on the human reproductive system.

Although there was never any admission of responsibility by UNICEF or evidence that the vaccines were administered with knowledge of the sterilizing component, a similar incident that occurred in the Philippines in 1995 makes this hard to ignore. In that case, a UNICEF anti-tetanus vaccine was reported to have been laced with B.Hcg, which, when administered, permanently causes a woman to be unable to sustain a pregnancy. During the course of that investigation, it was discovered that the vaccination program had already reached about 3 million women between the ages of 12 and 45. These incidents stimulated suspicion over

the extent of UNICEF's involvement in the campaign for population control in partnership with the UN Fund for Population Activities, and whether the organization was beginning to stray from its original mandate.

A major fear that has kept some governments deeply wary of UNICEF's programmes is the fact that the polio vaccine itself contains live polio-causing agents. Thus, some children end up contacting the paralysis-causing disease as a result of the vaccine. In Pakistan, as recent as 2011, about 78% of polio infected children had actually received polio vaccination; while in Nigeria, complaints that UNICEF officials were not forthcoming about such potential side effects caused some local authorities to reject the immunization campaigns.

These incidents raise questions about whether UNICEF is procuring sub-standard vaccines or sacrificing quality for quantity in its bid to provide "low-cost solutions"; and whether it is beginning to act outside its mandate, especially when partnering with other organizations like UN FPA. But more particularly, it raises questions of how UNICEF can be held accountable to those who suffer injury as a result of these actions.

2. *Materials and Links*

- UNICEF, *About UNICEF: Who we are* (www.unicef.org/about/who/index_history);
- UNICEF Division of Policy and Practice, *Guidance on Conducting a Situational Analysis of Children's and Women's Rights,* New York (www.unicef.org);
- UNICEF, *Annual Report 2010* (http://www.unicef.org/publications/index_58840.html);
- World Health Organization, *Guidelines for Epidemic Preparedness and Response to Measles Outbreaks*, Geneva: WHO, 1999. WHO/CDS/CSR/ISR/99.1
- The United Nations, *Charter of the United Nations*, 1945 (http://www.un.org/en/documents/charter/);
- The United Nations, *Convention on the Privileges and Immunities of the United Nations* (http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/032/73/IMG/NR003273.pdf?OpenElement);
- The United Nations, *Convention on the Privileges and Immunities of the Specialized Agencies*

(http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/86/IMG/NR003886.pdf?OpenElement);

- UN General Assembly, Sixth Committee, *Draft Resolution on Responsibility of International Organizations*, 66th Session, 2011 (http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N11/580/43/PDF/N1158043.pdf?OpenElement);
- UN General Assembly, Fifth Committee, *Review of the Efficiency of the Administrative and Financial Functioning of the United Nations*, 49th Session 1995, UN Doc. No. A/C.5/49/65 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/120/51/PDF/N9512051.pdf?OpenElement);
- "Yearbook of International Organizations" UIA 13th Ed. (http://www.uia.be/yearbook-international-organizations-online);
- "UNICEF: Nigerian Polio Vaccine Contaminated with Sterilizing Agents, Scientist Finds", LIFESITENEWS, Thurs. Mar. 11, 2004 (http://www.lifesitenews.com/news/archive/ldn/2004/mar/04031101); (http://www.sott.net/articles/show/182359-UNICEF-Nigerian-Polio-Vaccine-Contaminated-with-Sterilizing-Agents-Scientist-Finds) (http://theindustry.yuku.com/topic/2471#.TyeINIHlREN).

3. *Analysis*

One of the basic principles of law is "ubi jus, ubi remedium" which means that where there is a right (for example, not to be injured), there should also be a remedy. However, in relation to UNICEF and similar international specialized agencies, this principle is almost inapplicable due to the privileges and immunities they enjoy. UNICEF's immunity stems from the UN Charter and some treaty obligations of states. Article 105 of the Charter obliges member states to grant the Organization and its representatives such privileges and immunities as are necessary for the independent exercise of their functions in connection to the organization. Additionally, the Convention on the Privileges and Immunities of the United Nations (CPIUN) and the Convention on the Privileges and Immunities of the Specialised Agencies (CPISA) confer absolute immunity from judicial actions on the UN and its agencies.

An argument advanced in favour of this immunity is that international agencies like UNICEF need immunity in order to carry out their functions. This

can be supported on the grounds that they are in the business of providing essential services and working for the public good. Thus, exposing them to excessive legal and regulatory demands might be counterproductive or limit their ability to exercise their mandate effectively. But pushed to the extreme and in light of recent events presented in the background section, should they be allowed to work without adequate responsibility for harm caused by their actions?

Some scholars have argued that these immunities may create a situation where there is *de facto* impunity for the Organization and its officials. Human rights experts have also argued that development and humanitarian work are neither inherently nor categorically benign, and that, in myriad ways, UN-supported programmes, however well-intentioned, can cause or contribute to human rights violations, or result in UN complicity in human rights violations perpetrated by others. To this end, the challenge is how to strike the right balance between the freedom and protection these agencies need in order to execute their mandates and the competing need to ensure that the rights of those affected are protected.

The disenchantment that followed the scandals involving UNICEF's polio and tetanus vaccines illustrate the dangers of giving them free rein or covering them with such a thick mass of immunity. It also serves as a strong indication that, although these agencies have achieved a high level of acceptance and legitimacy, this can only be sustained with the right oversight and accountability regime that ensures they act within allowable limits. Where these are absent or inadequate, they stand to lose both acceptance and legitimacy, and consequently, their ability to execute their mandates effectively. This invariably defeats the purpose of the privileges and immunities they are granted.

UNICEF's influence has grown significantly as a global standard-setting body (see Chapter II, Section II.B, "Global Standards as Technology of Global Governance"), with demonstrated ability to influence decision makers in the area of child survival and development. Its global reach and the group of people it services underscore the need for a mechanism to hold it accountable for harm caused to the putative beneficiaries of its actions.

4. *Issues*

Certain issues arise as regards how UNICEF can be held accountable for injuries caused in the conduct of its activities. This was one of the questions raised by Dr. Haruna Kaita after the sterilization scandal in Nigeria. One of the most effective ways of obtaining redress is through the global administrative law mechanism of

judicial review, and this is an avenue that could be explored by those involved. However, the question of whether it is desirable to subject agencies like UNICEF to this kind of review is not yet settled. This is more difficult due to the immunity that UNICEF enjoys. Precedent in the area of employee complaints, which are to date the most common kinds of actions brought against IOs, reveal a general reluctance by courts to limit or suspend immunity.

But even if UNICEF is to be held responsible, which regulatory regime should it be subjected to? Some of the international bodies that could exercise this review do not have the mandate to do so. For instance, the ICJ's jurisdiction is limited to matters involving states while the UN Administrative Tribunal handles complaints involving internal staff only (see § V.11 "Administrative Tribunals and the Review of Discretionary Powers: A Case from the Council of Europe Administrative Tribunal", by E. Mitzman).

National courts could be a potential avenue for claims to be brought and they could provide some regulatory oversight for the activities of UNICEF. This is demonstrated by the decision of the Supreme Court of the Philippines to stop the immunization campaign after allegations of the vaccine's sterilizing effect emerged. However, being an international agency, UNICEF is a body that carries out a mandate delegated to it by a group of states. Thus, it operates beyond the institutional frameworks of individual states. That being the case, can national courts legitimately exercise jurisdiction over UNICEF? And what kinds of remedies can they grant? The Philippines and India case studies indicate that national courts are more likely to grant injunctions than compensation. Perhaps the disclaimer contained in the Cooperation Agreement that UNICEF and states sign could be used to secure compensation. This clause states that any harm that occurs in the course of executing any programme or project is attributable to the state and not UNICEF. Potentially, victims could obtain compensation by claiming against states and not necessarily UNICEF. However, the clause provides an exception where the act is caused by "gross negligence or wilful misconduct" on the part of UNICEF, which given its immunity, essentially means that victims may well not get the redress they deserve.

The Draft Articles on Responsibility of International Organizations (DARIO) provides instances where international organizations can be held responsible for internationally wrongful acts attributable to them. To this extent, victims of compromised immunizations or children who get infected with polio as a result of the vaccines administered to them by UNICEF, or indeed, victims of any other kind of injury, could have a cause of action. However, the DARIO are soft law and thus not legally binding on the organizations. Also, the question of which regulatory body can enforce the claims remains. Even where the DARIO are codified into hard law, the combined effect of Articles 103 and 105

of the UN Charter will act to preclude any form of liability. Moreover, what is the status of the provisions of the DARIO in relation to the those of the CPIUN and CPISA?

In the absence of strong judicial review at the international or national level (on Chapter V on "Judicial Globalization"), a regulatory gap is evident which makes it very difficult to hold UNICEF accountable for its actions. In the light of this, should UNICEF develop some form of internal oversight/complaint mechanism, like the WTO Dispute Settlement Body or the World Bank Inspection Panel? (on the former, see §§ I.E.11 "Compliance and the Post-Retaliatory Phase in the WTO: *US/Canada – Continued Suspensions*", and III.A.3 "*WTO Hormones*: Impartiality and Local Interests", by G. Bolaffi; § III.C.2 "The Disclosure of Information: Anti-Dumping Duties and the WTO System", by M. De Bellis; § III.D.2 "Global Procedural and Substantial Limits for National Administrations: The *EC-Biotech* Case", by D. Bevilacqua; § IV.4 "When SPS Applies to Apples. The *Japan – Apples* and *Australia – Apples* WTO Disputes", by F. Fontanelli; § V.9 "Spreading the WTO Dispute Resolution System: Cotton, High-Tech Products, and Developing Countries", by J. Langille; on the latter, see §§ III.B.6 "The World Bank Inspection Panel: The *Indian Mumbai Urban Transport Project* Case" and VII.A.9 "*Chad - Petroleum Development and Pipeline Project*: Human Rights and the World Bank" by M. Circi). This is certainly a possibility that is recommended by the Humanitarian Accountability Partnership (HAP), an international institution that seeks to regulate the activities of inter-governmental and non-governmental actors that provide humanitarian, philanthropic or essential services. Also, if such a body was formed, who would have standing to bring claims before it? States or affected individuals? The HAP itself is an oversight body that could be used to bolster the accountability inadequacies of UNICEF. It lays down international best practices for accountability and requires organizations to make provisions for proper complaint and compensation mechanisms. However, because membership is voluntary, its powers are limited. Currently, UNICEF and indeed most UN agencies have not submitted themselves to this regulatory regime.

5. *Similar Cases*

Other incidents have occurred over the years that bring to fore the inadequacy of the accountability of international organizations and their agencies, and accentuated the limitations caused by the immunities they enjoy. One example is the persistent allegations of rape and sexual assault carried out by UN Peacekeepers, particularly the case of the Democratic Republic of Congo.

Although acting under the auspices of the UN and thus covered by immunity, the allegations caused a lot of outcry and led to international investigations into the activities of peacekeepers in the field.

A second example is the case of Behrami and Saramati involving UNMIK's administration in Kosovo, and the K-FOR and NATO forces, where the ECtHR attributed the acts of the forces to the UN, in effect meaning that the applicants could obtain no redress for the injuries they suffered.

Below are links to relevant materials on these issues:

- Michael Fleshman, "Tough UN Line on Peacekeeper Abuses: Action Initiated to End Sexual Misdeeds in Peacekeeping Missions", Africa Renewal, Vol. 19 #1(April 2005) p. 16 (http://www.un.org/en/africarenewal/vol19no1/191peacekeep.htm);
- UN General Assembly, Fifty-ninth Session, Report of the Secretary-General on the activities of the Office of Internal Oversight Services "Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo", Document No. A/59/661 (2005);
- P. ROWE, "United Nations Peacekeepers and Human Rights Violations: The Role of Military Discipline", 51 *Harv. Int'l L.J.* 113 (2010); (http://www.harvardilj.org/articles/Rowe.pdf);
- European Court of Human Rights, *Behrami v. France* (2007) 45 EHRR SE 85, 45 EHRR SE 85, [1999] ECHR 182 (see § VI.B.5 "*Behrami/Behrami and Saramati v. France*: Relations between Supranational Systems (ECHR - UN)" by E. D'Alterio) (http://www.bailii.org/eu/cases/ECHR/1999/182.html).

6. *Further Reading*

a. J.E. ALVAREZ, *International Organizations as Lawmakers*, Oxford (2005);
b. E. BENVENISTI, G.W. DOWNS, "Court Cooperation, Executive Accountability, and Global Governance", 41 *Journal of International Law and Politics* 931 (2009);
c. E. BENVENISTI, "The Interplay Between Actors as a Determinant of the Evolution of Global Administrative Law in International Institutions", 68 *Law & Contemporary Problems* 319 (2005);

d. R.E. BLACK, S.S. MORRIS, J. BRYCE "Child Survival I: Where and Why are 10 Million Children Dying Every Year?", 361 (9376) *The Lancet* 2226, 28 June 2003;
e. L. BOISSON de CHAZOURNES, "Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies", 6 *International Law Organizations Review* 655 (2009);
f. A. BUCHANAN, R.O. KEOHANE, "The Legitimacy of Global Governance Institutions", 20 *Ethics and International Affairs* 405 (2006);
g. A. CASSESE, "The Human Dimension of International Law: Selected Papers", Oxford (2008);
h. S. CHESTERMAN, "Globalization Rules: Accountability, Power and the Prospects for Global Administrative Law", 14 *Global Governance* (2008);
i. M. A. CONNOLLY, M. GAYER, M.J. RYAN, P. SALAMA, P. SPIEGEL, D. HEYMANN, "Communicable Diseases in Complex Emergencies", 364 *The Lancet* November 2004;
j. M. DARROW, L. ARBOUR, "The Pillar of Glass: Human Rights in the Development Work of the United Nations", 103 *American Journal of International Law* 446 (2009);
k. R. GRANT, R. O. KEOHANE, "Accountability and Abuses of Power in World Politics", 99 *American Political Science Review* 29 (2005);
l. B. KINGSBURY, L. CASINI, "Global Administrative Law Dimensions of International Organizations Law", 6 *International Organizations Law Review* 319 (2009);
m. B. KINGSBURY, R. STEWART, "Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations" (http://www.iilj.org/aboutus/documents/LegitimacyAccountabilityandGAL.UNATvolumefinalAug82008.pdf);
n. E. D. KINNEY, "The Emerging Field of International Administrative Law: Its Content and Potential", 54 *Administrative Law Review* 415 (2002);
o. J. KLABBERS, "The Paradox of International Institutional Law", 5 *International Organizations Law Review* 151 (2008);
p. A. MARSCHIK, "The Administration of Arms Control – Ensuring Accountability and Legitimacy of Field Operations", 6 *International Law Organizations Review* 627 (2009);
q. M. O'FLAHERTY, *The Human Rights Field Operation: Law, Theory and Practice*, Ashgate (2007);

r. F. RAWSKI, "To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations", 18 *Connecticut Journal of International Law* 103 (2002-2003);
s. A. REINISCH, "Immunity of International Organizations and Alternative Remedies Against the United Nations", Seminar on State Immunity - Vienna University (2006);
t. H.J. STEINER et al., "International Human Rights in Context: Law, Politics, Morals", Oxford, 3rd ed., (2008);
u. R. STEWART, "The Global Regulatory Challenge to the US Administrative Law", 37 *Journal of International Law and Politics* 695 (2005);
v. M.J. TOOLE, R.J. WALDMAN, "An Analysis of Mortality Trends among Refugee Populations in Somalia, Sudan, and Thailand", 66 *Bulletin of the World Health Organ* 237 (1988);
w. M. ZWANENBURG, *Accountability of Peace Support Operations'*, Leiden (2005);
x. M. ZWANENBURG, "UN Peace Operations Between Independence and Accountability", 5 *International Organizations Law Review* 23 (2008).

I.B.4 Securing "Orderly" Movement of Peoples: The International Organization for Migration

J. Benton Heath

1. *Background*

From its beginnings as an institution largely focused on the transfer of migrants out of Europe, the International Organization for Migration (IOM) today constitutes an important force in nearly every global issue dealing with the movement of peoples. A treaty-based international organization, IOM is not a UN specialized agency, and does not generally operate under UN oversight. The organization is highly decentralized, with a lean core staff in Geneva, and its activities are undertaken largely on a project basis (see below for an elaboration). Because of its unique funding structure and the ambiguity concerning the term "migration" in international law, IOM activities encompass a wide range of high-profile issues, including disaster relief, refugee assistance in armed conflicts, and human trafficking.

IOM began life as the Intergovernmental Committee for European Migration, a non-permanent organization tasked with promoting and arranging the transportation of emigrants from Europe to "countries lacking manpower". Despite this European focus, the organization's existence can be attributed in large measure to the United States. In the years following World War II, several institutions, including the International Labor Organization and the UN, competed for competence over migration-related issues. The US was concerned to limit Soviet influence over migration policy, and to preserve national sovereignty over immigration issues. The regional focus and largely technical mandate of the Intergovernmental Committee achieved these objectives (Karatani 2005). Though the IOM has expanded far beyond its original mandate, US dominance of the organization continues to be highlighted by critics, and, not surprisingly, the US remains IOM's largest financial contributor (for another case on domestic influence over an IO, see § I.B.6 "Palestine Admission into the UNESCO: A Case of Politics, and Finances", by I. Paradisi). In addition, all IOM directors-general save one have been American.

From its roots in the transportation of migrants, IOM has steadily expanded its scope of activities. Today, the Organization is also concerned with managing camps of asylum claimants and internally displaced persons, as well as providing related humanitarian aid. The Organization provides training to governments on a range of issues, such as immigration and "border management." More controversially, the Organization has, at the request of state governments, managed camps or detention centers for housing asylum claimants fleeing conflict zones. In such camps, critics have charged, migrants are subjected to coercive pressure to return home "voluntarily," as they are faced with an invidious choice between remaining in indefinite detention and accepting IOM's offer of money and assistance to return to a dangerous environment.

The Organization's range of operations are thus worthy of further inquiry. IOM continues to grow in size and reach as it expands its activities to address "internally displaced persons" and the nebulous category of "internal migration." In addition, the Organization's increasing focus on "pre-frontier strategies" to encourage "orderly migration" involves IOM in a broad range of domestic policy and administrative issues. Despite this growing role, IOM appears in the media and legal literature largely as a source of information about migration trends and human trafficking. Its governance structure and activities remain largely unexplored.

2. *Materials*

Treaties and Other International Instruments

- Constitution of the Intergovernmental Committee for European Migration, 19 October 1953, 207 U.N.T.S. 189 (http://treaties.un.org/doc/Publication/UNTS/Volume%20207/volume-207-I-2807-English.pdf);
- Amendments to the Constitution of the Intergovernmental Committee for European Migration [IOM Constitution], 20 May 1987, 1560 U.N.T.S. 440 (http://treaties.un.org/doc/Publication/UNTS/Volume%201560/volume-1560-I-2807-English.pdf);
- Cooperation Agreement Between the United Nations and the International Organization for Migration, 25 June 1996, *reprinted in* IOM Doc. MC/INF/290, Annex II (9 November 2007);
- U.N. Charter, arts. 17, 57-59, 62-64, 70, 96.

IOM Documents

- *IOM Strategic Planning: Toward the Twenty First Century*, IOM Doc. MC/1842 (1995);
- *Internally Displaced Persons: IOM Policy and Activities*, IOM Doc. MC/INF/258 (18 November 2002) (http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/84/Mcinf258.pdf);
- *Role of IOM in Emergency and Post-Conflict Situations*, IOM Doc. MC/INF/260 (18 November 2002) (http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/84/Mcinf260.pdf);
- *Note on IOM Strategy: Current and Future Migration Realities and IOM's Role*, IOM Doc. MC/INF/262 (13 October 2003) (http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/86/MCINF_262.pdf);
- *IOM-UN Relationship*, IOM Doc. MC/INF/285 (14 November 2006) (http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/92/MC-INF-285.pdf);
- *Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits*, IOM Doc. MC/INF/290 (9 November 2007) (http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_290.pdf);
- *Review of the IOM Strategy*, IOM Doc. MC/INF/302 (12 October 2010) (http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/99/MC_INF_302.pdf);
- *Programme & Budget for 2012*, IOM Doc. MC/2317 (7 October 2011) (http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/100/MC_2317.pdf);
- IOM PROJECT HANDBOOK (2011) (http://publications.iom.int/bookstore/index.php?main_page=product_info&cPath=1&products_id=751).

Evaluations of IOM Activities

- K. BEM et al., A Just Australia, Oxfam Australia & Oxfam Novib, *A Price Too High: The Cost of Australia's Approach to Asylum Seekers* (2007) (http://www.irr.org.uk/pdf/a_price_too%20_high.pdf);
- Human Rights Watch, *'Rot Here or Die There': Bleak Choices for Iraqi Refugees in Lebanon* (2007) (http://www.hrw.org/sites/default/files/reports/lebanon1207.pdf);

- B. BENGTSON et al., Swedish Institute for Public Administration, *Study of the International Organization for Migration and its Humanitarian Assistance* (2008) (http://www.sida.se/Documents/Import/pdf/200840-Study-of-the-International-Organization-for-Migration-and-its-Humanitarian-Assistance.pdf);
- U.K. Department for International Development, *Multilateral Aid Review: Assessment of International Organization for Migration* (2011) (http://www.dfid.gov.uk/Documents/publications1/mar/IOM.pdf);
- IOM, *Response to the UK-DFID Multilateral Aid Review Report* (2011) (http://www.dfid.gov.uk/Documents/MAR/IOM-response.pdf);
- R. RANA, J. CONDOR, *Evaluation of the International Organization for Migration's Ongoing Activities on Support to the Flash Appeal for the Haiti Earthquake and Cholera Outbreak* (2011) (http://www.sida.se/Global/Countries%20and%20regions/Latin%20America/IOM%20Sida%20Haiti%20Evaluation.pdf);
- R. VERDUIJN, L. VERDUJIN-JÖNSSON, Stakehouse International, *External Process Evaluation of IOM's Response to the Libya Crisis* (2011).

3. *Analysis: "Decentralized" and "Pragmatic"*

The IOM Constitution, most recently amended in 1987, sets up a tripartite structure (plenary, executive, and secretariat) common to international organizations, but the organization is more notable for its emphasis on decentralization. IOM's Geneva office engages in a variety of normative and data-gathering initiatives – the organization is most widely cited for the data it assembles on global human trafficking. But headquarters staff makes up a relatively small portion of IOM personnel, and the organization's website brags that its 7,800 operational staff is located "almost entirely in the field".

IOM works almost entirely on a "project" basis. A very small portion of the its budget derives from annual assessed contributions from member states. Mostly, the organization operates through voluntary contributions, which are assigned (often earmarked by donors) for a particular project. Projects are generally conceived and developed by country-level missions, and later endorsed by staff at the regional or headquarters level. Thus, the "lower" levels of the IOM organizational structure are responsible for most of the organization's innovation and institutional development, in addition to constituting most of the staff. The fact that each project is assigned a unique code allows all contributions and charges to be attributed to a specific project, a method which is meant to increase

transparency and foster competitive project design. IOM refers to this process as "projectization".

IOM activities extend to many high-profile natural disasters and crisis zones. Among IOM's largest expenses today are its activities in Haiti following the 2010 earthquake. The Organization serves as the "lead agency" for camp coordination, camp management, and shelter, under an agreement with the United Nations humanitarian system. This means that IOM is responsible for coordinating the activities of other relief agencies, and serves as the "provider of last resort" for these services. In fact, IOM has itself managed a number of camps in Haiti, and it has also become heavily involved in managing the movement of displaced persons when camps are closed by the government or by landowners.

In disaster response and crisis management, IOM has emerged as a "pragmatic" agency with a "can-do" mentality. These terms figure prominently into IOM's own branding efforts, and the Organization takes pains to distinguish itself from other international organizations and NGOs: "IOM's principal comparative advantage lies in combining the strength and recognition of an intergovernmental organization with unusual speed and flexibility of response" (IOM Doc. MC/INF/260). In practical terms, this attitude manifests itself in the Organization's willingness to delegate a large amount of decisional authority downward to country-level teams, and in its emphasis on practical, results-based projects rather than theoretical issues. The Organization's competitive and pragmatic disposition, however, has drawn criticism from those who view IOM as willfully blind to the issues of principle or policy implicated by its assistance to state governments.

4. *Issue: Project-Based Funding and the Limits of Accountability*

IOM's emphasis on "projectization" is widely viewed by critics and supporters as a unique and important feature of the Organization. The Organization notes its similarity to "activity-based costing", an accounting method that has gained traction mostly in the private sector. The benefits of IOM's approach are couched largely in terms of efficiency, innovation, and accountability. But the method comes with its own tradeoffs, notably in terms of strategic planning and other issues of public policy.

When projectization was implemented in 1993, it was seen largely as an accountability measure that increased transparency vis-à-vis donors. Most of IOM's staff is currently funded by voluntary contributions to the project(s) on which they work, meaning that most staff are on short-term contracts and hold

positions at the country level, where projects tend to originate. In principle, staff are to be released when projects are completed, and, if no new ideas are put forward, the country office is supposed to be dissolved (Bengtson 2008). This creates an incentive for staff to innovate and propose ideas to secure their survival, but the expansionist tendencies of innovation are theoretically limited by donors' willingness to pay for a project.

The IOM appears to prefer locally generated solutions to top-down strategic direction. While project ideas may emerge at headquarters or in the eight regional offices, it is expected that most activities will be devised by country-level staff. In 2011, IOM implemented a uniform policy for the approval of project proposals, which require support from the head of the country-level delegation, followed by endorsement from the regional office or headquarters, and then by donor involvement. In light of this process, what types of institutional structures would strike a proper balance between centralized oversight and locally grown innovation, and how can "products" developed in one country be effectively recognized and adapted by other offices?

An obvious drawback to the projectization process concerns IOM's capacity to respond quickly to emergencies. Flexibility and speed are among the Organization's most prominent selling points, but these seem to be undermined by a funding procedure that requires projects to be conceived and pitched to donors before any action takes place on the ground. This has been a problem for IOM in practice, and it has developed several processes to deal with this issue. In 2011, the IOM Council approved the establishment of an emergency funding mechanism that would bridge this gap. It remains to be seen whether IOM's increasing need for on-hand cash, owing to its rapidly expanding emergency response operations, will ultimately undermine projectization and force the development of new transparency and accountability mechanisms (see also § I.B.10 "SARS, the 'Swine Flu' Crisis and Emergency Procedures in the WHO", by J. B. Heath; § I.B.11 "National Dysfunction and Global Remedies: The International Commission against Impunity in Guatemala", by E. Dunlop; for accountability issues involving complex form of governance, see § I.E.1 "The Great East Japan Earthquake: Disasters Risk Reduction and the Policy of the International Community", by S. Nespor; § I.E.5 "Horizontality as a Global Strategy for Accountability: the OECD Reviewing the EU CAP", by B. Carotti and G. Dimitropoulos; § I.E.7 "Accountability in Transnational Governance: The Case of Forestry", by G. Sgueo; § I.E.9 "International Organizations and Horizontal Review: The World Health Organization, the Parliamentary Council of Europe, and the H1N1 Pandemic", by A. Deshman).

A much deeper issue, however, concerns the direction and limits of the accountability generated by projectization. As noted above, the process makes

continual employment and perhaps even the existence of a country office dependent on the generation of new project ideas and the identification of funding sources. A likely and frequent source of both ideas and funds is the host state, which may be facing an array of problems such as border security, large migrant worker populations, asylum claimants, or internal displacement. This set of incentives encourages a close and receptive relationship with host governments, and perhaps a willingness to accept projects that might otherwise be deemed counter-productive, unprincipled, or illegal.

This concern is compounded by IOM's acknowledged view "that the organization cannot tell governments what they should do or how to do it" (Bengtson 2008, 13). In the past, IOM has been willing to accept projects even where the government limits what assistance is provided. In at least one case, the organization was willing to forgo even the systematic screening of migrants for persons with valid asylum claims (*Ibid*). Critics in the past have argued that such actions implicate IOM in *refoulement* – the return of refugees to territories where they face persecution – and other human rights violations.

In light of these incentives, can IOM projects be supplemented with additional accountability mechanisms to ensure compliance with norms of human rights and refugee law? To whom ought IOM be accountable—member states, intended beneficiaries, affected individuals, the "world community"? In recent years, IOM has avidly endorsed several sets of principles and guidelines, some of which purport to wholly or partially restate binding law, such as the Guiding Principles on Internal Displacement. How might adherence to such principles be assessed?

In the area of humanitarian reform, observers have begun to suggest the potential for "peer review" as a source of accountability and learning. Under what conditions can mutual observation structures, such as the humanitarian "cluster" system, in which IOM interacts with a number of humanitarian agencies, foster a meaningful "peer review" that might lead to reform? Alternatively, can the competition and innovation among country-level IOM offices themselves be harnessed to promote compliance with human rights and other norms?

5. *Issue: IOM-UN Relations*

The separation between IOM and the United Nations system is not the result of a historical accident. Rather, in the years following World War II, the United States aggressively opposed efforts to develop a general migration organization within the UN framework. The IOM's independence from the United Nations

became a crucial condition of US support, as it was not interested in establishing a permanent organization with substantial operational or policymaking autonomy (Karatani, 2005). Though IOM has since been transformed into a permanent organization with a global focus, its separation from the UN structure arguably continues to facilitate broad state control over migration policy.

Today the IOM maintains a formal cooperation agreement with the United Nations that provides the normative basis for cooperation and consultation between the two organizations. The provisions of that document are quite broad, though it is perhaps notable that the agreement obliges IOM to "take into consideration any formal recommendations that the United Nations may make to it and, upon request, report to the United Nations on actions taken by it … in order to respond to or otherwise give effect to such recommendations" (Article V.3). There is no reciprocal obligation on the United Nations.

IOM also participates in a number of coordination arrangements with the UN. It is a "standing invitee" to the Inter-Agency Standing Committee for humanitarian policy and response, and the IOM participates on an *ad hoc* basis in arrangements for development cooperation. The Organization also maintains specific cooperation agreements with certain UN offices and agencies, including UNHCR and the United Nations Office on Drugs and Crime.

A series of discussions between 2002 and 2007 at IOM focused on possibilities for closer cooperation with the United Nations. A 2007 paper (MC/INF/290) details four options: (1) greater implementation of the existing cooperation agreement, by establishing standing bodies for technical or policy issues; (2) "related agency" status, such as that enjoyed by the IAEA and the WTO; (3) dissolution of IOM and reorganization as a UN programme or fund; and (4) "specialized agency" status under Articles 57 and 63 of the United Nations charter, such as that enjoyed by the WHO and the FAO. It seems that most members continue to favor the status quo, perhaps with enhanced arrangements for cooperation.

It should be asked who benefits from the current arrangement. As IOM's membership grows rapidly, such that its membership overlaps significantly with that of the UN, what are the remaining benefits of formal independence? To what extent can formal independence be said to preserve a different institutional culture, a distinct "informal constitution" (Cogan 2009), or different internal rules for funding or accountability? Additionally, to what extent could the dynamics of "regulatory competition" between IOM and the UN differ if the two organizations were brought into a closer relationship?

Provisions for "specialized agencies" in the UN Charter have been said to provide for a kind of "constitutional" structure, in which certain functions become the province of certain organizations (Klabbers 2009). Agreements with

specialized agencies commonly recognize the agency's "distinctive and central role" in its relative field. Because the IOM-UN agreement contains no such provision, is it appropriate to say that IOM exists "outside" this constitutional structure? In answering this question, one should bear in mind that the specialized agencies retain their own ultimate decision-making structure, although they, like IOM, are required to take account of UN recommendations. See the IOM document on this subject, MC/INF/290, for a detailed analysis of the various options for tighter integration.

6. *Further Reading*

a. R. ANDRIJASEVIC, "Deported: The Right to Asylum at EU's External Border of Italy and Libya", 48 *Int'l Migration* 148 (2009);
b. R. ANDRIJASEVIC, W. WALTERS, "The International Organization for Migration and the International Government of Borders", 28 *Envt'l & Planning D: Soc. & Space* 977 (2010);
c. I. ASHUTOSH, A. MOUNTZ, "Migration Management for the Benefit of Whom? Interrogating the Work of the International Organization for Migration", 15 *Citizenship Stud.* 21 (2011);
d. M. BARNETT, M. FINNEMORE, *Rules for the World: International Organizations in Global Politics* (2004);
e. R. CHOLEWINISKI, R. PERRUCHOUD, E. MACDONALD (eds.), *International Migration Law: Developing Paradigms and Key Challenges* (2007);
f. M.C. DORF, C.F. SABEL, "A Constitution of Democratic Experimentalism", 98 *Colum. L. Rev.* 267 (1998);
g. G.S. GOODWIN-GIL, "Towards a Comprehensive Regional Policy Approach: The Case for Closer Inter-Agency Cooperation", 5 *Int'l J. Refugee* L. 347 (1993);
h. R. GRANT, R.O. KEOHANE, "Accountability and Abuses of Power in World Politics", 99 *Am. Pol. Sci. Rev.* 29 (2005);
i. E. HAPPEL, "Returning to Zero: Forced Evictions in Haiti's Displaced Persons Camps", *Canada Haiti Action Network*, March 1, 2012, (http://canadahaitiaction.ca/content/returning-zero-forced-evictions-haitis-displaced-persons-camps);
j. R. KARATANI, "How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins", 17 *Int'l J. Refugee L.* 517 (2005);

k. J. KATZ COGAN, "Representation and Power in International Organization: The Operational Constitution and Its Critics", 103 *Am. J. Int'l L.* 209 (2009);
l. J. KLABBERS, "Global Governance before the ICJ: Re-Reading the WHA Opinion", 13 *Max Planck Y.B. U.N. L.* 1 (2009);
m. S. MARTIN, "An Overview of International Cooperation over Migration", 101 *Am. Soc'y Int'l L. Proc.* 306 (2007);
n. R. PERROUCHOUD, "From the Intergovernmental Committee for European Migration to the International Organization for Migration", 1 *Int'l J. Refugee L.* 501 (1989);
o. R. PERROUCHOUD, "Persons Falling Under the Mandate of the International Organization for Migration (IOM) and to Whom the Organization May Provide Migration Services", 4 *Int'l J. Refugee L.* 206 (1992);
p. C. PHUONG, *The International Protection of Internally Displaced Persons* (2004);
q. "Activity-Based Costing", in *The Economist*, 29 June 2009 (http://www.economist.com/node/13933812).

I.B.5 The UN Committee against Torture – in Search of Greater Cooperation

Rosa Raffaelli

1. *Background*

The UN Convention against Torture, adopted by the General Assembly of the United Nations in December 1984, served both to define torture at the international level and to establish the duty of States parties to prevent and punish it, including by exerting universal jurisdiction in accordance with the principle *aut dedere aut judicare*.

Article 17 of the Convention set up the Committee against Torture (CAT) as the monitoring body tasked with supervising States' compliance with the Convention. The Committee is an autonomous quasi-judicial treaty-based organ, created and managed by the States Parties to the Convention; in its structure and basic functioning, it is very similar to all other UN treaty based committees. The CAT is made up of 10 experts, who are nominated and elected by State parties but serve in their personal capacity; their independence should be ensured as they are entitled to the privileges and immunities of experts on mission for the UN. All Committee members must and undertake a solemn declaration upon acceptance of office that they shall act "honourably, faithfully, impartially and conscientiously" in their role (see Rule 14 of the Rules of Procedure (RoP)). Over time, members of the Committee have included not only lawyers but also doctors, civil servants and other persons having a specific expertise relevant in the field of torture.

The CAT is tasked with reviewing States' reports, as well as, for those States that have accepted such procedures, receiving inter-State and individual complaints (according to Articles 21 and 22). Additionally, it can also carry out confidential *ex officio* inquiries as provided by Article 20, which sets up a regime to which States are automatically subjected unless they opt out. This last procedure, which was new at the time of the establishment of the Committee, gives it the power to act "*proprio motu*" whenever it has received reliable information containing well-founded indications that torture is systematically practiced in the territory of a State party.

In addition to the functions specified in the Convention, the Committee also plays a role in the implementation of the Optional Protocol to the Convention, which was adopted by the UN General Assembly in 2002 and entered into force in 2006. The Protocol, which aims at establishing a system of regular visits to places of detention, also created an additional body, the Subcommittee on the Prevention of Torture (SPT), to carry out such visits and inspections. The SPT is, however, a sub-committee of the CAT and presents its annual report to the latter, which then decides whether to include it in its own annual report. The most effective system for sanctioning a failure by a State party to cooperate with the SPT (that is, "naming and shaming") depends upon a decision by the CAT (adopted by majority) to make a public statement on the matter or to publish the report of the SPT (see Art. 16 of the Optional Protocol). As the SPT is a relatively new body, it may be too early to evaluate its effectiveness and its relationship to the CAT; however, its creation has certainly served to extend the Committee's powers.

2. *Materials and Sources*

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (http://www2.ohchr.org/english/law/cat.htm#part2);
- Rules of Procedure of the Committee against Torture (http://tb.ohchr.org/default.aspx?Symbol=CAT/C/3/Rev.5);
- Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (http://www2.ohchr.org/english/law/cat-one.htm);
- Annual Reports of the Committee against Torture (http://www2.ohchr.org/english/bodies/cat/reports.htm);
- General Comments of the Committee against Torture (http://www2.ohchr.org/english/bodies/cat/comments.htm);
- Confidential Inquiries of the Committee against Torture (http://www2.ohchr.org/english/bodies/cat/confidential_art20.htm);
- Guidelines on the form and content of initial reports under article 19 to be submitted by States parties to the Convention against Torture, CAT/C/4/Rev.3, 18 July 2005 (http://www.unhcr.org/refworld/category,REFERENCE,,OPGUIDELINE,,43f2fe4611,0.html);
- General guidelines regarding the form and contents of periodic reports to be submitted by states parties, CAT/C/14/Rev.1, 2 June 1998.

(http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/7df33ca2971affd3802566270055f195?Opendocument);
- New optional reporting procedure to the Committee against Torture (http://www2.ohchr.org/english/bodies/cat/reporting-procedure.htm);
- Statistical survey of individual complaints considered (http://www2.ohchr.org/english/bodies/cat/procedure.htm).

3. *Analysis*

As noted above, the main task of the Committee is to supervise States' compliance with the Convention through a number of different monitoring procedures. The Convention, while listing these mechanisms and establishing their main features, does not include a detailed description of each the procedures have therefore been specified by the Committee itself, both through its Rules of Procedure (which it is empowered to adopt, in accordance with Article 18 of the Convention) and through its comments and guidelines. Thus, the types and contents of States' obligations under the Convention have been substantially specified, and to a certain extent altered, by the case law and practice of the Committee itself.

Article 19 provides that States must submit an initial report on their compliance with the Convention within one year of its entry into force, as well as periodic reports every 4 years and "such other reports that the Committee may request". The procedure allows the Committee to examine the reports and to make general comments, while States are allowed to make observations in response. Since the early 1990s, the Committee has adopted final conclusions and recommendations on State reports, focusing both on positive aspects and on issues of concern; additionally, all materials related to the reports are published on its website.

In order to ensure uniformity in the reports, as well as to assist States in drafting them and ensure, as far as possible, their completeness, the Committee first included Rule 65(4) in its Ruls of Procedure, which empowers it to inform State parties of its wishes regarding the form and content of the reports and to issue guidelines on this matter. The Committee then subsequently adopted Guidelines on the form and content of initial reports (CAT/C/4/Rev.3). According to the Guidelines, which are extremely detailed and aim at soliciting a very high level of information from reporting States, States are requested to provide general information on both the *de jure* and *de facto* situation in the country (including cases of violations and remedies taken), as well as information on an article-by-article basis. In addition, the Committee has also adopted

guidelines regarding periodic reports (CAT/C/14/Rev.1). According to these, the reports should be divided into three parts: the first concerning new developments (including new legislative and administrative measures, case law, cases of alleged violation of the Convention, and any new developments which might hinder the State's ability to comply with the Convention); the second including information which was requested by the Committee and not previously provided by the State; and the third providing information on all measures taken by the State in order to comply with the Committee's previous recommendations. If the Report submitted by a State does not contain sufficient information, i.e. all information which was required according to the Guidelines, the Committee may request an additional report containing the missing information. Once the reports have been received, they are reviewed by the CAT. According to Rule 68 of the Rules of Procedure, the Committee notifies the States parties of the date, duration and place of the session at which their reports will be examined and invites representatives of the States to attend the meetings. If a State fails to send its representatives, the Committee may either postpone consideration of the report or proceed with it. The examination of the country reports generally takes place in a public session, in which both the delegation from the State and the Country Rapporteur (designated to consider specific State reports) are allowed to speak and discuss issues of concern to the Committee; at the end of this dialogue, and after hearing any additional information or reply from the State's representatives, the Committee makes its final remarks (Rules 70 and 71).

One peculiarity of this procedure, which was not envisaged by the Convention but was rather developed in the CAT's practice, is the Committee's ability to rely on information from sources other than the Report: thus, the CAT evaluates the State's report in the light of information available to the Human Rights Committee, the Special Rapporteur on Torture, as well as information provided by NGOs, national human rights institutions, and publicly available information. Indeed, during the drafting of the Rules of Procedure, it had been suggested that NGOs and other organizations having consultative status with ECOSOC should be granted observer status in the Committee's public meetings, thus ensuring that they would be invited to the Committee, granted access to its documents and allowed to speak after the Committee's members. While no consensus could be reached on the adoption of this rule, NGOs with ECOSOC consultative status, specialized agencies, UN bodies and regional intergovernmental organizations have been granted, under Rule 63, the power to provide information to the Committee and to lodge a complaint under Article 22 on behalf of victims (Rule 107). The role of NGOs is clearly essential in ensuring that the Committee is provided with full information in addition to that

contained in State's reports; NGOs may thus submit reports to the Committee and meet with it, in private, on the day immediately before the consideration of each State party report (A/65/44). The procedure to examine State reports comes to an end with the adoption, by the Committee, of its conclusions; subsequently, however, States are allowed to present their observations in reply to the Committee's conclusions, and the Rules of Procedure have also set up a follow-up procedure. Firstly, the Committee may, in its conclusions and recommendations, indicate that State has not discharged some of its obligations under the Convention or did not provide sufficient information; in such a case, the CAT may request the State party to provide it with additional follow-up information (see Rule 71(2)). According to Rule 72, the Committee may also designate one Rapporteur to follow-up with the State party on its implementation of a number of specified recommendations; the Rapporteur assesses, together with the country Rapporteurs, the information provided by the State and reports to the Committee at every session.

Another mechanism to ensure compliance with the Convention, which was set up for the first time in the Torture Convention, is the procedure envisaged in Article 20: an *ex officio* inquiry by the Committee, not based on a complaint or a report but merely on reliable information (coming from any possible source, including NGO reports), that torture is used systematically in the territory of a State. According to information available to the public, the Committee has initiated at least 8 *ex officio* inquiries, in most cases based on information submitted by NGOs. This procedure, to which States are automatically subjected unless they opt out, must be carried out in close cooperation with the State concerned, and its final outcome is confidential. However, Article 20 also allows the Committee to publish a summary account of its conclusions in its annual report (also see Rule 90), and the Rules empower it to issue communiqués for the media and the general public (Rule 80); thus, although publicity is limited, and often comes at a later stage, it still may produce significant effects, especially when the Committee finds that torture is, indeed, systematically practiced in the territory of a State party. The procedure under Article 20 is further specified in the Rules of Procedure, which deal in particular with the relationship between the CAT and the member State concerned, with a view to ensuring the latter's cooperation. Thus, before deciding whether to open a procedure under Article 20, the Committee invites the State to cooperate and to submit observations, which it then reviews, together with other relevant information, in order to take its decision. If the procedure is opened, the CAT appoints one or more of its members to conduct the inquiry and report back; moreover, it may request States to appoint a representative to engage with the inquiry, to provide all necessary information, to indicate any further means of cooperation that they wish to

extend to the Committee (Rule 85), as well as to agree to a visit on their territory by the Committee (Rule 86). Scholars had argued that the requirement of State's consent to country visits would be an insurmountable obstacle to the effectiveness of Article 20's procedures; however, the Committee has been able to obtain such agreement in almost all cases, thus being able to visit penitentiaries and to conduct hearings (such as interviews with witnesses and other individuals, in accordance with Rule 87). Moreover, in the only case known to the public where such consent was requested but not granted, while Egypt's refusal to accept a country visit prevented the Committee from examining the situation *in situ*, it was also taken into account when the Committee decided to publish a summary account of its report. Thus, it may be argued that the threat of publication may place pressure on the State to extend cooperation (see the Summary Report on Egypt, A/51/44, para. 200). Once the inquiry procedure is concluded, the Committee transmits its findings, as well as its recommendations, to the State concerned, and may decide, after consultations with the State (whose requests are however not binding), to include a summary account of the proceedings in its annual report.

The Convention envisages two additional mechanisms to review a State party's compliance with its obligations: inter-State communications and individual complaints. Both procedures are optional, and States must explicitly accept the Committee's competence under Articles 21 and 22 in order to activate them. As is often the case with inter-State procedures, the Article 21 mechanism has never been resorted to; but the individual complaints mechanism, on the other hand, represents an effective tool for reviewing States' compliance with the Convention, at least with respect to the 65 States which have accepted this procedure. According to the Committee's own statistics, it has to date received 462 communications regarding 29 countries, 324 of which have already been concluded (180 were discontinued or declared inadmissible, while in 60 cases the Committee found a violation of the Convention and in 121 it found no violation).

According to the procedure under Article 22, the Committee may receive complaints from individuals who claim to be victims of a violation of the Convention, and who are under the jurisdiction of a State that has accepted the procedure. This complaint mechanism is confidential and also allows the Committee, according to the Rules of Procedure, to adopt interim measures, if "necessary to avoid irreparable damage to the victim or victims of alleged violations" (Rule 114). The CAT then proceeds to examine the admissibility of the claim (for instance, ascertaining that all available domestic remedies have been exhausted, and that the same matter has not been and is not being examined under another procedure of international investigation or settlement, in

accordance with Rule 113); if it is found to be admissible, the State and the person concerned are informed and may submit explanations and statements. Subsequently, the Committee considers the complaint and formulates its findings (or "decisions"); the State concerned is then invited to inform the Committee of action taken in conformity with its decisions. The Committee may include in its annual report a summary of the communications examined and of its decisions; additionally, it may designate one or more Rapporteur(s) for follow-up, tasked with ascertaining the measures taken by the State concerned to give effect to the Committee's findings.

4. *Issues: New Mechanisms to Improve State Cooperation: Questions of Legitimacy and Effectiveness*

As appears clearly from this brief analysis of the monitoring mechanisms envisaged by the Convention, the CAT has consistently expanded its powers with a view to improving and deepening the cooperation of States. This expansion has taken place both through the Rules of Procedure, which the Committee itself has adopted and which are often much broader than what might have been expected based on the language of the Convention, and through the adoption of guidelines, general comments and informal procedures.

As seen above, the Committee's guidelines have imposed on member States a number of very detailed duties and obligations with regard to the content and format of their periodic reports; the completeness of the report is then evaluated based on the standards established by the CAT, potentially leading to a request for additional information. Moreover, although the periodic reporting procedure was originally meant to only involve States and the Committee, as the Convention does not envisage participation by external actors, the CAT has successfully been able to engage in meaningful discussion with NGOs and other national actors, as well as to cooperate with the Special Rapporteur against Torture, thus ensuring alternative sources of information which are potentially less biased than the national report. In addition to these mechanisms, which are clearly aimed at ensuring more cooperation from States as well as from other concerned organizations, it is worth highlighting other additional new instruments which have the same purpose and objective: the so-called "list of issues", developed in the context of the State reporting procedure under Article 19, and the request for interim measures, applicable in the course of the Article 22 procedure. I will also examine the procedures that the CAT has developed to deal with States' failure to comply with their duty to submit initial and periodic reports.

The first additional mechanism, the list of issues, has been recently developed based on a pre-existing practice, which was also created by the Committee and had no legal basis either in the Convention or in the Rules. This procedure was created in the context of the State reporting procedure: before the Committee's session, a pre-sessional Working Group met to prepare a list of issues for the States whose reports were due to be examined in the following session. The aim of this procedure, as originally drafted, was to ensure that the dialogue between the State and the Committee would focus on matters of particular interest to the latter, allowing for informed oral replies by the representatives of the State; the list of issues was thus prepared on the basis, inter *alia*, of the information contained in the national periodic report, the recommendations addressed by the Committee to the State in the past, and information originating from non-governmental sources (See A/59/44, Annex VI).

This initial procedure clearly formed the basis for the development of a new mechanism, which was adopted by the Committee in May 2007: before a State party submits its periodic report, the Committee drafts a list of issues which the State is required to address in its subsequent report. According to the Committee, the procedure should assist States parties to prepare and submit more focused reports, guiding their preparation and content, facilitating the reporting process (since States are encouraged to submit, as a report, replies to the questions and issues raised in the list of issues), and strengthening the State's capacity to fulfill their reporting obligation in a timely and effective manner (see A/62/44).

The new procedure was initially adopted on a trial basis, but, given the positive feedback received from States, it was then decided to use it on a regular basis; reports submitted in accordance with the new procedure are given priority in their examination by the Committee. While the new procedure is optional and States are allowed to accept it or not, the Committee, in an attempt to ensure better cooperation and a more meaningful use of the reporting procedure, has up to now, prepared lists of issues for all States whose reports were due, regardless of their acceptance of the new procedure, and is planning to continue to do so until 2013, when it will seek to obtain States' acceptance prior to submitting the list of issues.

The new procedure has no legal basis in either the Convention or the Rules of Procedure; indeed, it represents a departure from the mechanisms envisaged by the Convention. However, States parties have, in the main, accepted it; although it is entirely optional, more than 70% of States decided to respond to the CAT following this new procedure (see A/66/44). Thus, it may be concluded that this new process, which was adopted merely following internal procedures

and which places a number of additional administrative requirements on member States (since they are required to present a specific report containing replies to detailed questions raised by the CAT, and thus to gather precise information on a number of different issues), has been successful in ensuring a higher degree of cooperation on the part of States.

Another mechanism that the CAT has developed in order to ensure better cooperation is the procedure which applies when States do not submit their reports, or do so with substantial delay. Indeed, like many other human rights bodies, the Committee has also been faced with the problem of ensuring that States comply with their reporting obligations, submitting timely and adequate reports and attending sessions for their consideration; this is particularly important since the Art. 19 review procedure is the only mandatory mechanism under the Convention. In order to increase State's compliance with their obligation to report (with regard to both initial and periodic reports), the Committee has established a procedure to react to States' non-compliance with their obligations.

Thus, according to Rule 67 of the Rules of Procedure, the Committee may transmit to a State party, through the Secretary-General, a reminder of its duty to submit a report; if the State does not comply, the Committee notes this failure in its annual report to the States parties and to the UN General Assembly. Additionally, since 2002 a new provision has been added to this Rule, allowing the Committee to notify the State party, through the Secretary-General, that it intends to examine the measures taken by the State "to protect or give effect to the rights recognized in the Convention in the absence of a report, and adopt concluding observations"; thus, the Committee has endowed itself with the power to review the situation existing in a State party even in the absence of a report, if this is long overdue. Although this procedure has never been used, and its legitimacy appears somewhat disputable, it is claimed to have been relatively successful, as the mere threat of its application has encouraged some States parties to submit their long overdue reports.

Another new procedure that has been developed in the CAT's Rules of Procedure and practices, but has no legal basis in the Convention, is the adoption of interim measures. Interim measures are frequently requested by applicants under the Article 22 procedure, in particular in cases concerning imminent expulsion or extradition and regarding a violation of Article 3; according to Rule 114 of the RoP, "at any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations". Since the

adoption of interim measures by the Committee is not based on the text of the Convention, but merely on the Rules of Procedure, their legal status is not entirely clear and they are not legally binding. The Committee originally qualified States' non-compliance with requests for interim measures as a violation of the substantive article of the Convention (in most cases, Article 3), without ruling on the existence of a breach of Article 22. More recently, however, the Committee has treated States' refusal to comply with interim measures as a breach of both the substantive rule and Article 22 (*Brada v. France*, Communication n. 195/2002, in A/60/44): according to the Committee, since Article 18 of the Convention vests it with competence to establish its own rules of procedure, these become "inseparable from the Convention to the extent that they do not contradict it". In this case, Rule 114 of the Rules of Procedure is specifically intended to give meaning and scope to Articles 3 and 22 of the Convention, which otherwise "would only offer asylum seekers invoking a serious risk of torture a purely relative, if not theoretical, form of protection" (*T.P.S. v. Canada*, Communication n. 99/1997, A/55/44). Thus, the Committee, by approving a rule of procedure which empowers it to adopt interim measures (which were not foreseen by the Convention), and by interpreting this rule as allowing for a finding of a violation of Article 22 whenever such measures are not respected by the State concerned, has arguably expanded its powers under the Convention, at the same time limiting State discretion. Consequently, although interim measures are in no way binding, a State's decision not to respect them may give rise to a finding by the CAT of a violation of Article 22.

The procedures examined in this and in the previous paragraph are all intended to improve cooperation by member States and to enhance the CAT's powers and ability to engage in meaningful discussion with States. Of course, these procedures can only assist the CAT to a limited extent; States can submit incomplete reports, or no reports at all, or refuse to enforce interim measures, and the Committee does not have the power to subject them to sanctions or binding duties. However, this chapter has shown that the CAT, through its internal procedures and standards, is requiring an increasingly higher degree of cooperation on the part of member States, be it by complying with requests for interim measures, by suspending expulsions of persons who are at risk of ill-treatment or by submitting detailed reports in accordance to the CAT's requests, guidelines and issues (for a general overview of correlated aspects, see Chapter IV "The Enforcement of Global Decisions").

5. *Further Reading*

a. R. BANK, "International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?", 8 *European Journal of International Law* 613 (1997);
b. R. BANK, "Country-oriented procedures under the Convention against Torture: Towards a new dynamism", in P. ALSTON, J. CRAWFORD (eds.), *The future of U.N. Human Rights Treaty Monitoring*, Cambridge (2000), p. 145 et seq.;
c. A. BOULESBAA, *The UN Convention on torture and the prospects for enforcement*, The Hague (1999);
d. C. INGELSE, *The UN Committee against Torture: An Assessment*, The Hague (2001);
e. A. MUKHERJEE, *Torture and the United Nations: Charter and Treaty-based Monitoring*, London (2008);
f. M. NOWAK, E. MCARTHUR, *The United Nations Convention Against Torture: A Commentary*, Oxford (2008);
g. G.J. NALDI, "Interim Measures in the UN Human Rights Committee", 53 *International and Comparative Law Quarterly* 445 (2004);
h. J.M. PASQUALUCCI, "Interim Measures in International Human Rights: Evolution and Harmonization", 38 *Vanderbilt Journal of Transnational Law* 2 (2005).

I.B.6 Palestine Admission into the UNESCO: A Case of Politics, and Finances

Ilaria Paradisi

1. *Background*

The United Nation Educational, Scientific and Cultural organization (UNESCO) was created in November 1945 as a specialized agency of the United Nations (UN), according to Article 57 of the UN Charter. The purpose of the Organization is to contribute to peace and security; it promotes stronger collaboration among nations through education, science and culture; and it seeks to foster universal respect for justice, the rule of law, human rights and fundamental freedoms.

The Constitution of UNESCO, signed on November 16th, 1945, entered into force on November 4th, 1946 after ratification by twenty countries. According to Article X, relations with the UN were to be formalized by means of an agreement approved by the General Conference of the Organization, in order to provide for effective cooperation with UN structures while recognizing, at the same time, the autonomy of the UNESCO in its fields of competence.

The organs of the UNESCO are the General Conference, the Executive Board and the Secretariat (Article III of the Constitution). The General Conference consists of the representatives of the Member States; it determines the policies and the "main lines of work" of the Organization, taking decisions on programmes submitted by the Executive Board.

The Executive Board is composed of 58 government representatives of Member States, elected by the General Conference, having regard to "the diversity of cultures and to a balanced geographical distribution". It acts under the authority of the General Conference, and it is "responsible for the execution of the programme adopted by the Conference". The Executive Board also "recommend[s] to the General Conference the admission of new Members to the Organization".

The Secretariat is constituted by a Director General and related personnel as may be required. The Director General "formulate[s] proposals for appropriate action by the Conference and the Executive Board", and submits a draft programme of work for the Organization with corresponding budget estimate to the Board. In the

discharge of their duties, the Director General and its staff cannot "seek or receive instructions from any government or from any authority external to the Organization" (Article VI of the Constitution).

There are also several UNESCO "institutes", charged with specific operational tasks and enjoying various degree of autonomy, established by the General Conference in order to decentralize its functions.

With a resolution of the General Conference, on October 31st, 2011, UNESCO became the first UN agency to admit Palestine as full Member (its 195th). According to Article II of the Constitution, a new membership requires the approval of the two-thirds of the General Conference: 107 votes were in favor, 14 contrary, with 52 abstentions. The United States, Israel, Sweden, the Netherlands and Germany were among States that opposed the admission.

Palestine's request for admission to UNESCO was presented, for the first time, in 1989. The application was rejected on the basis that Palestine lacked recognition as a State (on the concept of statehood see § I.A.2 "The Notion of "Statehood": the Palestinian National Authority's Attempt to Bring a Claim Against Israel Before the International Criminal Court", by Y. Meer). Prior to UNESCO's 2011 decision, Palestine only had observer status in the General Conference, with the capacity to make oral or written statements in plenary meetings of committees, commissions and other subsidiary organs, with the consent of the presiding officer (Rule 68 of Procedure of the General Conference). Nevertheless, since 1989 the Palestinian Authority has been closely involved in several activities of the UNESCO, primarily thanks to the establishment, in December 1993, of the Joint UNESCO Palestinian Authority Committee, created in order to encourage and enhance the peace building process and, in particular, to provide support for the development of education, institution builiding, and culture. Immediately after, in april 1994, the UNESCO set up the Programme of Assistance to the Palestinian People (PAPP), which became the UNESCO Programme for Palestine (UPP) in April 2000. In May 1997 a UNESCO office has been opened in Ramallah, enabling the Organization to contribute actively to the humanitarian response following the conflict which has affected the Gaza Strip from December 2008 to January 2009. During the last two years the joint initiatives of UNESCO and Palestianian Authority made relevant outcomes in the Organization's fields of competence. Quality of education has been promoted, especially by UNESCO advices for reforming the teacher training system and the education planning and mangement. With regard to culture, the assistance to the safeguarding of the Palestinan tangible and intangible cultural heritage has been further strenghtened. The same has been done for the promotion of human rights, especially freedom of expression of the press and women's rights. All these activities should be implemented as provided

in the framework of the Programme and Budget for 2012-2013, proposed by the General Conference during its 36th session general.

In this context came the recent admission of Palestine as a full Member of UNESCO, decided on the premises that Palestine accepts UNESCO's Constitution and it is ready to fulfil the obligations related to the membership. UNESCO's official documents don't argue about the statehood issue, being the status of Palestine, at the moment, the subject of ongoing deliberations at the UN.

In response to the admission vote, the United States announced their intention to stop paying all dues and voluntary contributions to UNESCO. The domestic prohibition on using US resources to fund UN agencies that recognize Palestine as a State is based on two laws, signed by President George H.W. Bush in 1990 (P.L. 101-246) and President Bill Clinton in 1994 (P.L. 103-236). Title IV of P.L. 101-246 prohibits the authorization and the appropriation of funds "for the United Nations or any specialized agency thereof which accords the Palestine Liberation Organization the same standing as a member state". Title IV section 410 of P.L. 103-236 of 1994 prohibits the provision of funding to "any affiliated organization of the United Nations which grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood".

The US provides the UNESCO with more than 80 million dollars per year, equating to some 22% of the Agency's budget. The US funding actually helps UNESCO to develop and sustain free and competitive media in several Muslim countries (Iraq, Tunisia, Egypt) and literacy programs in areas of conflict; and to support scientific research an projects intended to bring benefits to the public throughout the world. The withholding of US contributions for 2011 brings a serious risk for the UNESCO's ability to deliver its programs in such critical areas.

This is not the first time that the US has objected to a UNESCO decisions. In December 1983, the US notified the Organization of its intention to withdraw its membership, citing a growing imbalance between the size of the financial contribution it made and its comparative lack of political influence. After its withdrawal, on December 31st, 1984, the US maintained observer status. Under a new Director General, elected in 1987, UNESCO made significant changes in its management policies, which were viewed positively by the US. Throughout the 1990s, the US remained significantly involved in the UNESCO activities, by making extra-budgetary financial contributions and participating in several subsidiary activities; it finally re-joined the Organization as a full member in 2003.

2. *Materials*

- The Washington Post "UNESCO votes to admit Palestine; U.S. cuts off funding" (http://www.washingtonpost.com/world/national-security/unesco-votes-to-admit-palestine-over-us-objections/2011/10/31/gIQAMleYZM_story.html);
- Reuter "UNESCO suspends new programs after U.S. funding cut" (http://www.reuters.com/article/2011/11/10/us-unesco-palestine-funding-idUSTRE7A969620111110);
- UNESCO Basic documents (http://unesdoc.unesco.org/images/0018/001874/187429e.pdf);
- Request for the Admission of Palestine to UNESCO General Conference 35th session, Paris 2009 (http://unesdoc.unesco.org/images/0018/001832/183270e.pdf);
- Speech of Secretary Irina Bokova, Paris 13 December 2011 (http://unesdoc.unesco.org/images/0021/002146/214667M.pdf);
- UNESCO General Conference 36th session provisional agenda (http://unesdoc.unesco.org/images/0019/001938/193896e.pdf);
- UNESCO General Conference 36C/Resolution 76 on Admission of Palestine as a Member of UNESCO (http://unesdoc.unesco.org/images/0021/002150/215084e.pdf);
- UNESCO Executive Board 187 EX/Decision 40 (http://unesdoc.unesco.org/images/0021/002144/214466e.pdf);
- UNESCO Implementation of resolution 35 C/resolution 75 concerning educational and cultural institutions in occupied Arab territory (http://unesdoc.unesco.org/images/0021/002132/213290E.pdf);
- Statement by the Director General of UNESCO on withholding of funds by the United States, November 2nd, 2011 (http://www.unesco.org/new/en/unesco/about-us/who-we-are/director-general/news-single-view/news/statement_by_the_director_general_of_unesco_on_withholding_of_funds_by_the_united_states);
- 36/C/34 July 2011 scales of assessments and currency for member states' contributions 2012-2013 (http://unesdoc.unesco.org/images/0021/002108/210828e.pdf);

- Executive Board 131st session (March 26th, 1989) Request for the admission of Palestine as a member state of UNESCO (http://unesdoc.unesco.org/images/0008/000827/082711eo.pdf);
- Resolution of UN General Assembly 64/248 on Scale of assessments for the apportionment of the expenses of the United Nations (http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/248);
- Financial Regulations and rules of the World Intellectual Property Organization (http://www.wipo.int/about-wipo/en/pdf/wipo_financial_regulations.pdf);
- Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, (ICJ Rep. 1962, 167).

3. *Analysis: The Connection between Politics and UNESCO Financing System*

As noted above, the US refused to pay its financial dues contributions as a result of the UNESCO decision to admit Palestine, as provided for in its national law. Put simply, the UNESCO decision is illegal under US law because Palestine does not have the internationally recognized attributes of statehood. However, it is not the criteria for membership in IOs that concerns us here; rather, this contribution will analyze the refusal by a member of an IO to make the financial contribution that it is obliged to.

Several IOs have confronted this problem. The US and the former USSR, for instance, resorted to this "sanction" when IOs of which they were members engaged in activities they considered illegal. The motivations behind these kinds of measures are for the most political – or legal – objections to the functioning or activities of the Organization in question, rather than a more straightforward inability to pay.

Resort to this tactic is most frequent when the main financial contributors find themselves in a minority in the central decision-making bodies of an IO, and to each State therein is accorded an equal vote. This is precisely the situation in the UNESCO General Conference. In such instances, a refusal to make financial contributions represents a means of protecting the national interests of the State concerned, particularly if it feels that the IO in question is exceeding its competence. When major funders withhold their contributions, many of the Organization's activities are at risk. Indeed, in many ways the UNESCO case demonstrates the extent to which it remains dependent on Member States – and certain among them in particular. This dependency is primarily a result of a lack

of mechanisms by which to enforce unpopular decisions, and the absence of an autonomous source of funding.

On the one hand, should be emphasized that the UNESCO decision to admit Palestine was within the powers derived from its Constitution, i.e. powers that had been conferred on it by Member States. The Organization's rules on decision-making process should have determined precisely the extent to which Member States were able to control this process, and the outcome should be binding on all. From this perspective, the US has violated its international obligations, on the basis that a failure to do so – that is, a failure to stop funding UNESCO – would have conflicted with requirements stemming from its national legal order.

The question of the validity of UNESCO decisions cannot be remitted to a third body, and a judicial resolution of the dispute between the IO and its Member State does not appear viable in this case. UNESCO, like other IOs, cannot be party to a case before the International Court of Justice (ICJ). In accordance with the UN Charter, UNESCO is only authorized to request advisory opinions from the Court on any legal question (Article 96). An advisory opinion of the ICJ can rule upon the legality of an IO's act; it cannot, however, annul the act itself.

With regard to financial autonomy, several aspects merit consideration. First, the majority of UNESCO's financial resources comes from Member State contributions (see also § I.C.5 "Between Vertical and Horizontal Financing: The Global Fund and The Global Aid System", by F. Di Cristina). The payment of contributions to the regular budget of the Organization, adopted by the General Conference, is an obligation binding on Member States (Article 5 of the Financial Regulations). A smaller part of the income comes from "voluntary contributions, gifts, bequests and subventions", which may be accepted by the Director General, with the consent of the Executive Board, "provided that the purpose, for which the contribution is made is consistent with the policies, aims and activities of the organization" (Article 7 of the Financial Regulations).

The appropriations voted by the General Conference constitute an authorization to the Director General, for a two-year financial period, to incur commitments and make payments for the purposes set by the Conference (Article 4 of the Financial Regulations). The financial cost is distributed among the Members in accordance with a scale of contribution determined by the General Conference for each financial period. The scale adopted by the UNESCO is based on that of the UN suitably adjusted, to take into account the different membership of the two organizations.

The apportionment of the Organization's expenses is based on the fundamental principle of the capacity to pay. Under this principle, Member

States' vast differences in size and financial resources are taken into account, on the basis of several different elements and criteria (e.g. estimates of gross national income and others).

The scale of assessment provides also a minimum and a maximum rate (establishing a lower maximum for the least developed countries). The concept of maximum contribution has been adopted as a correction to the capacity-to-pay principle, to reduce the Organization's dependence on one or a few Member States. The principle of sovereign equality - expressed by the equality of Members voting powers recognized by the UNESCO Constitution (Article IV) – requires that differences in levels of contribution made by Member States should at least remain within certain bounds. According to the scale of assessment adopted by the UN and UNESCO to share the financial burden amongst States for the current financial period (2010-2012), a single Member can contribute a maximum of 22% of the budget and a minimum of 0.01%. These figures clearly indicate that the "sovereign equality of states", in terms of contributions or, indeed, influence, is illusory.

Secondly, the UNESCO financing system does not offer appropriate measures to compensate for defaulting members. Any failure in payment of contributions leaves a gap in the budget, which cannot be filled unless other members pay more than the percentage allotted to them. A higher percentage of contribution can be only required after the scale of assessment has been amended by the General Conference. The UNESCO Constitution provides for a Working Capital Fund as an instrument that can be used to address such gaps in the short term. The fund may be used to finance the budget appropriations while the receipt of contributions is pending. Money can be borrowed from this fund, when Members are in arrears or when urgent activities require financing, before the necessary payments are due. However, the Working Capital Fund is itself funded by the contributions of Member States, and it thus decreases when some Members remain in arrears with payments, or if provisionally-financed projects cost more than the amount of the money allocated to them. Thus, in the present case, the budget gap must be filled by voluntary contributions from Members.

Thirdly, only a few provisions of the UNESCO Constitution provide indirect assistance in enforcing Member States' financial obligations. Article IV provides for a sanction of sorts, States losing their voting rights in the General Conference "if the total amount of contributions due from it exceeds the total amount of contributions payable by it for the current year and the immediately preceding calendar year". If the failure to pay is due to circumstances beyond the control of the Member concerned, the General Conference may permit them to vote in any event. Only if failure to pay is due to condition beyond the control of the Member, the General Conference may permit the defaulting Member to vote.

Article II of the Constitution statues that when a Member State notifies its intention to withdraw from the Organization, such notice takes effect on December 31st of the following year. Thus, the notice does not have the immediate effect of terminating the financial obligations owed to the Organization.

4. *Issues: The Financial Autonomy of IOs and the Pursuit of Global Interests*

The case raises a number of relevant issues, in particular with regard to the absence of a real separation between politics and administration within UNESCO governance.

It demonstrates the ways in which States' political choices may influence and compromise the exercise of the Organization's functions, due to the latter's lack of any real financial autonomy, and the absence of tools to enforce Member States' obligations under the Constitution. This gives rise to several questions: can the principle of separation between politics and administration be effectively respected within the IOs like UNESCO? Would an independent financing system contribute to the achievement of this goal? Can Member States' obligations towards the Organization be enforced in some way?

The financing system of an IO is fundamental to its autonomy and ability to carry out its activities. The autonomy of an IO is also often closely linked to its capacity for self-funding. When an IO depends on direct contribution from Member States for its functioning and activities, it is more exposed to State influences, exerted by unilaterally suspending or reducing their contributions in order to guide the actions of the IO in their preferred direction.

The financing system of the EU, compared to that of the UN and UNESCO, has been successful in achieving a certain degree of autonomy. The EU has its own resources, but it does not have the power to impose and levy taxes or duties, as this is reserved to Member States. At present, it is difficult to conceive that any IO could directly wield a taxation power; and any effort to introduce a capacity of this kind would need to confront difficult issues in ensuring that the tax burden was equally spread. At the present moment, only a few IOs are able to require fees connected to services or benefits received by the payers. An example is given by the WIPO: it offers services, relating, for example, to the protection of intellectual property rights, requiring the payment of annual fees in return. In Europe, the first important tax collecting regional organization was the European Coal and Steel Community (ECSC). The principal

organ of the ECSC, the High Authority, was empowered to impose levies on coal and steel producers.

Finally, looking forward, other relevant questions arise in relation to the lack of resources for IOs. The Palestinians are exploring ways of acquiring membership in various UN agencies: might the UNESCO decision have a "snowball" effect, increasing the likelihood of acceptance to other UN agencies such as the WHO or the IAEA (see § I.B.10 "SARS, the 'Swine Flu' Crisis and Emergency Procedures in the WHO", by J.B. Heath; § II.A.7, "The International Atomic Energy Agency (IAEA)", by A.J. Ziaja)? If so, would the protection of key global interests, like culture, education and science, health, or the safe use of atomic energy, be undermined by certain States refusing to recognize the authority of each IO in its particular field of competence?

5. *Similar Cases*

One of the most famous examples was the refusal by France and a number of other European States to finance the United Nations Operation in Congo (ONUC), and the First United Nations Emergency Force (UNEF I) peace operations, in the 1960s. This refusal to make the required contributions forced the UN to appeal for voluntary contributions.

This was an exceptional example of the UN resorting to extra-budgetary methods to raise money for current expenses. On July 20th, 1962, the ICJ handed down an important Advisory Opinion on the matter, upholding the principle of collective financial responsibility for peace-keeping missions of the UN. The Court ruled that expenditure authorized in the General Assembly resolution for peace-keeping purposes constituted "expense of the organization in the meaning of Article 17, par. 2 of the Charter". In determining whether such expenditure legally constituted an "expense" of the Organization, the ICJ looked at the relationship between the expenditure and the purposes of the UN. As an advisory opinion, however, the judgment was unable to compel the payment of dues it held obligatory.

Another example is provided by South Africa, which decided to reduce its contributions to International Civil Aviation Organization (ICAO – see § II.A.2 "The Public Model: ICAO's Standards and Recommended Practices", by T.F. de Freitas) by 30% in 1972, 1973 and 1974, in reaction to a proposal by the Organization to suspend cooperation with that country.

6. *Further Reading*

a. C. AHLBORN, "UNESCO Approves Palestinian Membership Bid: A Case for U.S. Countermeasures Against the Organization?", 2011, (http://www.ejiltalk.org/unesco-approves-palestinian-membership-bid-%e2%80%93-a-case-for-us-countermeasures-against-the-organization/#more-4052);
b. L. EVANS, "Some Management Problems of UNESCO", 17 *International Organization* 76 (1963);
c. M. FINNEMORE, "International Organizations as teachers of norms: the United Nations Educational, Scientific and Cultural Organization and Science Policy", 47 *International Organization* 565 (1993);
d. A. MCDERMOTT, *The New Politics of Financing the United Nations*, Palgrave Mac Millan (2000);
e. R. MCKEON, "The Pursuit of Peace Through Understanding", 38 (2) *The Yale Review* 253 (1948);
f. F.L. KIRGIS, "Admission of Palestine as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response", 84 *American Journal of International Law* 230 (1990);
g. S.D. MURPHY, *United States Practice in International Law*, Volume 2: 2002-2004, Washington, DC (2005);
h. T.V. SATHYAMURTHY, *The Politics of International Cooperation; Contrasting Conceptions of UNESCO*, Genève (1964).

I.B.7 The ASEAN Charter: the Legalization of ASEAN?

Michael Ewing-Chow and *Leonardo Bernard*

1. *Introduction*

The Association of Southeast Asian Nations (ASEAN) has traditionally been regarded as a group of states operating on an *ad hoc* basis through informal understandings that impose no legally binding obligations. ASEAN's informal approach is reflected in its traditional dispute settlement mechanism that mainly focuses on the "ASEAN Way", settling disputes by informal peaceful means. This was often characterized by minimal institutionalization, non-interference in the internal affairs of one another, consultation and consensus, as well as non-confrontation.
This view, however, has been challenged since the signing of the ASEAN Charter in 2007, an international agreement signed and ratified by all Member States of ASEAN. The signing of the Charter suggests a new self-understanding of ASEAN as an organization based on clear legal obligations.

2. *History of ASEAN*

ASEAN was established on 8 August 1967 in Bangkok, Thailand, with the signing of the Bangkok Declaration by Indonesia, Malaysia, Philippines, Singapore and Thailand. Prior to the founding of ASEAN, from 1962 to 1966, an undeclared military conflict between Indonesia and Malaysia (which included Singapore for part of that time) known as the *Konfrontasi* was a major source of tension in the region. While purportedly a dispute over the island of Borneo, it was also an exercise in hegemony by the Sukarno government of Indonesia. The *Konfrontasi* was marked by several relatively minor skirmishes but resulted in the breaking off of diplomatic relations between Malaysia and Indonesia and strained diplomatic ties between the parties and other Southeast Asian nations. At the same time, the Vietnam war was escalating and many countries in the region feared that communism in the region would spread as predicted by the domino theory. Thus, when General Suharto ousted President Sukarno in Indonesia in

1966, the five founding members of ASEAN quickly moved to restore diplomatic ties, creating an organization to encourage peaceful relations with each other and limit external interference.

Despite the fall of South Viet Nam and the loss of Cambodia and Laos to the communist takeovers in the 1970s, ASEAN continued in its efforts to maintain peaceful coexistence in the region. Brunei Darussalam joined ASEAN on 8 January 1984 after obtaining independence from the British. In the 1990s, after Viet Nam pulled out of Cambodia, it was felt that it was pertinent to bring the Indochina countries into the fold of ASEAN, in order to ensure peace in the region. Thus, Viet Nam joined ASEAN on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and finally Cambodia on 30 April 1999, making up what is today the ten Member States of ASEAN.

In the first thirty years of its establishment, ASEAN was almost like a tentative experiment conducted by its founding members, with Member States largely reliant upon patient consensus-building to arrive at informal understandings or loose agreements. This initial *raison d'être* found its clearest expression in the 1979 Treaty of Amity and Cooperation, which provided that ASEAN members would abide by the following principles:

1. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
2. The right of every State to lead its national existence free from external interference, subversion or coercion;
3. Non-interference in the internal affairs of one another;
4. Settlement of differences or disputes by peaceful means;
5. Renunciation of the threat or use of force;
6. Effective cooperation among themselves.

These principles have led ASEAN to develop what has been known as "the ASEAN Way" of cooperation and dispute resolution in which members do not interfere with the internal affairs of other members, and decision making (as well as dispute resolution) is carried out only by consensus. While this has enabled ASEAN to develop (albeit as a relatively loosely integrated organization), it has often been criticized for its ASEAN Way and its apparent adherence to the principle of non-interference. Many Western commentators suggest that this adherence to non-interference and consensus undermines the rule of law. ASEAN has usually responded that, culturally, the ASEAN Way was a more effective method of resolving disputes in South East Asia, and that by not forcing its members into legally binding standards, ASEAN has moved its members from animosity to the close cooperative relationship that they enjoy today.

3. *From the ASEAN Way to the ASEAN Charter*

It is clear that, beginning with the Bangkok Declaration, ASEAN leaders initially made a deliberate decision to steer clear of binding legal obligations and to allow for flexibility. The Bangkok Declaration itself is only a political statement (as opposed to a legal document) that required no ratification, and it did not set up any institutional framework for ASEAN other than calling for an annual meeting of Foreign Ministers. ASEAN's founding fathers wanted it to be an organization with minimal legal institutionalization because, to them, it was first and foremost a diplomatic instrument for confidence-building in a time when member countries' common concern was containing communist China.

For more than forty (40) years, ASEAN functioned without a formal constitution. By choice, it has conducted its affairs in a loose, informal way with few legally binding arrangements and weak institutions. Indeed, the ASEAN Way, a term derived from the Indonesian/Malay concepts of *musjawarah* and *mufukat* stresses decision-making by consensus. The approach involves conducting informal, behind-the-scene discussions to reach a general consensus, which then forms the starting point from which a unanimous decision is to be taken at formal meetings. This can be contrasted with formal across-the-table negotiations which result in deals enforceable in a court of law. In short, the ASEAN Way is distinct from the formal legalism present in most Western international legal institutions.

All of this suggests that, at least initially, much of ASEAN's *raison d'état* was based either on realism (that is, the self-interest of each state) or at best functionalism (based on the common interests of each state). Indeed, ASEAN arose not from the ashes of the Second World War but from the *realpolitik* of the Cold War. Over the decades, however, as the threat of the spread of communism and regional military conflicts diminished, economic cooperation between ASEAN member states has begun to take on more prominence. This has resulted in the adoption of a more legally binding framework to govern the economic relationship between member countries. It is anticipated that, as levels of comfort with the more legally binding economic framework increase within ASEAN, this will eventually spread cognitively to some extent to the security and socio-cultural areas as well. The first generation economic agreements adopted by ASEAN include the 1977 Agreement on ASEAN Preferential Trading Arrangements, the 1979 Agreement on the ASEAN Food Security Reserve and the 1980 Basic Agreement on ASEAN Industrial Projects. These were early

examples of ASEAN members entering into legally binding instruments to facilitate economic cooperation.

More recently, legal rationalization took place within the context of the Framework Agreements for Enhancing ASEAN Economic Cooperation (Framework Agreements). As these were framework agreements, they mainly affirm ASEAN members' commitment to cooperate in various economic areas, but do not contain any specific binding legal obligations on economic cooperation. However, agreements containing more precise binding terms have been enacted by members to implement the mandate of the Framework Agreements (see § I.D.3 "ASEAN International Investment Agreements: The Incorporation of Global Regulatory Governance", by M. Ewing-Chow and G.R. Fischer).

The shift of ASEAN towards a more legally binding framework of cooperation resulted in the ASEAN Charter. This raises the question of whether ASEAN is changing culturally towards a more legalized basis for its intra-regional international relationships. The ASEAN Charter was signed on 20 November 2007 at the 13th ASEAN Summit in Singapore, and entered into force on 15 December 2008 when all ten ASEAN members ratified it (despite some hesitation on the part of some members over the Myanmar problem: see § II.B.3 "Labour Standards: Forced Labour in Myanmar", by E. Morlino). The Charter equips the organization with the necessary rules and mechanisms to become a legitimate player in the international arena. *Some of the drafters of the Charter have expressed the hope that the ASEAN Charter will lead to a formal system for the peaceful settlement of disputes between members.*

Article 1 of the Charter sets out the purposes of ASEAN, which include creating a single market and production base as well as enhancing regional cooperation and integration. The Preamble to the Charter concludes as follows:

> We, the Peoples of the Member States of the Association of South East Asian Nations … [h]ereby decide to establish, through this Charter, the legal and institutional framework for ASEAN.

There are two important institutional issues that ASEAN should address in order to determine whether its current institutions are internally consistent with its agenda of enhanced regional cooperation and integration – ASEAN as an independent institution and ASEAN as a rules-based institution.

As mentioned previously, ASEAN operated for over forty (40) years without a formal charter. It did not have formal (as opposed to functional) legal personality as it was never formally established as an international organization endowed with such personality. The Charter is valuable as it gives ASEAN a formally recognized juridical and legal personality. This officially recognized personality could confer on ASEAN the rights, privileges and immunities of

international organizations recognized in international law, although much of the detail in this regard remains to be clarified. Such rights could also conceivably eventually allow ASEAN to operate as an entity capable of contracting as a whole (instead of as separate treaty parties) with non-ASEAN countries, and enforcing treaties entered into by its members and non-members. Such treaty-making powers had not been agreed upon by the ASEAN member states until recently, when the Rules of Procedure for Conclusion of International Agreement by ASEAN were adopted in December 2011. These Rules set out clear processes and require a degree of transparency for the conclusion of international instruments by ASEAN. With that said, they will likely have to be worked out in much more detail in the future, as they do not provide for a specific requirement to publish any international instruments concluded in an official gazette (similar to the L series of the Official Journal of the European Union), methods of implementing legislation or even reporting requirements.

The ASEAN Charter was heralded as the building block for further legally binding commitments by ASEAN members. While the Charter does take the important step of conferring legal personality on ASEAN, it does not sufficiently address the legally important elements of rule making, monitoring and enforcement, as will be explained below.

4. *The ASEAN Organs*

For deeper regional integration to take place, it is also important to enhance coordination among new and existing ASEAN institutions and to facilitate the interpretation and enforcement of ASEAN decisions. A Charter that achieves these ends will be invaluable. The Charter established and formalized a number of regional organs to facilitate the development of the ASEAN community, such as the Summit (Article 7); the Coordinating Council (Article 8); the Community Councils, which consist of the Political-Security Council, the Economic Community Council and the Socio-Cultural Community Council (Article 9); and the Intergovernmental Commission on Human Rights (Article 14).

The Charter also established a committee of Permanent Representatives that are appointed to ASEAN with the rank of Ambassador based in Jakarta. However, the committee will not be the primary decision-making body. Instead, the ASEAN Summit will continue to be the main forum for decision-making, and decisions at all levels will continue to be made by consultation and consensus.

Moreover, the Charter also expands the role and function of the Secretary-General and the Secretariat to enable them to play a more substantive role,

including facilitation and monitoring of progress of the implementation of ASEAN agreements and decisions, with a view to realizing the ASEAN community. Article 11(2) of the Charter makes it clear that one of the function of the Secretary-General is to improve compliance with the ASEAN agreements, and accords the Secretary-General with ministerial status in order to carry out this function.

While the Secretary-General and the Secretariat have been given greater responsibility to monitor compliance and facilitate the implementation of the ASEAN agreements, the budget for the Secretariat remains very tight. In the 2011 financial year, the Secretariat was given US$15.76 million with each Member State contributing equally to the budget. This insistence on equal contributions means that the annual budget of the Secretariat is limited by the amount that the less developed Member States are willing to contribute. This will continue to restrict the budget of the Secretariat as some members, in particular those categorized as Least Developed Countries, may find it difficult to increase their contributions. Indeed, in very practical terms, the very limited budget at ASEAN's disposal will likely limit its effectiveness as a legally separate entity from its members, for all the clarity that legal personality has provided.

All of these organs were intended to provide ASEAN with the institutional framework necessary to improve the to the compliance of members with ASEAN agreements and commitments. However, the Charter provides few details on the roles of these organs and how they relate to each other. Take the ASEAN Summit, for example. Article 7 establishes the Summit as "the supreme policy-making body of ASEAN" comprising of the "Heads of State or Government of the Member States". One of the tasks of the Summit is to "decide on matters referred to it under Chapter VII", which deals with decision-making within ASEAN. Chapter VII confirms that the ASEAN Way of consensus is to remain a basic principle of decision-making in ASEAN, and that the Summit comes into the picture only when a consensus cannot be reached, in which case it "may decide how a specific decision can be made".

An examination of Article 7, however, reveals that there is scant information on how the ASEAN Summit is to arrive at specific decisions in the event of non-consensus. The provision, whilst empowering the Summit to "decide on matters referred to it under Chapter VII", does not clarify whether decisions by the Summit have to be reached via unanimous consensus or voting. If unanimous consensus is required, there is no information in the provision indicating what is to happen should the Summit fail to reach consensus on an issue referred to it under Chapter VII. In this regard, the Charter perhaps missed an opportunity to prescribe the mechanisms for effective decision-making

necessary for successful economic integration. It may well be that political realities made such silence a necessity.

Another possible reason why the Charter does not elaborate the roles of these organs in detail may be that it was meant to be a general framing document, not one that fleshed out the technical content of every provision. Indeed, Article 49 of the Charter actually empowers the ASEAN Coordinating Council to issue the terms of reference and rules of procedure for ASEAN. This also makes it easier to review and amend these norms separately, without having to amend the Charter. Recently, the Rules of Procedure for Conclusion of International Agreements by ASEAN, the Rules of Procedure for the Interpretation of the ASEAN Charter and the Rules of Procedure of the Committee of Permanent Representatives have all been concluded. The Rules of Authorisation for Legal Transactions under Domestic Laws, the Rules of Reference of Non-Compliances to the ASEAN Summit, and the ASEAN Secretariat Staff Regulations are all currently in the process of being finalised. These norms all seek to establish clear, transparent and efficient working relationships between the ASEAN Organs.

5. *ASEAN Dispute Settlement Mechanisms*

Since its establishment, ASEAN has developed three main mechanisms for dispute settlement. The first was actually established less than ten years after the Bangkok Declaration, with the adoption of the 1976 Treaty of Amity and Cooperation (TAC). Almost twenty years later, when economic integration became the focus of ASEAN, the Member States adopted the 1996 Protocol on Dispute Settlement Mechanism for disputes relating to ASEAN economic agreements, which was updated by the 2004 Protocol for Enhanced Dispute Settlement Mechanism (EDSM). Finally, the Charter contains dispute settlement provisions that serve as an overarching framework for the resolution of disputes in ASEAN. Unfortunately, the dispute settlement mechanisms provided under the TAC, the EDSM and the Charter have never been utilized by member states.

A. *The Treaty of Amity and Cooperation*

The TAC was signed on 24 February 1976, in conjunction with the Declaration of ASEAN Concord, which declared that "Member States, in the spirit of ASEAN solidarity, shall rely exclusively on peaceful processes in the settlement of intra-regional differences". The TAC in Article 13 sets out that Member States should "refrain from the threat or use of force" and settle any disputes through "friendly negotiations". Any unresolved disputes are to be brought in front a

High Council comprising ministerial representatives of all Member States of ASEAN and ministerial representatives of non-ASEAN contracting parties that are directly involved in the dispute. All parties to the dispute must agree to submit the dispute to the High Council, which then recommends an appropriate means of resolving the issue, which can include the High Council's good offices, or setting up a committee for mediation, inquiry or conciliation. The dispute settlement mechanism under the TAC, although an important achievement for ASEAN, is largely a validation of the ASEAN Way, where disputes can only be brought before a settlement mechanism with the agreement of all parties. Furthermore, even if all parties agree to settle the dispute according to the TAC, the modes of resolution available are all non-legal in nature, which demonstrates the reluctance of the Member States to allow third parties to decide on international disputes between them.

B. *The Protocol for Enhanced Dispute Settlement Mechanism*

The EDSM was signed in Vientiane in 2004 by the ASEAN Economic Ministers. It supersedes the 1996 Protocol on Dispute Settlement Mechanism, which itself had superseded the 1987 Agreement for the Promotion and Protection of Investments. The EDSM applies to disputes arising under the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation, as well as retroactively to earlier key economic agreements and to future ASEAN economic agreements. At the core of the dispute settlement mechanism under the EDSM is a mandatory process involving a panel established by the Senior Economic Officials Meeting (SEOM) to consider disputes that cannot be settled through good offices, mediation or conciliation. The panel has sixty (60) days to come up with recommendations, which then have to be adopted by the SEOM within thirty (30) days, unless the SEOM decides by consensus not to adopt the recommendations, or a party decides to appeal. Appeals ar heard by an appellate body established by the ASEAN Economic Ministers, which must decide the appeal on the issues of law and interpretation within sixty (60) days.

Under Article 16 of the EDSM, if a party fails to implement the findings and recommendations of the panel's or the appellate body's reports once adopted, then the party that invoked the dispute settlement procedures may enter into negotiations with the other with a view to deciding upon mutually acceptable compensation. If this cannot be agreed, the injured party may request authorization from the SEOM to suspend the application to the Member State concerned of concessions or other obligations under the covered agreements. The SEOM must grant this authorization within thirty (30) days of the expiry of the sixty (60) day period unless there is a consensus against the request.

The system adopted under the EDSM is modelled on that of the World Trade Organization's (WTO) Dispute Settlement Understanding, albeit with even shorter timelines. To date, the EDSM has not been resorted to by ASEAN members. Although this mechanism have never been invoked, it is interesting to note that Singapore (in 1995) and the Philippines (in 2008) both preferred to resort to the WTO dispute settlement mechanism against other ASEAN countries (Malaysia and Thailand, respectively) rather than use existing ASEAN dispute settlement mechanisms (although it should be recalled that Singapore brought the complaint before WTO in 1995, before the 1996 Protocol on Enhanced Dispute Settlement Mechanism had been concluded). This suggests that ASEAN members themselves trust the multilateral WTO dispute settlement mechanism more than the ASEAN dispute settlement mechanism, including the EDSM (on WTO, see §§ I.E.11 "Compliance and the Post-Retaliatory Phase in the WTO: *US/Canada – Continued Suspensions*", and III.A.3 "*WTO Hormones*: Impartiality and Local Interests", by G. Bolaffi; § III.C.2 "The Disclosure of Information: Anti-Dumping Duties and the WTO System", by M. De Bellis; § III.D.2 "Global Procedural and Substantial Limits for National Administrations: The *EC-Biotech* Case", by D. Bevilacqua; § IV.4 "When SPS Applies to Apples. The *Japan – Apples* and *Australia – Apples* WTO Disputes", by F. Fontanelli; § V.9 "Spreading the WTO Dispute Resolution System: Cotton, High-Tech Products, and Developing Countries", by J. Langille).

C. *The ASEAN Charter*

Chapter VIII of the 2007 ASEAN Charter, on Dispute Settlement, provides a comprehensive framework for existing and future dispute settlement mechanisms within the Association. Article 24(1) provides that where specific ASEAN instruments provide for a dispute settlement mechanism, disputes are to be resolved with reference to that mechanism. Article 24(2) states that disputes not concerning the application or interpretation of ASEAN agreements are to be resolved in accordance with the TAC, while Article 24(3) further provides that disputes concerning the interpretation or application of ASEAN economic agreements should be settled in accordance with the EDSM. While these provisions do increase certainty in relation to enforcement, Article 25 of the Charter suggests that, where there are no pre-existing dispute settlement mechanisms, "appropriate dispute settlement mechanisms, including arbitration, shall be established." The application of this provision is further elaborated in the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010 Protocol), which provides for consultations within a fixed timeframe and the possibility of convening an arbitral tribunal.

Aside from disputes concerning the interpretation or application of the Charter, the 2010 Protocol also applies to disputes concerning the interpretation or application of other ASEAN instruments that either do not provide any means of settling such disputes or specifically refer to the 2010 Protocol. The Protocol provides that a complaining party may request consultations with the responding party, in which case the responding party must reply to the request within thirty (30) days and must enter into consultation within sixty (60) days from the date of the receipt of the consultation request. If, and only if, the responding party does not respond to the consultation request or if consultation fails to settle the dispute within ninety (90) days from the date of the receipt of the request for consultation, then the complaining party can request the establishment of an arbitral tribunal. Still, under the 2010 Protocol, an arbitration tribunal can only be convened if both parties agree to do so. If the responding party does not agree or fails to respond to the request within the period provided in Article 8(3) of the 2010 Protocol, then the complaining party may refer the dispute to the ASEAN Coordinating Council to decide on how the dispute is to be resolved; and, should this fail to produce an outcome, any party can refer the dispute to the ASEAN Summit. The problem is that there are no clear publicly available procedures offsetting out how the ASEAN Summit should reach its decisions, whether by positive or negative consensus indeed another method altogether. Moreover, since the ASEAN Summit is comprised of officials from all Member States, it will be difficult for it to reach a consensus decision against any single member.

The 2010 Protocol has some similarities with the dispute settlement procedure contained in Chapter Twenty of the North American Free Trade Agreement (NAFTA) (Institutional Arrangements and Dispute Settlement Procedures). Both mechanisms provide for consultation, good offices, mediation and conciliation, as well as arbitration (see § I.A.1 "The Concept of the State in Globalization: The Case of the Environmental Cooperation Commission of the North American Free Trade Agreement (NAFTA)", by M.-S. Kuo; § IV.3 "The *Metalclad* NAFTA Litigation: What is National Courts' Role in Investment Arbitration?", by F. Fontanelli; § III.D.4 "Reasonableness and Proportionality: The NAFTA Binational Panel and the Extension of Administrative Justice to International Relations", by M. Macchia). There are two main differences, however. First, NAFTA Article 2007 provides that good offices, mediation and conciliation can only be requested if consultation between the parties fails; and arbitration can only be initiated if resort to good offices, mediation or conciliation fails. Under the 2010 Protocol, good offices, mediation and conciliation can be resorted to at anytime by the parties; and the request for arbitration can be made immediately following the failure of consultations to

produce a mutually acceptable settlement, without the need to first go through the other forms of dispute resolution available. Second, NAFTA Articles 2008 and 2011 provide for automatic establishment of arbitral tribunal once a request has been made (although, in practice, these automatic panel appointment procedures largely inoperative, as the NAFTA Parties have never agreed on a Chapter 20 arbitrator roster and as a result the responding party can delay panel selection indefinitely). By contrast, in the 2010 Protocol, an arbitral tribunal can only be convened if the responding party agrees to such a request.

In light of this, Chapter VIII of the Charter envisions the Summit playing two roles. First, it is to act as a *de facto* final arbitrator. When "a dispute remains unresolved" after the parties have used the dispute settlement mechanisms available within the ASEAN framework, they can bring their dispute to the Summit for a decision. Second, the ASEAN Summit takes on the role of "enforcing" a decision that has been reached using one of ASEAN's dispute settlement mechanisms. If there is non-compliance with a decision, the Member State "may refer the matter to the ASEAN Summit for a decision". However, as the Charter is silent about decision-making at the ASEAN Summit level, this could mean resolution by the "ASEAN Way": through dialogue, consultation and negotiation.

In both instances, the role of the Summit as an arbitrator appears weak for two reasons. First, Article 7 of the Charter does not prescribe a mechanism enabling the Summit to act in this capacity. Is the Charter's silence an implicit acknowledgement that the Summit is to adopt the consensus approach? If so, what should be done if no consensus can be reached? Second, Article 7 does not obligate Member States to comply with the decision of the Summit. These uncertainties may need to be clarified in the future in order to facilitate enhanced coordination between Member States and the enforcement of decisions by the Summit.

6. *Conclusion*

While there are a number of areas that will need to be addressed as ASEAN evolves, the Charter does provide for some legal rules which are internally consistent with enhanced cooperation and integration within ASEAN; indeed, they even serve to advance the integration process to a degree. Unlike prior ASEAN declarations and instruments, the Charter brings the legal and institutional issues to the forefront of ASEAN's objectives, and it will help guide the future development of the Association. That said, ASEAN must exhibit

"institutional integrity", as a greater observance of the rule of law within the Association is necessary if it is to be taken more seriously.

ASEAN also needs to develop a more comprehensive way of resolving disputes. It has done so for disputes pertaining to ASEAN economic agreements by agreeing in the Charter to resolve such disputes in accordance with the EDSM. As noted above, as with the WTO Dispute Settlement Understanding, the EDSM provides for a negative consensus rule for the adoption of panel reports, which permits a report to be enforced as long as one Member State supports it. In practice, however, that particular Member State will likely face pressure from the others, and may choose to follow the views of the majority pursuant to the "ASEAN Way".

For non-economic disputes relating to agreements lacking their own dispute settlement mechanism, the 2010 Protocol applies. Although the 2010 Protocol has established a comprehensive procedure for resolving disputes concerning the interpretation of the ASEAN Charter, arbitration can only be convened with the agreement of both parties. The alternative is to submit the dispute to the ASEAN Coordinating Council, and, if settlement still cannot be reached, then any party can bring it before the Summit. Thus, the dispute could ultimately be resolved by means of informal consensus or dialogue. This seems to continue the "ASEAN Way" practice for non-economic disputes.

This general tendency to prefer informal consensus over other means of dispute settlement is probably the result of political expediency rather than cultural determinism. Nonetheless, ASEAN members are convinced of the long term advantages regional integration will bring. The political will to adopt legalization as a basis for the relationships between ASEAN members will likely emerge regardless of any rhetoric about the importance of national sovereignty and the principle of non-interference. This legalization, based on the existing rules, will probably develop, even in practice, once the ASEAN members develop greater trust in the legal process by experiencing the functional benefits of such legal institutions. Constructivist theories of cognitive regionalism would suggest that this is particularly true for economic relations. . While there are areas that will need to be addressed as ASEAN evolves, the Charter does provide for some legal rules which serve to move regional integration efforts forward. Still, we hope that this is not the final legal chapter for ASEAN but rather a step in the development of a more effective regional entity that endeavours to make bargains (particularly economic ones) stick and relations work.

7. *Further Reading*

a. 1967 ASEAN Declaration (Bangkok Declaration) (http://www.aseansec.org/1212.htm);
b. 1976 Declaration of ASEAN Concord (http://www.aseansec.org/1216.htm);
c. 1976 Treaty of Amity and Cooperation in Southeast Asia (http://www.aseansec.org/1217.htm);
d. 1992 Framework Agreements on Enhancing ASEAN Economic Cooperation (http://www.aseansec.org/12374.htm);
e. 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (http://www.aseansec.org/16754.htm);
f. 2007 Charter of the Association of Southeast Asian Nations (http://www.aseansec.org/21829.htm);
g. 2009 Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015) (http://www.aseansec.org/22331.htm);
h. 2010 Protocol to the ASEAN Charter on Dispute Settlement (http://cil.nus.edu.sg/2010/2010-protocol-to-the-asean-charter-on-dispute-settlement-mechanisms/);
i. S. CHESTERMAN, "Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person" 12 *Singapore Year Book of International Law* 199 (2008);
j. M. EWING-CHOW, "Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?" 12 *Singapore Year Book of International Law* 225 (2008);
k. M. EWING-CHOW, "Translating the Design into a Bloc: The Domestic Implementation of the ASEAN Charter" in S. TIWARI (ed.), *ASEAN: Life after the Charter*, ISEAS Publishing (2010);
l. T. KOH, R.G. MANALO, W. WOON (eds.), *The Making of the ASEAN Charter*, World Scientific Publishing (2009);
m. R.C. SEVERINO, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-general*, ISEAS Publishing (2006);
n. R.C. SEVERINO, *ASEAN, Southeast Asia Background Series No. 10*, ISEAS Publications (2008);
o. W. WOON, "The ASEAN Charter Dispute Settlement Mechanisms", in T. KOH, R.G. MANALO, AND W. WOON (eds.), *The Making of the ASEAN Charter*, World Scientific Publishing (2009);

p. W. WOON, "Dispute Settlement in ASEAN", Conference Paper 2010 [Unpublished] (http://cil.nus.edu.sg/wp/wp-content/uploads/2010/08/DISPUTE-SETTLEMENT-IN-ASEAN-KSIL-ProfWalterWoon.pdf).

The official texts of ASEAN documents listed above are available at the ASEAN website at http://www.aseansec.org/24184.htm. For a full text searchable database of ASEAN documents please see the Centre for International Law's ASEAN Document database available at www.cil.nus.edu.sg.

I.B.8 The International Labour Organization: The Evolution of Soft Law

Andrew J. Ziaja

1. *Background*

In 2005, the United Electrical, Radio and Machine Workers of America (UE) filed an ILO complaint alleging that a North Carolina statute violated the United States' treaty obligations under the ILO regime. The statute at issue was the North Carolina General Statute ("NCGS") § 95-98, which prohibits any public entity from entering into a collective bargaining agreement with a trade union. It declares any such contract "to be against the public policy of the State, illegal, unlawful, void and of no effect".

Despite this prohibition against collective bargaining, public employees in North Carolina may still join unions. Yet collective bargaining – the process by which organized groups of employees negotiate with their employer over the terms and conditions of employment – is a key strategic impetus leading to the formation of trade unions. Without collective bargaining, trade unions can play only a peripheral role in industrial relations.

UE brought its complaint under the ILO's framework for protecting the rights of employees to free association (an overview of the ILO and its complaint procedures appears in § II.B.3 "Labour Standards: Forced Labour in Myanmar" by E. Morlino), before the Committee on Freedom of Association (CFA) – a quasi-judicial body subordinate to the ILO's Governing Body – that collective bargaining and free association rights are characterized by an "undeniable interdependence" in the industrial relations context. The United States Government argued in response that the right to free association under the First Amendment of the United States Constitution and the ILO regime are co-extensive. Citing domestic Supreme Court precedent, the United States further emphasized that the right to free association does not in any way involve the right to bargain collectively. Thanks to the Supremacy Clause, no state statute can impinge on any rights guaranteed under the Federal Constitution, and must be construed accordingly.

In 2007, the CFA issued a report siding with UE. It concluded that "the right to bargain freely with employers […]. constitutes an essential element in

freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent". The CFA declared the United States to be in violation of freedom of association principles and called for the repeal of NCGS § 95-98 as a result.

Nevertheless, NCGS § 95-98 remains in force. This stems partly from the CFA's limited authority. Its mandate does not include enforcement powers. This also results from the weight and role of treaty law within the United States' legal system. Treaty agreements signed by the President do not enter into force as law unless and until certain conditions have been satisfied. These conditions include Congress's ratification in conjunction with "self-executing" language in the agreement itself, or alternatively a further act of Congress that specifically implements the treaty as law. Treaty agreements can therefore end up caught in limbo between procedural phases, leaving them without legal impact on domestic policy.

2. *Materials*

- *Complaint against the Government of the United States presented by the United Electrical, Radio and Machine Workers of America (UE) supported by Public Services International (PSI)*, ILO Committee on Freedom of Association Report No. 344, Case No. 2460 (2007) (http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:310466723848675::NO:50001:P50001_COMPLAINT_FILE_ID:2897486);
- ILO Convention No. 87, Concerning Freedom of Association and Protection of the Right to Organize (http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087);
- ILO Convention No. 98, Concerning the Application of the Principles of the Right to Organize (http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098);
- ILO Convention No. 151, Concerning Labor Relations (Public Service) (http://www.ilo.org/ilolex/cgi-lex/convde.pl?C151);
- ILO Declaration on Fundamental Principles and Rights at Work (http://www.ilo.org/declaration/lang--en/index.htm);
- ILO Constitution (http://www.ilo.org/ilolex/english/constq.htm);
- North Carolina General Statute § 95-98;
- *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (1969);

- *Winston- Salem/Forsyth County Unit of the North Carolina Association of Educators v. Philips*, 381 F. Supp 644 (1974);
- *Medellín v. Texas*, 552 U.S. 491 (2008) (see § VI.B.4 "Bringing to an End International Commitment: *Medellín v. Texas*" by E. D'Alterio).

3. *Analysis*

The CFA's decision relied on a host of ILO treaty documents: ILO Conventions 87, 98, and 151; the ILO Constitution; and the ILO Declaration of Fundamental Principles and Rights at Work ("DFPRW"). Taken together, these documents provide robust protections for workers' rights, ranging in specificity from the right of public employees to negotiate over their terms of employment, to a right to organize, to a general right of free association. The net effect of Supreme Court precedent is to exclude workers in the United States from the scope of certain of these protections.

The CFA first referenced ILO Convention 87, Articles 8 and 11. Article 8 provides that member states may not create or apply domestic law in such a way as to violate the rights established by the Convention: "The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention". Article 11 provides that "Each Member of the International Labor Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize".

The CFA next referenced ILO Convention 98, Articles 3, 4, and 6. Article 3 creates an affirmative obligation for member states to protect workers' ability to join unions: "Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organize [...]" Article 4 goes further, creating an affirmative obligation to encourage collective bargaining: "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements". Article 6 explicitly excludes high level public employees from the scope of Convention 98: "This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way".

The final ILO Convention referenced by the CFA was Convention 151. Convention 151 applies specifically to public employees "to the extent that more

favorable provisions in other international labor Conventions are not applicable to them." In Article 4, it provides that "Public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment". Article 5(2) provides that "Public employees' organizations shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration". Article 7 protects public employees' right to bargain collectively, and requires that member states "promote the full development and utilization of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organizations […]". In Article 9, Convention 151 also broadly protects public employees' right to free association: "Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association […]".

The ILO Constitution states that a primary purpose of the Organization is to protect the rights of workers to freely associate. Its preamble envisions free association as part of an antidote to "such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled […]", further stating that "conditions of labor" are to blame for the world's imperilment and that the "recognition of the principle of freedom of association" is therefore "urgently required". The concepts of free association and collective action to improve working conditions are therefore closely intertwined under the ILO Constitution.

The ILO Declaration of Fundamental Principles and Rights at Work was passed by the ILO in 1981 and contains the most far-reaching protection of the right of free association referred to by the CFA. Section (2)(A) imposes an obligation on all members to uphold the right to free association. The Declaration of Fundamental Principles does not clearly define, however, its use of the term "freedom of association".

NCGS § 95-98, meanwhile, survived domestic constitutional challenges before the Supreme Court in 1969 and 1974, in *Atkins v. City of Charlotte* and *Winston-Salem/Forsyth County Unit of the North Carolina Association of Educators v. Philips* respectively. These cases directly conflict with the CFA's conclusion. The CFA held that collective bargaining "constitutes an essential element in freedom of association." The *Atkins* and *Winston-Salem/Forsyth County* courts together held that freedom of association, as defined in the United States Constitution, does not depend on the ability to bargain collectively.

A background consideration is the effect of *Medellín v. Texas*, a Supreme Court case from 2008 (see § VI.B.4 "Bringing to an End International Commitment: *Medellín v. Texas*" by E. D'Alterio). In *Medellín*, the Court held that "while treaties may comprise international commitments […] they are not

domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms". The *Medellín* Court thereby embraced a "distinction between treaties that automatically have effect as domestic law, and those that – while they constitute international law commitments – do not by themselves function as binding federal law".

4. *Issues*

The UE case illustrates the sometimes discordant interaction between international and domestic law (see Chapter VI "Conflicting Jursdictions" and, in particular, Section VI.A "Conflicting Regimes: When Legal Orders Collide"). ILO law offers broader freedom of association protections than does domestic law in the United States. Yet international principles, no matter how well established, do not always translate seamlessly across national boundaries. In such cases, what is the value of international law? When domestic law ostensibly closes itself to international law, should that end the analysis?

Further considerations arise from the development of ILO freedom of association law. The United States was an instrumental and founding member of the Organization. In fact, it was among the drafters of the ILO Constitution, which first enshrined the right to free association within the regime. The right under the United States Constitution thus predates that under the ILO Constitution. The ILO regime bears the United States' imprimatur in this sense. To what extent are principles like the right to free association creatures of international versus domestic law? Where is the dividing line? In this vein, was it truly a conflicting principle of international law that the United States confronted in the UE case?

Lastly, questions arise in relation to the enforcement of international decisions. NCGS § 95-98 remains in force in part because the CFA lacks authority to compel compliance with its decisions. Does it matter whether international adjudicative bodies have enforcement powers? Do the domestically unenforceable decisions of international bodies have value? If so, is that value the same for all countries?

5. *Further Reading*

a. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, (Fifth [revised] ed.) (2006) (http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/WCMS_090632/lang--en/index.htm);
b. ILO, The Freedom of Association Procedure, (http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/image/wcms_088456.pdf);
c. *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. FL, 2003);
d. A. ZIAJA, "Beyond Soft Law? An Assessment of International Labour Organisation Freedom of Association Complaints as a Means to Protect Collective Bargaining Rights in the United States", 9 *Global Jurist* 2 (2009).

I.B.9 The World Intellectual Property Organization (WIPO)

Cinzia Carmosino

1. *Background*

A study commissioned in 2011 by the Business Software Alliance, and conducted independently by the International Data Corporation, revealed that in 2010 personal computer software piracy hit the worldwide rate of 42%; the commercial value of pirated software grew globally by 14%, up to a total amount of $58.8 billion, against $95 billion spent on PC software – nearly doubling its real value since 2003. Thus, for every dollar spent on legitimate software, an additional 63 cents were diverted to unlicensed copies.

In the music industry, the International Federation of the Phonographic Industry (IFPI) estimated that some 40 billion songs were illegally downloaded in 2008: that is, 95% of all music downloads. The *Digital Music Report 2012* claimed that more than a quarter of Internet users globally access unlicensed services every month, especially through peer-to-peer channels. In the *Recording Industry in Numbers 2010*, the IFPI reported that global recorded music revenues had declined by 7 percent in 2009; it calculated that the economic impact of piracy on the creative industries in the EU could produce a loss of 1.2 million jobs by 2015, if no effective action is taken to deal with this phenomenon.

Admittedly, the global relevance of intellectual property issues is manifest in a wide array of fields, such as public health (with regard to pharmaceutical patents and their effect on procurement of medicines); agriculture (given the need to protect farmers' rights while using patented seeds); bio-genetic resources; and environmental protection.

The need for international protection of intellectual property dates back to the late 19th century, when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873; they were concerned that their ideas would not be protected in other countries. This led to the conclusion of the two major international treaties in the field of intellectual property, the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886.

In 1893, the secretariats administering the two treaties were merged into a single body, the Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (BIRPI), which can be considered the predecessor of

WIPO. Under the supervision of the Swiss government, it oversaw the adoption of several further treaties (as well as amendments to the former conventions) in response to new technologies. With the Convention establishing the World Intellectual Property Organization (hereinafter, the WIPO Convention), signed in Stockholm in 1967 and entering into force three years later, the BIRPI underwent structural and administrative reform, ceasing to be under the authority of the Swiss government and becoming a formal international organization, the World Intellectual Property Organization.

In 1974, WIPO was formally recognized as a specialized agency of the United Nations, responsible for "promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development", in accordance with the UN general developmental mission (Art. 1, Agreement between the United Nations and the World Intellectual Property Organization).

As of 2012, WIPO, with its headquarters in Geneva and a staff of around 1300 employees from 116 countries, has 185 Member States. 69 IGOs and 284 national and international NGOs have the status of observers at WIPO meetings; these bodies have neither voting rights nor the power to submit proposals, amendments or motions.

The objectives pursued by WIPO, as established by Art. 3 of the WIPO Convention, are "to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, and to ensure administrative cooperation among the Unions".

Since its establishment, WIPO has had work constantly to adapt the protection of intellectual property to the continuous progress of technology and the advent of the internet, and to maintain its central role in the global governance of intellectual property rights (IPRs) – particularly following their inclusion within the WTO framework through the 1994 Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). The TRIPs Agreement introduced minimum intellectual property standards and entailed a substantial change in the international perception of legal regime of intellectual property, linking it to trade which, therefore, leading to a commoditization of the stream of information and knowledge.

2. *Materials and Sources*

- Convention Establishing the World Intellectual Property Organization, signed on July 14, 1967 and as amended on September 28, 1979 (http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html);
- WIPO General Rules of Procedure, as adopted on September 28, 1970 and amended on November 27, 1973, October 5, 1976, and October 2, 1979 (http://www.wipo.int/freepublications/en/general/399/wipo_pub_399.pdf);
- Agreement between the United Nations and the World Intellectual Property Organization, entered into force on December 17, 1974 (http://www.wipo.int/treaties/en/agreement/index.html);
- Agreement between the World Intellectual Property Organization and the World Trade Organization on December 22, 1995 (http://www.wipo.int/treaties/en/agreement/trtdocs_wo030.html);
- Treaties administered by WIPO (http://www.wipo.int/treaties/en/);
- WIPO Recommendations adopted by the General Assembly in 2007 under the Development Agenda (http://www.wipo.int/ip-development/en/agenda/recommendations.html);
- WIPO Medium Term Strategic Plan (2010-2015) adopted by the Assemblies of the Member States on August 20, 2010 (http://www.wipo.int/about-wipo/en/goals.html);
- WIPO Intellectual Property Handbook: Policy, Law and Use, 2004, 2nd edition, WIPO Publication n. 489 (http://www.wipo.int/about-ip/en/iprm/);
- Financial Regulations and Rules of the World Intellectual Property Organization (WIPO), applicable from January 1, 2008, as amended (http://www.wipo.int/export/sites/www/about-wipo/en/pdf/wipo_financial_regulations.pdf#annex2);
- WIPO Program and Budget for the 2010/11 biennium, approved by the Assemblies of the Member States of WIPO on October 1, 2009; WIPO Program and Budget for the 2012/13 biennium, approved by the Assemblies of the Member States of WIPO on September 29, 2011 (http://www.wipo.int/about-wipo/en/budget/);
- WIPO Strategic Realignment Program-Results Framework, Baseline Report, measured at December 31, 2010 (http://www.wipo.int/export/sites/www/about-wipo/en/strategic_realignment/pdf/baselines_march2011.pdf);

- WIPO Arbitration and Mediation Center (1994) (http://www.wipo.int/amc/en/center/index.html);
- WIPO Arbitration, Mediation and Expert Determination Rules and Clauses, January 2009, WIPO publication n. 446 (http://www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf);

3. *Analysis*

In order to accomplish its core mission, WIPO carries out four main functions: setting norms, providing intellectual property-protection services, conducting quasi-judicial activities, and building technical capacity and infrastructure.

First, it administers 24 multilateral treaties. This activity consists basically in revising the treaties and establishing new provisions, either to respond to Member States' needs or to adapt treaties to new technological developments.

In particular, the treaties are divided in three groups: treaties defining basic internationally-agreed standards of intellectual property protection (e.g., the 1883 Paris Convention, the 1886 Berne Convention, the 1994 Trademark Law Treaty, the 1996 WIPO Copyright Treaty, and the 2006 Singapore Treaty on the Law of Trademarks); global protection system treaties, intended to simplify filing and registration procedures for industrial property rights, ensuring they have effect in all the relevant signatory countries (e.g., the 1970 Patent Cooperation Treaty (PCT): see § I.E.13 "Shared Powers: Global and National Proceedings under the International Patent Cooperation Treaty", by M. Veronelli and L. Carbonara), the 1891 Madrid Agreement for the International Registration of Marks, the 1958 Lisbon Agreement for the International Registration of Appellations of Origin, and the 1925 Hague Agreement for the International Registration of Industrial Designs); treaties that create classification systems for inventions, trademarks and industrial designs, facilitating a comparison on a global scale through indexes (e.g., the 1957 Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks, the 1968 Locarno Agreement Concerning the International Classification of Industrial Designs, and the 1971 Strasbourg Agreement Concerning the International Patent Classification).

WIPO has traditionally used the multilateral treaty-making process to create rules and norms, but this procedure, very time-consuming, does not keep pace with the continuous challenges presented by progressive technological development, which require a more flexible and dynamic rulemaking system. For this reason, alongside treaty making, a soft law approach has been developed, in

the form of recommendations, resolutions, guidelines and declarations that, differently from treaty law which binds only those states that ratify it, might be more widely and rapidly implemented without any formal consensus an ratification necessary.

As intellectual property is still regulated by domestic law, WIPO is committed to harmonizing national intellectual property legislation and proceedings, also fucntioning as forum for negotiation and transferring know-how to its contracting countries, seeking to set out the most uniform normative framework.

The second area of activities encompasses provision of administrative intellectual property-protection services, aimed at ensuring that a single international registration or application has simultaneous effect in any designated contracting countries in which the applicant seeks protection. Under the global protection system treaties, WIPO processes and facilitates the international registration of industrial property rights (e.g. new inventions, brands, industrial designs, trademarks, appellations of origin), reducing costs and administrative burden through removing the need for the holder of an industrial property right to submit individual applications in all of the designated contracting states in which protection is sought, in different languages, paying different fees and complying each time with varying national rules and procedures.

In addition to registration or filing services, since 1994 WIPO has also performed a quasi-judicial function, by offering settlement of intellectual property-related disputes between private parties, individuals or enterprises, through arbitration, mediation and other alternative dispute resolution mechanisms. Future disputes can be submitted to WIPO only if parties include in their contract a special clause referring all disputes to the WIPO dispute resolution procedures. Otherwise, for already existing disputes, parties can conclude a submission agreement that contains the same provision. The disputes may be settled under the WIPO Arbitration, Mediation and Expert Determination Rules, but also under non-WIPO rules, when other organizations are involved, as we will see below.

Lastly, WIPO cooperates with countries, especially developing ones, in order to provide them with adequate and modern technical infrastructures and expertise. Activities in this regard range from training and educational programs to enabling policy makers to assistance in the formulation and implementation of national intellectual property plans, and can include measures to facilitate and enhance access to common databases and consultation fora.

WIPO accomplishes its manifold activities through an *articulated institutional structure*. The basic decision-making bodies are the General Assembly, the Conference and the Coordination Committee. According to the WIPO

Convention, the General Assembly consists of all the States that are both members of WIPO and members of one or more treaties formally administered by WIPO (Art. 6). It appoints the Director General, the chief executive of the organization, who is nominated by the Coordination Committee, and overviews and approves their reports and activities, for a fixed term of not less than six years. The General Assembly also controls the budget and attributes the status of observer to non-members. The Conference brings together the States that are WIPO members, irrespective of their membership in any of the WIPO-administered treaties (Art. 7). The Conference may adopt recommendations on intellectual property issues, amendments to the WIPO Convention and, like the General Assembly, grant observer status. Finally, the Coordination Committee, which is the executive branch of the organization, consists of all States that are at once members of WIPO, and of the Executive Committees of either or both of the Paris Union and the Berne Union (Art. 8). A Union is composed of all the States that are party to a particular treaty and usually takes its name from the place where the text was firstly adopted. Among other functions, the Coordination Committee gives advice to the WIPO bodies on administrative, financial and other relevant matters. Each treaty administered by WIPO sets up sub-assemblies of all the contracting parties as main decision-making bodies of the Unions (e.g. the PCT Union Assembly, the Hague Union Assembly).

The day-by-day operations are run by the WIPO Secretariat, the International Bureau, headed by the Director General, on the basis of the overall strategy approved by the General Assembly and the Conference (Art. 9). The International Bureau is one of the leading actors in industrial property registration and application procedures.

Compliance with financial rules is overseen by an Internal Audit and Oversight Division, as well as by an External Auditor and an Independent Advisory Oversight Committee.

A key role is played by standing committees of experts and advisory bodies, established by the General Assembly or other governing bodies on specific subjects (e.g. patents, copyrights, trademarks, traditional knowledge), inasmuch as it is in these bodies that most of the negotiations on the development and harmonization of international intellectual property law take place. Their components are designated individually, either by the Director General, by governments of the interested Member States, or by IGOs and NGOs on invitation of the Director General (see Rule 48 of the WIPO General Rules of Procedure).

Among the advisory bodies, the *Industry Advisory Commission* (IAC), created by the Director General in 1998, is particularly worthy of mention: despite its purely advisory role, it was established specifically to ensure the representation of

market interests within the organization. Citizens, consumers, civil society and developmental associations do not have a comparable forum within WIPO, apart from in the *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (IGC), whose scope is however limited to the protection of those intellectual property aspects linked to traditional knowledge and folklore.

It is interesting to note that such committees carry out functions in three directions at once: bottom-up, because they allow domestic administrations to participate in the international decision-making process, guaranteeing that their national interests are adequately considered; top-down, because norms issued at international level with the participation of Member States may be easily implemented in domestic legal orders, reducing the risk of conflicts between supranational and national rules; and horizontal, because they favor the dialogue and exchange of knowledge between Member States.

Unlikely other UN organizations, WIPO is largely self-funding and, as a result, it can maintain some partial independence. Approximately 90% of its revenue comes from fees paid by private actors for the use of its registration service, namely the PCT System. The remaining 10% comes from contributions from Member States, arbitration and mediation services and WIPO publications. Contributions of Member States are made on the basis of 14 contribution classes, freely chosen by States. It should be emphasized that the rights and the obligations of each State are the same regardless of the contribution paid. In 2010, contribution classes ranged from the lowest amount of about 1,400 Swiss francs per year to the highest amount of some 1.1 million Swiss francs.

The global character of WIPO is further underlined by its strong interconnections with other global regulatory regimes, which generate a sort of network. An example is the WIPO's Agreement with the WTO, signed in 1995, whereby WIPO has been required to assist developing countries members of the WTO in the implementation of the TRIPs Agreement. Moving IPRs into the WTO regime has challenged WIPO to reshape its role in the global governance of intellectual property: it has become much more focused on supporting developing countries in drafting TRIPs-compliant legislation and norm-building, leaving any enforcement duties to the WTO.

Another case of horizontal cooperation has been set up with UNESCO since the late 1970s, when WIPO considered the issue of safeguarding intangible cultural heritage, in particular traditional knowledge, concentrating on the intellectual property aspects of protection (on UNESCO, see § I.B.6 "Palestine Admission into the UNESCO: A Case of Politics, and Finances", by I. Paradisi, and § I.E.15 "The Role of UNESCO Advisory Bodies in the World Heritage Convention", by E. Cavalieri). This shows an evolution in the very concept of

intellectual property, which has expanded to encompass intellectual expressions of traditional indigenous culture and folklore. In 1982, the two organizations issued the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit and Other Prejudicial Actions, followed by a series of joint regional consultations and the UNESCO/WIPO World Forum on the Protection of Folklore in 1997, which set out a shared plan of action. This led, in 2000, to the establishment within WIPO of a separate committee dealing with these issues, the aforementioned Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Further, the WIPO Arbitration and Mediation Center participates as observer in the sessions of the UNESCO Intergovernmental Committee charged with the development of a conciliation and mediation procedure for the resolution of disputes relating to the return or restitution of cultural property.

The WIPO Arbitration and Mediation Center has a primary role in this global networking when addressing disputes raised within other global regulatory regimes. The International Council of Museums (ICOM) and the Internet Corporation for Assigned Names and Numbers (ICANN) represent interesting examples (on ICANN, see § I.C.2, "A Hybrid Public-Private Regime: The Internet Corporation for Assigned Names and Numbers (ICANN) and the Governance of the Internet", by B. Carotti and L. Casini; on ICOM, see § II.A.6 "Measuring Culture? The ICOM Standards for Museums", by C. Carmosino). In the field of art and cultural heritage, a Memorandum of Understanding was signed in 2011, under which the WIPO Mediation Center provides its expertise, know-how and facilities in order to settle disputes involving the activities of museums (e.g., return and restitution of works of art, loan and deposit, acquisition, insurance, and digitization). The mediation procedure, jointly developed with ICOM, is open to ICOM members and non-members and may be used both by public and private parties, including States, museums, artists, art dealers, and local communities.

With regard to the field of information technology, in 1999 the WIPO Arbitration and Mediation Center was accredited by ICANN to settle disputes relatin to the abusive and bad-faith registration and use of internet domain names involving trademarks, under the Uniform Domain Name Dispute Resolution Policy (UDRP), adopted by ICANN on the basis of WIPO recommendations. Even if only private actors can be parties to the dispute, the decisions made by WIPO panels can affect the decisions of national public authorities (more extensively, see § V.14, "Alternative Dispute Resolution: The ICANN's Uniform Dispute Resolution Policy (UDRP)", by B. Carotti).

4. *Issues: The Structure and Functions of International Organizations in the Global Legal Order*

The case of WIPO raises a number of issues stemming from its institutional structure and functions.

Firstly, WIPO is an international organization, whose membership is open to States. Does it serve equally the interests of all its members? What is the role of developing countries, which ake up the majority of members? WIPO has been long criticized for being biased in favor of developed countries, to the detriment of developing countries seeking rules on protection of intellectual property more tailored to their social, economic and cultural needs. The adoption of the Development Agenda by the General Assembly in 2007 represented the first victory for developing countries in this context, provoking a shift from viewing intellectual property as an end in itself to considering it as a means to serve larger public developmental objectives.

Secondly, with regard to the actors affected by the global governance of IPRs, a wide range of stakeholders, public and private, are involved: States, policy makers, industries, inventors, individual authors, IGOs, NGOs, civil society, consumers, and local communities. Since WIPO is primarily financed by fees paid by private actors (for registration services), how much influence do these actors, and industry groups in particular, have on the development of WIPO's working strategies? The answer to this question lies in the very structure of WIPO. The establishment inside the organization of an *Industry Advisory Commission* that gives a voice to business interests testifies to the disproportionate leverage of industry groups over international intellectual property regulation. Hence, industry's interests end up being very well represented within WIPO in multiple fora, either through the IAC or by governments and professional associations, whereas the views of civil society groups are not heard to anything like this degree. There is, therefore, a need to reestablish the public dimension of the protection of IPRs, in order to counterbalance the interests of private actors and commercial rights holders.

Thirdly, WIPO carries out three essential functions: legislative, administrative and quasi-judicial. The rulemaking activity has been shifting from treaty-making to the development of soft law norms, which are more flexible, easier to adopt and immediately applicable by Member States. Is this soft law approach effective? What is the binding force of such standards? This move creates significant problems of accountability too.

WIPO's administrative activities are mainly focused on international filing, registration or recognition of industrial property rights. Several aspects, concerning core issues of global administrative law, are at stake. We often deal

with composite multilevel proceedings, in which decision-making power is shared between international and domestic authorities (e.g., the international registration of trademarks, and the procedure under the Patent Cooperation Treaty, upon which see § I.E.13 "Shared Powers: Global and National Proceedings under the International Patent Cooperation Treaty", by M. Veronelli and L. Carbonara); in many procedures (e.g. the international registration of trademarks), the final administrative act is directly applicable in the designated contracting countries, without any further domestic implementation, and is binding on the public authority that has issued it, on the applicant as well as on third parties, who cannot use the registered industrial property right without authorization. Moreover, many rule of law principles are applied in such global administrative proceedings, like the right to be heard, the right to access information, and the duty to provide reasoned decisions. Review mechanisms vary according to the proceeding in question: in the international registration of trademarks, for example, the international applicant cannot appeal against a negative decision of the International Bureau; if, however, the International Bureau's decides to register the trademark, domestic authorities of the designated contracting countries have the power to examine the that decision and, if they think it flawed, to refuse to grant protection to the trademark in their territory.

Finally, the global dimension of WIPO is amplified by numerous agreements and horizontal networks with other global regulatory regimes. Does this create risks of overlapping competences? One way such networking occurs is through the exercise of quasi-judicial functions, whereby the WIPO Arbitration and Mediation Center addresses disputes raised within other global regimes by applying alternative dispute resolution mechanisms (the ICOM and ICANN cases represent good examples). The decisions made by the WIPO administrative panels can have an impact on public authorities even where only private actors can be party to the proceedings (as, for exampe, under ICANN's UDRP). In other cases, proceedings can involve both private and public actors (as under the ICOM-WIPO mediation rules). However, the absence of enforcement powers can undermine the effectiveness of WIPO's quasi-judicial role.

5. *Further Reading*

a. J.H. BARTON, "Issues Posed by a World Patent System", 7 *Journal of International Economic Law* 341 (2004);
b. J. BLAKE, *Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage*, UNESCO (2002) (http://unesdoc.unesco.org/images/0012/001237/123744e.pdf);

c. M. BURRI, "Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship", 17 *International Journal of Cultural Property* 33 (2010);
d. T. COTTIER, M. PANIZZON, "Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection", 7 *Journal of International Economic Law* 371 (2004);
e. R.C. DREYFUSS, *Fostering Dynamic Innovation, Developing the Trade: Intellectual Property as a Case Study in Global Administrative Law*, IILJ Working Paper 2008/4 (2008) (http://www.iilj.org/publications/2008-4dreyfuss.asp);
f. R.C. DREYFUSS, *The Role of India, China and Other Emerging Economies in Establishing Access Norms for Intellectual Property and Intellectual Property Lawmaking*, IILJ Working Paper 2009/5 (2009) (http://www.iilj.org/publications/documents/2009-5.Dreyfuss.pdf);
g. R.C. DREYFUSS, "Introduction: Designing Intellectual Property Institutions for the Twenty-First Century", 12 *The Journal of World Intellectual Property* 341 (2009);
h. G. DUTFIELD, "World Intellectual Property Organization", in K.A. REINERT, R.S. RAJAN (eds.), *The Princeton Encyclopedia of the World Economy*, Vol. II (I-W), Princeton University Press (2008), p. 1182 et seq.;
i. D.J. GERVAIS, "The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New", 12 *Fordham Intellectual Property, Media and Entertainment Law Journal* 929 (2002) (http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1232&context=iplj);
j. F. GURRY, "The Dispute Resolution Services of the World Intellectual Property Organization", *Journal of International Economic Law* 385 (1999);
k. L.R. HELFER, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking", 29 *Yale Journal of International Law* 1 (2004);
l. K. KAISER, "WIPO's International Registration of Trademarks: An International Administrative Act Subject to Examination by the Designated Contracting Parties", 9 (11) *German Law Journal* 1597 (2008);
m. E. KWAKWA, "Institutional and Procedural Reform at the World Intellectual Property Organization", 3 *International Organizations Law Review* 143 (2006);
n. E. KWAKWA, "Some Comments on Rulemaking at the World Intellectual Property Organization", 12 *Duke Journal of Comparative and International Law*, 179 (2002);

o. C. MAY, *The World Intellectual Property Organization. Resurgence and the Development Agenda*, London (2007);

p. K.E. MASKUS, J.H. REICHMAN, "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods", 7 *Journal of International Economic Law* 279 (2004);

q. A.K. MENESCAL, "Changing WIPO's Ways? The 2004 Development Agenda in Historical Perspective", 8 *Journal of World Intellectual Property* 761 (2005);

r. S.F. MUSUNGU, G. DUTFIELD, "Multilateral Agreements and a TRIPS-Plus World: The World Intellectual Property Organization", TRIPS Issues Paper No. 3 (2003), Geneva: Quaker United Nations Office (http://www.quno.org/geneva/pdf/economic/Issues/Multilateral-Agreements-in-TRIPSplus-English.pdf);

s. R.L. OKEDIJI, "WIPO-WTO Relations and the Future of Global Intellectual Property Norms", XXXIX *Netherlands Yearbook of International Law* 69 (2008);

t. C.A. PRIMO BRAGA, C. FINK, "Reforming Intellectual Property Rights Regime: Challenges for Developing Countries", *Journal of International Economic Law* 537 (1998);

u. C.J. STRANDBURG, "Accommodating User Innovation in the International Intellectual Property Regime: A Global Administrative Law Approach", *Acta Juridica* (2009) (http://www.iilj.org/gal/galcapetown.asp);

w. S. TEURICH, "Alternative Dispute Resolution in Art and Cultural Heritage – Explored in the Context of the World Intellectual Property Organization's Work", 8 *Kulturgüterschutz-Kunstrecth – Kulturrecht* 569 (2010) (http://www.wipo.int/export/sites/www/amc/en/docs/theurichbeitrag.pdf).

I.B.10 SARS, the 'Swine Flu' Crisis and Emergency Procedures in the WHO

J. Benton Heath

1. *Background*

The World Health Organization (WHO) is an international organization established in 1948 with the broad mandate of securing "the attainment by all peoples of the highest possible level of health". Member States endowed the WHO with power to adopt binding regulations regarding the international spread of disease, and the organization adopted the first such regulations in 1951. Among other requirements, the early regulations obliged States to report certain diseases within their territory, and subjected quarantines and import restrictions to specified "maximum" levels, which States were not permitted to exceed. These regulations were expected to form the central international framework governing quarantine procedures and other disease-prevention measures.

It soon became clear that the regulations were not functioning as intended, due to at least five mutually reinforcing problems. First, States regularly shirked their obligations to report signs of epidemics within their territory, frustrating the Organization's ability to coordinate efforts to combat the spread of disease. Second, compounding this problem, the regulations did not permit the Organization to consider evidence of disease outbreaks from any source other than official State reports. Third, after 1981, the regulations applied only to three infectious diseases – cholera, yellow fever, and plague – thus providing no legal mechanism for combating novel or emerging health threats. Fourth, the regulations focused too heavily on so-called "negative" measures, such as personal surveillance and quarantine, which came to be seen as ineffective for combating disease in an era of jet travel. Finally, the "maximum" measures provision of the old regulations was seen as too inflexible. Consequently, the International Health Regulations were seldom invoked.

In the years before 2003, the WHO legal regime for outbreak-response seemed antiquated, and the organization was in the midst of a long-term process to overhaul its international health regulations. The early twenty-first century also constituted a relatively low point for the WHO's image more generally, as other

organizations such as the World Bank began to eclipse the WHO in terms of funding and leadership on global health issues. On some accounts, the organization was viewed as a stuffy and sluggish bureaucracy that was ill-equipped to handle the diverse and emerging health threats of a rapidly globalizing world.

The 2003 outbreak of Severe Acute Respiratory Syndrome (SARS) thrust the organization back into the spotlight, as WHO efforts to stop the spread of SARS were widely credited with preventing a full-blown pandemic. The response also catalyzed and accelerated efforts to reform the International Health Regulations. The organization's plenary body, the World Health Assembly, approved a new set of regulations in 2005, which entered into force on 15 June 2007. At the same time, fears about avian influenza led the organization to begin developing pandemic preparedness plans and to enter into consultations with member States on preparing for a widespread outbreak of potentially deadly influenza. These plans, and the international health regulations, were operationalized for the first time following the outbreak of pandemic influenza A(H1N1), or "swine flu" (on this case, see also § I.E.9 "International Organizations and Horizontal Review: The World Health Organization, the Parliamentary Council of Europe, and the H1N1 Pandemic", by A. Deshman).

2. *Materials*

- Constitution of the World Health Organization, 22 July 1946, 14 U.N.T.S. 185 (http://www.who.int/governance/eb/who_constitution_en.pdf);
- International Sanitary Regulations, 25 May 1951, 175 U.N.T.S. 215 (http://treaties.un.org/pages/showDetails.aspx?objid=080000028014df7f);
- International Health Regulations, 23 May 2005, 2509 U.N.T.S. (http://www.who.int/ihr/en/);
- World Health Organization, *WHO Global Influenza Preparedness Plan* (2005) (http://www.who.int/csr/resources/publications/influenza/WHO_CDS_CSR_GIP_2005_5.pdf);
- World Health Organization, *Pandemic Influenza Preparedness and Response* (2009) (http://www.who.int/csr/disease/influenza/pipguidance2009/en/index.html);
- World Health Organization, *Report of the Review Committee on the Functioning of the International Health Regulations (2005) in relation to Pandemic (H1N1) 2009*, WHO Doc. A64/10 (May 5, 2011)

(http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_10-en.pdf);

- Paul Flynn (U.K), Soc. & Family Aff. Comm., Eur. Parl. Ass., *The handling of the H1N1 pandemic: more transparency needed*, Doc. No. 12283 (7 June 2010) (http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12283.pdf);

3. *Analysis*

The WHO responses to SARS and swine flu each raise important issues regarding the role of international organizations, and particularly their secretariats, in managing emergencies. Following SARS, the World Health Assembly of the WHO enacted sweeping new regulations that both endowed the WHO secretariat with broad emergency powers, and subjected those powers to explicit and robust procedures. These procedures were tested for the first time in the swine flu epidemic. It will be useful to analyze these developments chronologically.

In responding to the SARS outbreak, the WHO took three important and unprecedented steps. First, the WHO relied heavily on non-governmental sources of information to identify and track the spread of SARS, even as China continued to deny or play down the seriousness of the outbreak. This led the WHO to take its second unprecedented step, which was to vocally criticize China's handling of the outbreak. Despite this criticism, China did eventually cooperate with the WHO after information about SARS became too prominent to deny. Third, and most crucially, the WHO secretariat issued several global alerts directed specifically to travelers and airlines, culminating in a series of "travel advisories" that suggested the postponement of all non-essential travel to SARS-affected locations, including Beijing, Guangdong province, Taipei, Hong Kong, and Toronto. The advisory against Toronto proved controversial, and most likely had a serious effect on the city's economy. Nonetheless, aggressive WHO action is widely credited for quickly stopping the spread of SARS.

The travel advisories were issued through an improvised process that endowed the secretariat with significant power. There did not seem to be any formal procedure for conferring with governments before an advisory was issued, and it is unclear whether the Canadian government was consulted in advance of the advisory against Toronto. In addition, the organization claimed to base all of its travel advisories on three criteria—the magnitude of the outbreak, the extent of local chains of transmission, and evidence that travelers were exporting the disease from that location to other countries. But travel advisories

rarely did more than restate these criteria, and the organization's findings were not backed by explicitly stated evidence.

The SARS response saw the WHO secretariat acting at its most independent: a small team of specialists working without any formal process for input from states. Governments did have access to the WHO secretariat during this time, however, and Canada was able to persuade the organization to lift its travel advisory against Toronto after only three days. The World Health Assembly largely approved the secretariat's actions during the SARS response, although the 2005 revisions to the International Health Regulations would subject the organization's actions in future emergencies to greater oversight by States.

The 2005 International Health Regulations create a highly proceduralized structure for responding to disease outbreaks. The regulations explicitly endow the DG with the authority to declare a "public health emergency of international concern". Before declaring that a specific situation constitutes such an emergency, the DG must consult with the States concerned, though the final authority to declare a public health emergency rests with the DG alone.

In the declaration, management, and termination of an emergency, the DG enjoys the assistance of an "Emergency Committee". The committee members are selected by the DG from a "roster" of experts—this roster is, in turn, compiled from nominations by States, international organizations, and the DG. The IHR also provide a set of procedures for the Committee. The DG sets the agenda for the meetings, and, following each meeting, the Committee prepares a summary of its deliberations and any advice on recommendations. The state party in which the event is occurring must be invited to make a presentation to the committee, though the state is not allowed to seek a postponement of the Committee meeting. The DG is not obliged to follow the advice of the Committee, but she must publish the views of the Committee along with any recommendations made, so in practice consensus between the Committee and DG is important.

The IHR largely codify and expand upon the secretariat's role in issuing "recommendations" (such as travel advisories) in response to emergencies. Upon the declaration of a public health emergency, the DG may issue recommendations to any States regarding appropriate responses, including vaccination, travel restrictions, food safety, or quarantine. In issuing the recommendations, the DG is required to consider a range of sources of information, including the views of States "directly concerned", the advice of the relevant committees, "scientific principles", and available measures that "are not more restrictive of international traffic and trade and are not more intrusive to persons than reasonably available alternatives". Notably, the DG also must

consider "relevant international standards and instruments" and the activities undertaken by other IOs, although the DG is not required to give detailed consideration to these sources if the situation is urgent.

The new IHR also explicitly allow the Organization to rely on non-governmental information when identifying public health threats, as it did in the SARS crisis. However, the regulations also require that States be given an opportunity to verify such information.

The WHO response to swine flu from 2009 to 2010 largely followed the script laid down by the new IHR, though the situation left some space for improvisation. Importantly, the IHR did not specify in detail what procedures would govern the Emergency Committee meetings. Therefore, the Organization simply used its existing rules and regulations for expert committee meetings, which were designed for other contexts and emphasized the privacy of experts participating in the meetings. To avoid undue influence by the pharmaceutical industry, these regulations required the anonymity of members until the Committee was disbanded. In the swine flu response, this strategy notoriously backfired, as the anonymity of the Emergency Committee fueled accusations that the WHO was artificially inflating the danger of swine flu for the benefit of vaccine manufacturers.

The stakes were actually quite high. The Emergency Committee's recommendations during swine flu focused on the implementation of a six-stage pandemic preparedness plan developed by the organization. At stage six, a full-blown pandemic was declared. In many countries, this declaration triggered contracts between the national government and drug companies for the delivery of large amounts of vaccine. So the declaration of a pandemic carried serious economic consequences.

The other problem that arose during the swine flu response was the WHO's general inability to ensure State compliance with the International Health Regulations. In particular, States are obliged under the IHR to avoid taking measures that are unnecessarily restrictive of travel and trade, in light of the risks posed by the health emergency. In this case, while Mexico did comply with its reporting obligations under the IHR by notifying the WHO of the swine flu outbreaks in its territory, the Organization was unable to prevent states from taking unreasonably restrictive trade and travel measures against Mexico.

4. *Issues: Formal vs. Informal Emergency Powers*

The WHO response to swine flu was widely maligned in some circles. The organization was criticized for setting off unnecessary panic and expense, and

was accused of being "captured" by the drug companies. At the same time, the new International Health Regulations proved ineffective at preventing States from engaging in unreasonably restrictive measures against Mexico. This criticism stands in stark contrast to the widespread praise heaped on the WHO for stopping SARS in 2003. In this light, it might be important to ask whether a formalized emergency powers regime actually serves the goal of placing reasonable constraints on the action of a secretariat, or whether an informal regime might be preferred.

There are many reasons to think that a formal emergency powers regime might be undesirable. Without the highly proceduralized machinery in the 2005 IHR, the WHO secretariat might have been more wary of taking dramatic action against swine flu, which did not appear to be a particularly deadly disease. Such discretion would be welcome to the extent one thinks the WHO overreached in the swine flu crisis. The Organization would also be put in the position of justifying the particular form and function that its emergency response was taking; it would not be able to simply appeal to the procedures laid down in the IHR. Thus, it is possible that more "improvised" emergency action would be more responsive to the actual conditions on the ground.

Finally, the current IHR regime is deficient to the extent that it promises States who report disease outbreaks and other health threats that they will be protected from unreasonable reactions. Mexico's experience in the swine flu epidemic might become typical: after reporting swine flu in its territory, Mexico endured unnecessary restrictions against its exports and on travel, despite the objections by the WHO. It would not be surprising if the Government of Mexico has come to view its compliance with its reporting obligations as a mistake. In this way, the new IHR regime may be delegitimized over time, in much the same way as its predecessor, leading the Organization to turn back to informal emergency responses.

Another issue arises from the Organization's continuing efforts to cast its emergency authority as a purely technocratic issue. At every step, public health and epidemiology experts maintain almost exclusive control over the management and review of WHO emergency actions. This raises the question of whether the World Health Organization should continue to calibrate its response largely in terms of specialized health expertise, or whether it should take a more synthetic approach, which takes into account broader perspectives on trade, travel, tourism, and other issues (on this subject, for an integrated approach in the European Union, see § VIII.13 "Balancing of Interests, Scientific Cognitions Knowledge and Health: The *Gowan* Case", by S. Penasa; § III.D.2 "Global Procedural and Substantial Limits for National Administrations: The *EC-Biotech*

Case", by D. Bevilacqua; as for the WTO context, finally, see § III.A.3 "*WTO Hormones*: Impartiality and Local Interests", by G. Bolaffi).

Efforts to depoliticize health emergencies, or to portray them as requiring a largely technocratic response, arguably have problematic practical effects. For example, the WHO decided to keep the members of its Emergency Committee anonymous because doing so was standard procedure for expert committees. This procedure is usually justified because of the need to obtain impartial advice from experts on health issues without the undue influence of drug companies and other external interests. The WHO erroneously assumed that the same logic was appropriate for an emergency-management committee. Arguably, this decision represents a failure to recognize the inherently political nature of emergency response, and the widely felt need that those persons in charge of taking potent emergency measures should be held to account for their actions.

On the other hand, it is possible that insisting on a specialized, health-based approach to disease outbreaks within the WHO is preferable, because it facilitates collateral review by other, non-health-oriented bodies. On this view, the WHO could never properly assimilate all perspectives, such as trade and tourism, into its decision-making and review process. Instead, by maintaining a focus solely on the health-related aspects of this crisis, the WHO implicitly opens itself up to critiques from national governments and other specialized bodies. The issue of collateral review following the swine flu outbreak is addressed elsewhere in this volume (see the already mentioned § I.E.9 "International Organizations and Horizontal Review: The World Health Organization, the Parliamentary Council of Europe, and the H1N1 Pandemic", by A. Deshman).

5. *Further Reading*

a. C.E. ALLEN, "World Health and World Politics", 4 *Int'l Org.* 27 (1950);
b. Y. BEIGBEDER, *The World Health Organization*, The Hague (1998);
c. G.L. BURCI, "Institutional Adaptation without Reform: WHO and the Challenges of Globalization", 2 *Int'l Org. L. Rev.* 437 (2005);
d. D. COHEN, P. CARTER, "WHO and the Pandemic Flu 'Conspiracies'", *Brit. Med. J.*, June 3, 2010 (http://www.bmj.com/content/340/bmj.c2912.full);
e. M. COHEN ET AL., "Cracking the Case: Attack on SARS Shows Bureaucracy Sometimes Works", *Wall St. J.*, May 2, 2003, at A1;
f. B.J. CONDON, T. SINHA, "The Effectiveness of Pandemic Preparations: Legal Lessons from the 2009 Influenza Epidemic", 22 *Fla. J. Int'l L.* 1 (2010);

g. A.P. CORTELL, S. PETERSON, "Dutiful Agents, Rogue Actors, or Both? Staffing, Voting Rules, and Slack in the WHO and WTO", in D.G. HAWKINS ET AL. (eds.) *Delegation and Agency in International Organizations*, Cambridge (2006);

h. H. EPSTEIN, "Flu Warning: Beware the Drug Companies", *N.Y. Rev. Books*, May 12, 2011 (http://www.nybooks.com/articles/archives/2011/may/12/flu-warning-beware-drug-companies/);

i. D.C. ESTY, "Good Governance at the Supranational Scale: Globalizing Administrative Law", 115 *Yale L.J.* 1490 (2006);

j. D.P. FIDLER, *SARS, Governance, and the Globalization of Disease*, London (2004);

k. D.P. FIDLER, "From International Sanitary Conventions to Global Health Security", 4 *Chinese J. Int'l L.* 325 (2005);

l. D.P. FIDLER, L.O. GOSTIN, "The New International Health Regulations: An Historic Development for International Law and Public Health", 34 *J.L. Med. & Ethics* 85 (2006);

m. A. KAMRADT-SCOTT, "The WHO and SARS: The Challenge of Innovative Responses to Global Health Security", in A.F. COOPER, J.J. KIRTON (eds.) *Critical Cases: Innovation in Global Health Governance*, (2009), p. 70 et seq.;

n. A. KAMRADT-SCOTT, "The WHO Secretariat, Norm Entrepreneurship and Global Disease Outbreak Control", 1 *J. Int'l Org. Stud.* 72 (2010);

o. B. KINGSBURY, L. CASINI, "Global Administrative Law Dimensions of International Organizations Law", 6 *Int'l Orgs. L. Rev.* 319 (2009);

p. A. SILVER, Note, "Obstacles to Complying with the World Health Organization's 2005 International Health Regulations", 26 *Wis. Int'l L.J.* 229 (2009);

q. E. STEIN, "International Integration and Democracy: No Love at First Sight", 95 *Am. J. Int'l L.* 489 (2001).

I.B.11 National Dysfunction and Global Remedies: The International Commission against Impunity in Guatemala

Emma Dunlop

1. *Background*

In 1996 Guatemala emerged from a three-decade civil war between the State and rebel factions in which more than 200,000 people were killed or "disappeared". The Commission for Historical Clarification, established in the wake of the conflict, concluded that State forces and related paramilitary groups were responsible for 93% of documented violations. During the course of the civil war the Guatemalan army gained progressive control of the country's institutions, warping their functions and creating an environment of impunity. The effect of the war persists in violence and insecurity, the fragility of State institutions and the strength of criminal networks. The aftermath of the conflict has seen powerful counter-insurgency forces transform themselves into illegal security groups and clandestine security operations, which engage in criminal activities from kidnapping and extortion to drug and arms trafficking. Corruption, infiltration and institutional weakness have crippled the capacity of the police and the judiciary to counter these networks effectively. In 2010, Guatemala's homicide rate was the fifth highest in the world according to the United Nations Office on Drugs and Crime, with only 2 percent of homicides resulting in prosecution. Speaking before the Human Rights Council, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has referred to Guatemala as "a good place to commit a murder, because you will almost certainly get away with it".

After a series of attacks on human rights advocates in 2002, the Guatemalan Government requested the United Nations' assistance in forming a commission capable of investigating and dismantling illegal security groups and clandestine security organizations within the country. The International Commission against Impunity in Guatemala (CICIG) was established by agreement between the United Nations and Guatemala in 2006 and began operating in January 2008. Funded by voluntary donations from the international community, CICIG works within the Guatemalan domestic system, investigating criminal networks, promoting prosecutions, and recommending legislative reforms.

Currently headed by Commissioner Francisco Javier Dall'Anese Ruiz, CICIG employs 207 staff from 23 countries. At the time of writing the Commission is involved in 62 open investigations, and has participated in twenty cases as a private prosecutor. The initial two-year mandate of the Commission has been extended twice, and will run until September 2013.

2. *Materials: Norms and Relevant Documents*

- "Agreement between the United Nations and the State of Guatemala on the establishment of an International Commission against Impunity in Guatemala ('CICIG')", 12 December 2006 (http://cicig.org/uploads/documents/CICIG_AGREEMENT_EN.pdf);
- United Nations General Assembly Resolution 65/181, "International Commission against Impunity in Guatemala" A/RES/65/181 (5 April 2011) (http://daccess-ods.un.org/TMP/1073879.301548.html);
- International Commission against Impunity in Guatemala, "Informe de la Comisión Internacional contra la Impunidad en Guatemala con Ocasión de su Cuarto Año de Labores" (2011) (http://www.cicig.org/uploads/documents/2011/COM-052-20111005-DOC01.pdf);
- International Commission against Impunity in Guatemala, "Tercer Año de Labores" (2010) (http://cicig.org/uploads/documents/tercer_anio_de_labores.pdf);
- International Commission against Impunity in Guatemala, "Two Years of Work: A Commitment to Justice" (2009) (http://cicig.org/uploads/documents/report_two_years_of_work.pdf);
- International Commission against Impunity in Guatemala, "International Commission against Impunity in Guatemala (CICIG): 'One Year Later'" (2008) (http://cicig.org/uploads/documents/One%20year%20report--%20english.pdf);
- International Commission against Impunity in Guatemala, "Report on Players Involved in the Illegal Adoption Process in Guatemala since the Entry into Force of the Adoption Law (Decree 77-2007)" (2010) (http://www.cicig.org/uploads/documents/adoptionsreport_CICIG2010.pdf);
- Press Release 005, "CICIG's Position on the Process to Select the Attorney General and Head of the Public Prosecutor's Office" (15 April 2010)

(http://cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=43&cntnt01returnid=80).

3. *Analysis*

CICIG's central aim is to bolster the ability of Guatemalan institutions to counter illegal security forces and clandestine security organizations. Funded by the international community and embedded within the Guatemalan legal system, its mandate consists of three functions: investigation into the structure, financing and operation of criminal networks, collaboration with State institutions to dismantle such networks and prosecute their members, and the promotion of legal and institutional reforms within Guatemala. The Commission also assists Guatemala in meeting its international human rights obligations and commitments under the Comprehensive Agreement on Human Rights (1994).

To fulfil its mandate CICIG is empowered to select and supervise an investigation team comprised of Guatemalan and foreign professionals. This team has broad authority to request documents, reports and general cooperation from any Guatemalan official, administrative authority, or semi-autonomous entity, and to act on information provided by any source. Under the 2006 Agreement, requests made by CICIG must be complied with promptly. The Commission has authority to report civil servants obstructing CICIG to the authorities and participate as a third party in disciplinary proceedings. At the level of prosecutions, CICIG is authorized to file criminal complaints with Guatemalan authorities and to join criminal proceedings as a private prosecutor. The Commission additionally provides technical advice to State institutions regarding investigations and criminal prosecution.

At the time of writing the Commission is entering its fifth year of operation. Its achievements to date are impressive given the pervasive culture of impunity in Guatemala and the delicacy of the Commission's mandate. In its third annual report, CICIG noted that collaboration with national institutions was somewhat hindered by the sheer number of cases involving senior officials within the National Civil Police and the Ministry of the Interior. In 2008, 1700 individuals suspected of corruption and involvement with criminal networks were removed from the police force, including 50 senior officials. The relationship between the judiciary and CICIG continues to be strained. In its first annual report, CICIG criticized the judiciary for an "unacceptably low" level of effectiveness. More recently, the Commission reported that its relationship with the judiciary has deteriorated in the light of allegations of misconduct against

judges.

Despite the sensitivity of its operations, the Commission has worked with the Public Prosecutor and National Civil Police to improve investigation techniques and build trust between institutions. Legal reforms have been instituted to enable plea-bargaining for those giving evidence on criminal networks and to establish courts with additional security measures for judges, prosecutors and witnesses in sensitive cases. A regulated wiretapping program became operational in 2009 through the joint efforts of CICIG and national institutions, and video conferencing is now used in high profile trials to protect witnesses and defendants. The Commission assisted in sourcing equipment for the wiretapping program and in training Guatemalan officials responsible for its operation. CICIG has also worked with the Public Prosecutors Office to draft Witness Protection Program Regulations, and to train recent police academy graduates in protection techniques. Collaboration extends to joint initiatives. In 2008, thirty National Civil Police officers were assigned to CICIG by the Minister of the Interior, creating a joint unit. The officers were trained extensively in investigation methods and criminology. A Special Prosecutor's Office for CICIG was established within the Public Prosecutors Office in the same year as a means to provide technical assistance and support national investigations.

This multi-pronged approach is bearing fruit in high-level convictions. A former advisor to the Minister of the Interior was sentenced to 10 years imprisonment for money laundering and extortion in 2011. The former Minister of the Interior was himself removed from office in 2010 and is currently in custody on charges of money laundering, collusion, conspiracy, abuse of authority and tax fraud. The ex-head of police, Baltazar Gómez Barrios, and a senior police officer have each been convicted on charges of extortion and dereliction of duty. Two police officers in Guatemala's Special Division for Criminal Investigation (DEIC) have been sentenced to 25 years in prison for the disappearance of an alleged blackmailer following complaints that a cabal within the National Civil Police was carrying out extra-judicial killings. While the case against former President Alfonso Portillo on charges of embezzlement collapsed in the courts earlier this year, the Guatemalan Constitutional Court has since authorized his extradition to the United States on money laundering charges.

Additional CICIG investigations have led to the conviction of fourteen people for their role in a gun battle between rival drug gangs in Zacapa, and eight others complicit in the murder of businessman Khalil Musa and his daughter Marjorie Musa. In a bizarre and highly publicized case, the Commission determined that Rodrigo Rosenberg, a Guatemalan lawyer who recorded a video before his assassination accusing Guatemala's President, First Lady and members of the Administration of conspiring to kill him, had in fact plotted his own

murder. The Commission's carefully delivered findings are credited with averting a national crisis. Investigators have also addressed criminal conspiracies surrounding illegal adoptions and the trafficking of children. In 2011, a trial opened against seven people accused of involvement in illegal adoptions, including three employees of the Attorney General's Office.

The presence of CICIG in Guatemala has altered the composition of its public institutions and is affecting the government appointment procedures. Through its public policy mandate the Commission has drafted selection criteria and rules of procedure for the nomination of judges and the post of Attorney-General, and has raised public objections to certain candidates based on criminal links. In 2009, a face-off between Congress and CICIG occurred when six judges that CICIG had objected to were appointed to the bench. After a Constitutional Court challenge, Congress replaced three of the impugned judges. In a subsequent judicial appointment for the Court of Appeal, none of the twenty candidates to whom CICIG objected were successful. In 2008, the CICIG Commissioner asked President Colom to remove his Attorney-General, Juan Luis Florido. Florido tendered his resignation in July 2008, shortly followed by the Chief Homicide Prosecutor and a number of senior personnel suspected of corruption within the Attorney-General's Department. In 2010, the government appointed an Attorney-General accused of links to drug trafficking and illegal adoption rings, prompting the resignation of CICIG's Commissioner. The Guatemalan Constitutional Court removed the new appointment barely three weeks later, holding that the nominations process had been flawed, with the implication that criminal networks may have coerced the result.

Despite the broad successes achieved by the Commission, challenges persist in fulfilling its heavy mandate. Declaring his resignation in 2010, former CICIG Commissioner Carlos Castresana chastised the government for failing to reform the justice system and for providing inadequate support to the Commission. Although several reforms recommended by CICIG have been implemented, including reforms to the Law on Arms and Ammunition, the Law against Organized Crime, the Forfeiture Act and the Act regulating Private Security Services, CICIG reports that none of the legislative proposals made since 2009 have advanced significantly in the past year.

4. *Issues: The Challenges of Embedded Institutions*

Visiting CICIG in 2011, UN Secretary-General Ban Ki-Moon described the initiative as "different from anything else the United Nations has ever done". Although such occasions call for the rhetoric of exceptionalism, CICIG does

indeed suggest an innovative model for responding to endemic corruption on a national level (on the fight against corruption, see also § III.A.7 "Corruption in Global Administrative Bodies: The Integrity Vice Presidency at the World Bank", by S. Fresa). The close ties between the Commission and national institutions, coupled with the Commission's complete political and financial independence, create both opportunities and hurdles in achieving its mandate.

The decision to embed the Commission within the national system rather than establishing it as a supervisory body enhances its credibility in complex affairs such as the removal of Ministerial staff or police officers and enables the active participation of national officers in investigations and case preparation. Nonetheless the arrangement does have certain setbacks. The Commission is at every step reliant on Guatemalan institutions – on the Public Prosecutor to act on CICIG investigations and initiate cases, on the judiciary to allow its participation as a private prosecutor, and on the legislature to act upon proposed law reforms to counter entrenched criminal networks. However these dependencies can be considered the Commission's strongest attribute. Its effectiveness is necessarily linked to the achievements of national institutions in fighting against impunity. In this sense the successes of the Commission emphasize a growing robustness in the capacity of national institutions to counter national corruption.

It is clear that the scale of the task of countering criminal networks in Guatemala outweighs the resources available to CICIG. The Commission is blunt regarding its inability to respond to all investigation requests, and selects cases on the basis not only of its mandate but also of their political impacts and the probability of success. However throughout its lifespan the Commission has continuously affirmed Guatemala's responsibility for rescuing its own institutions. It is to be hoped that the Commission's efforts in criminal investigations, encouraging prosecutions, training national officers and pushing for legislative reform will result in ongoing progress towards countering criminal elements within Guatemala after the conclusion of its mandate.

5. *Further Reading*

a. P. GAVIGAN, "Organized Crime, Illicit Power Structures and Guatemala's Threatened Peace Process", 16 *International Peacekeeping* 62 (2009);
b. A. HUDSON, A.W. TAYLOR, "The International Commission against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms", 8 *Journal of International Criminal Justice* 53 (2010);

c. M. PANNER, A. BELTRÁN, "Battling Organized Crime in Guatemala", 4 *Americas Quarterly* 38 (2010);
d. N. ROHT-ARRIAZA, "Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala", 9 *Chicago Journal of International Law* 79 (2008).

I.C HYBRID PUBLIC-PRIVATE ORGANIZATIONS AND PRIVATE BODIES EXERCISING PUBLIC FUNCTIONS

I.C.1 Legitimacy without Authority in Global Standardization Governance: The Case of the International Organization for Standardization (ISO)

Eran Shamir-Borer

1. *Background*

1.1. *Establishment and Organizational Goals*

The International Organization for Standardization (ISO) was formally established in 1947, the result of a conference of representatives of 25 National Standards Bodies (NSBs) that took place in London in 1946. ISO's establishment was in fact (even if not legally) the merger of two preceding standardization organizations, the International Federation of the National Standardization Associations (ISA) and the United Nations Standards Coordinating Committee (UNSCC). The ISA, established in 1926 and administered from Switzerland, operated mainly in continental Europe (i.e., in "metric" countries) in the area of mechanical engineering. The UNSCC was established by the United States, Great Britain and Canada in 1944 and was administered from London and New York, in close cooperation with the already-existing International Electrotechnical Commission (IEC).

ISO's objectives, as defined in the organization's Statutes, are "to promote the development of standardization and related activities in the world," with a view "to facilitating international exchange of goods and services and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity." The primary means available to promote these objectives are

the harmonization of standards and the development of international standards (on this issue, see also Chapter II, "Global standards").

1.2. *ISO Standards*

ISO standards are formally voluntary, and constitute "recommendations" to ISO members. Nonetheless, many ISO standards are widely adopted by NSBs (as national standards), by governments (in their technical regulation and legislation, as well as in their procurement requirements), by intergovernmental organizations (in their international instruments and in their procurement requirements), and by industry and businesses (in their manufacturing and supply practices, testing and analysis methods, etc.). Widespread adoption of international standards facilitates the access of businesses to global markets, by removing technical barriers to trade (in the form of national standards or technical regulation) and by creating a "level playing field" for all competitors in those markets. International standards provide governments with technical and scientific bases for their health, safety and environmental legislation. For developing countries in particular, international standards are also an important source of technological know-how. At the same time, however, ISO standards may also become trade barriers and exclude products or services of certain actors from global markets if they fail to take into account the interests of these actors.

In its first decades, ISO's work focused on technical, product-related standards that served and affected primarily the industry sector. This has changed in the past two decades, with globalization and the expansion of international trade increasing the demand for internationally acceptable standards that would remove non-tariff barriers to trade. First, the volume of ISO standards has increased dramatically (in general, see § II.B.1 "Defining A New Model: Global Indicators", by E. Dunlop). For example, in 2011 alone, ISO published 1,208 standards and standard-type documents, with more than 4,000 additional items in various stages of development (altogether, over 19,000 standards and standard-type documents have been published since ISO was established). Second, the scope of ISO standards has expanded to cover product-related standards that are not technical in nature, service-related standards (e.g., standards for complaint handling), standards for quality management and quality assurance (known as ISO 9000 standards, including guidelines for the implementation of quality management in the education sector), standards for environmental management (known as ISO 14000 standards, among them the recently-published standard on greenhouse gases), information technology (IT) standards, and even, very

recently, a standard for social responsibility of public and private organizations (known as ISO 26000).

1.3. *Organizational Character and Membership*

ISO does not easily fit into the traditional organizational categories of public / private, intergovernmental / non-governmental, or international / transnational. On the one hand, it has a private, non-governmental character. Its members are not governments but NSBs, whose identify and composition are determined by the respective originating countries. Many of these NSBs, particularly those from developed countries, are private entities (e.g., standards associations established by industry), or are comprised of both governmental and private stakeholders. For instance, the US representative within ISO, the American National Standards Institute (ANSI), is a private, non-profit organization, consisting of members from both the private sector (such as businesses, professional societies and trade associations) and federal governmental agencies. This is also true of many of the European standardization bodies that are private associations, such as the German and British ISO members (the *Deutsches Institut für Normung* (DIN) and the British Standards Institution (BSI), respectively). On the other hand, only one NSB in each country – that which is the "most broadly representative of standardization" there – may be admitted to ISO. Also, as a matter of fact, the vast majority of NSBs that constitute the ISO membership (over 70%), particularly those from developing countries, are governmental in nature, (either governmental departments or autonomous governmental bodies). This confers upon ISO a somewhat intergovernmental quality. Given this duality in ISO's organizational character, it is not surprising that, while some scholars have classified ISO as a private body, others have included it in the constantly expanding category of "hybrid" bodies; that is, both intergovernmental and non-governmental. On the ISO web-site, it is depicted as a "network of... national standards institutes... a non-governmental organization that forms a bridge between the public and private sectors."

As at August 1st, 2012, there are 164 members in ISO, divided into three categories. The first and most central category is that of Member Bodies (MBs). Member Bodies are those "national standards bodies most broadly representative of standardization in their respective countries"; one NSB from each country. Out of the total of 164 ISO members, 111 are Member Bodies. They enjoy full voting rights and may take an active part in all ISO activities. Membership is

subject to payment of annual dues. The two other categories of ISO members, Correspondent Members and Subscriber Members, have no voting rights and cannot take an active part in the technical and policy development work; however they may attend the General Assembly as observers. Correspondent Members are national bodies in countries without a Member Body, usually because they do not yet have a fully developed national standardization infrastructure. They are entitled to be kept fully informed about work of interest to them as well as to attend ISO technical committees as observers. Subscriber Members are national bodies from countries with very small economies. This membership allows them to keep up to date on ISO's work, for the payment of reduced fees, but unlike Member Bodies and Correspondent Members, they cannot sell ISO Standards and they do not adopt them nationally.

1.4. *Institutional Structure*

ISO, whose seat is in Geneva, is comprised of several organs – a General Assembly (GA), a Council, a Technical Management Board (TMB), technical committees, and a Central Secretariat, and of several Officers of the Organization – a President, two Vice-Presidents, a Treasurer, and a Secretary-General.

The hub of the standardization work is the technical committees, a general name for hundreds of technical committees (TCs), sub-committees (SCs) and working groups (WGs). Participation in the work of the technical committees is open to all Member Bodies as full participating members (P-members; having an obligation to vote on all issues and documents submitted for voting, and to participate in meetings) or as observers (O-members; having a right to submit comments and attend meetings, but not to vote), subject to the choice of each Member Body according to its national interests. Member Bodies are represented on the technical committees by either NSB officials, or professionals appointed by the NSB for the purpose (the latter in practice hailing primarily from the industry and the business sectors, but also from others, such as consumer groups and governmental organizations), or both. Chairpersonships and secretariats of technical committees are allocated by the Technical Management Board to specific Member Bodies, and, again, may be staffed by either NSB officials or by representatives of stakeholder groups.

The overall management of the technical committees is vested in the Technical Management Board, which is responsible, *inter alia*, for setting the procedures for the standardization process. The Council is responsible for ISO's

operations and policy-making. Both organs are effectively dominated by NSBs from developed countries, as the criteria for membership in them reflects the financial strength of NSBs' home countries.

1.5. *Financing*

ISO's chief source of revenue is the membership dues collected from its members, which are determined based on each country's Gross National Income and trade figures (on the financing of IOs, see § I.B.6 "Palestine Admission into the UNESCO: A Case of Politics, and Finances", by I. Paradisi; § I.C.5 "Between Vertical and Horizontal Financing: The Global Fund and the Global Aid System", by F. Di Cristina). Other sources of revenue are the sale of ISO standards, royalties on copyrights and income from services. These revenues finance the operation of ISO Central Secretariat exclusively (37 million CHF in 2011). The cost of the rest of ISO's operations, namely the standardization work itself, which is four times larger, is directly borne by the Member Bodies (which provide personnel and other resources necessary to support the chairpersonship and secretariat of the technical committees) and by stakeholders, mainly the industry and business sectors (which subsidize the standardization work by providing, and funding the participation of, professionals).

1.6. *The Standardization Process*

The development of ISO standards is generally market-driven, and usually originates in the needs expressed by the industry sector. To launch an ISO standardization process, these needs must be communicated to, and embraced by, the respective Member Body or an appropriate ISO organ. Once this is achieved, the standardization process advances in six stages (note that in some cases, such as IT standardization, different procedures apply; also, when a document with a certain degree of maturity is already available at the beginning of a standardization project, for example a standard developed by another organization, it is possible to skip certain stages). Throughout these stages, the standardization work is generally organized around the principle of "national representation," meaning that decision-making in the standardization process is generally based on the "national positions" expressed by "national delegations" that are comprised, as already mentioned, of NSB officials and/or professionals appointed by NSBs. The *Proposal Stage* is aimed at confirming the necessity of the proposed standard before launching the standardization work. Proposals are

reviewed by the relevant technical committee and are approved by a simple majority, on condition that at least five participating members of the technical committee (P-members) undertake to participate actively in the development of the standard by nominating technical experts and commenting on working drafts. The next, *Preparatory Stage* is dominated by "experts" assigned to working groups by interested Member Bodies in order to specify the technical scope of the future standard. Once the experts reach an agreement, the working draft is transferred back to the technical committee in order to obtain comments from the Member Bodies and build consensus around a draft standard (the *Committee Stage*). Consensus is obtained when "general agreement" among the participating members of the technical committee (P-members) is reached, "characterized by the absence of sustained opposition to substantial issues" (i.e., no need for unanimity), or, in case of doubt, when two-thirds of the participating members vote affirmatively on the draft standard. The draft standard is then circulated in two rounds among *all* ISO Member Bodies for comment and approval (the *Enquiry* and *Approval Stages*). The standard is approved if two-thirds of the participating members of the relevant technical committees are in favor and not more than one-quarter of the total number of votes cast are negative. Once approved, the standard is published as an International Standard (the *Publication Stage*). All International Standards are reviewed within three years after publication and every five years after the first review. A majority of the participating members of the relevant technical committee decides whether the International Standard should be confirmed, revised or withdrawn.

1.7. *ISO and the WTO*

While ISO standards constitute only "recommendations" to ISO members within the ISO regime, they have become somewhat less voluntary for states member of the WTO and their respective NSBs by virtue of the WTO Agreement on Technical Barriers to Trade (TBT) (see § I.E.10 "The TBT Agreement: Implications for Domestic Regulation", by J. Langille). This Agreement obliges states to use "international standards" – the vast majority of ISO standards falling within the ambit of this term – or draft "international standards" whose completion is imminent, "as a basis" for their technical regulation and national standards, related to products or their processes and production methods (PPMs).

The WTO TBT Committee has more than once expressed its concern about the under-representation of developing countries in the standardization process. In 2000 it adopted a decision containing a set of principles that it

considered important for international standard development, dealing, *inter alia*, with the transparency, openness, impartiality, and development dimension of the standardization process. The declared aim of this decision was to "improve the quality of international standards" and to "clarify and strengthen the concept of international standards under the Agreement". Time will tell whether national standards or technical regulation based on an ISO standard will be susceptible to challenge before the WTO as constituting technical barriers to trade, where the standardization process of the ISO standard relied upon had not followed the principles as prescribed by the WTO TBT Committee in the above-mentioned decision.

1.8. *Standardization as Administration*

The study of ISO confirms that much in international standardization can be perceived as a form of "administration." Much like traditional regulation, standardization usually involves a balancing of interests. These can be interests of the same kind, like commercial interests of different manufacturers or service providers. Take, for instance, a technical standard whose sole purpose is to provide interoperability in the market. Such a standard may favor the interests of one manufacturer over the interests of another where it prescribes a technical solution already applied by the former but not by the latter – to reap the benefits of the standard, the latter would be forced to incur the switching costs involved in compliance with the new standard. In other cases, where standards strike a balance between the interests of different stakeholder groups (such as consumers, environmentalists, or governments) they may also have public policy implications (in general, see Chapter II, Section II.A "Global Standards as Regulatory Devices"). In the case of international standards in particular, policy implications may reach not only across stakeholder groups, but across countries as well. For instance, the interests of industry and consumers in developing countries are different from those of comparable stakeholder groups in industrialized countries. A standard that favors the needs and interests of the latter may be simply irrelevant to the former, or, even worse, have detrimental economic consequences for developing countries in a world of global trade. Furthermore, standards not only resemble traditional regulation in their essence; there is also a strong connection between the two. As mentioned above, standards, including international standards, often provide the foundation for public regulation or may serve as gap-fillers. International standards may also replace existing regulation, or be initiated in order to forestall the development of more stringent public regulation.

2. *Materials and Links*

- ISO, "Statutes and Rules of Procedure" (15th ed. 2011);
- ISO, "ISO Code of Ethics" (2004) (http://www.iso.org/iso/codeethics_2004.pdf);
- ISO/IEC, ISO/IEC, "Guide 2: Standardization and related activities – General vocabulary" (8th ed., 2004);
- ISO/IEC, ISO/IEC ,"Directives, Part 1: Procedures for the technical work" (9th ed. 2012) (http://isotc.iso.org/livelink/livelink/fetch/2000/2122/3146825/4229629/4230450/4230455/ISO_IEC_Directives%2C_Part_1_%28Procedures_for_the_technical_work%29_%282011%2C_8th_ed.%29_%28PDF_format%29.pdf?nodeid=10563026&vernum=-2);
- ISO/IEC, ISO/IEC, "Directives, Part 1: Consolidated ISO Supplement – Procedures specific to ISO" (3rd ed. 2012) (http://isotc.iso.org/livelink/livelink/fetch/2000/2122/3146825/4229629/4230450/4230452/Supplement_-_Procedures_specific_to_ISO_%28the__ISO_Supplement_%29_2nd_edition_%28PDF_format%29_.pdf?nodeid=10579742&vernum=-2);
- ISO/IEC DIRECTIVES, PART 1: SUPPLEMENT – PROCEDURES SPECIFIC TO JTC 1 (3rd ed. 2012) (http://isotc.iso.org/livelink/livelink/fetch/2000/2122/3146825/4229629/4230450/9482942/JTC_1_Supplement_%28pdf_version%29.pdf?nodeid=9484244&vernum=-2);
- ISO, "Code of Conduct for the Technical Work" (2011) (http://www.iso.org/iso/codes_of_conduct.pdf);
- ISO, "Principles for Developing ISO and IEC Standards Related to or Supporting Public Policy Initiatives" (2008) (http://www.iso.org/iso/principles_for_developing_iso_and_iec_standards_related_to_or_supporting_public_policy_initiatives.pdf);
- ISO/IEC, "Using and referencing ISO and IEC standards for technical regulations" (2007) (http://www.iso.org/iso/standards_for_technical_regulations.pdf);
- ISO, "ISO Strategic Plan 2011-2015: Solutions to Global Challenges" (2010) (http://www.iso.org/iso/iso_strategic_plan_2011-2015.pdf);
- ISO, "About ISO" (http://www.iso.org/iso/about.htm);

- ISO, "ISO's Structure" (http://www.iso.org/iso/about/structure.htm);
- ISO/IEC "Information Centre" (http://www.standardsinfo.net/info/index.html);
- Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement (WTO, Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee since 1 January 1995, G/TBT/1/Rev.9 (9 June 2011), Annex B to Part 1) (http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FSymbol+G%FCTBT%FC1%FCRev%2A%29&doc=D%3A%2FDDFDOCUMENTS%2FT%2FG%2FTBT%2F1R10%2EDOC%2EHTM&curdoc=3&popTitle=G%2FTBT%2F1%2FRev%2E10);
- "Friendship among Equals: Recollections from ISO's First Fifty Years" (ISO Central Secretariat ed., 1997) (http://www.iso.org/iso/about/the_iso_story/friendship_equals.htm);
- C.N. MURPHY, J. YATES, "The International Organization for Standardization (ISO): Global governance through voluntary consensus" (2009).

3. *Analysis: ISO's Efforts to Facilitate NGO Participation in the Standardization Process in Its Pursuit of International Civil Society Legitimacy*

3.1. *ISO's Need for Broad Legitimacy*

How has ISO managed to secure and strengthen its position as the pre-eminent global body for the production of standards for over sixty years, despite its lack of coercive powers and its peculiar organizational structure, and notwithstanding competition from other standards bodies and the potential for friction with national and international regulators? It is suggested here that a major element in ISO's pre-eminence has been its ability to extract legitimacy from its social environment, and, more particularly, its use of the standardization procedures in the pursuit of such legitimacy.

Sociological legitimacy is invaluable to any organization; even more so to norm-generating organizations like ISO that lack any coercive powers. To remain effective and significant, ISO is dependent on the participation of others in its standardization processes, as well as on the purchase and implementation of its

standards by various stakeholders. One of the most effective ways to achieve these goals is for ISO to win the legitimacy of relevant audiences that have influence on the acceptance of ISO standards. ISO is thus constantly engaged in efforts to gain and maintain the support of various "legitimacy audiences" in its environment, from industry and business stakeholders, through governments and intergovernmental organizations, to civil society NGOs and academia. Because the legitimacy of these different audiences may be based on different grounds, their legitimacy demands – namely, their pre-conditions for granting ISO their support – may vary, and at times even conflict with one another. The remainder of this section will focus on ISO's efforts to gain and maintain the support of one of ISO's most important legitimacy audiences – civil society NGOs (i.e., NGOs that are non-profit associations, operating as the advocates and bearers of the ideas and interests of "international civil society" for non-commercial objectives, independently of government, industry, or business structures) – and, more particularly, on the role that ISO's standardization procedures have played in these efforts (on these aspects, see § II.A.5 "Competing Interests: Food Safety Standards and The Codex Alimentarius Commission", by D. Bevilacqua).

3.2. *Civil Society NGO Participation in the Standardization Process*

Organizations with an interest in standardization, that are not NSBs, are not eligible for membership in ISO. Yet they may still influence the development of ISO standards, at both the national and the transnational levels. At the national level, organizations with a stake in a particular area of ISO's standardization work may participate in the "national mirror committees" that ISO Member Bodies are expected to establish in order to provide input from domestic stakeholders in all stages of the standardization process. At the transnational level, such organizations may take direct part in the standardization debates as members of their respective national delegations (although they are expected to represent the "national position" decided upon by the "national mirror committee" rather than their own). Another avenue for organizations to participate at the transnational level is to apply for "liaison organization" status to the relevant ISO technical committee. This is intended to allow organizations other than NSBs with an interest in a particular area of ISO's work to participate and contribute to, or at least to be informed of, the standardization process. ISO distinguishes between several categories of liaison organization status, which differ from one another with regard to the type of qualifying organizations, the approval authority, the privileges attached, and the level of standardization work in which the organization is allowed to participate (Working Group, Sub-committee, or

Committee debates). Common to all categories, though, is the lack of voting rights, which are reserved exclusively to Member Bodies.

However, despite the formal opportunities afforded to organizations with an interest in standardization, ISO has been widely criticized for the fact that the actual participation of civil society NGOs in the standardization process is far from satisfactory. Such under-representation may be explained by a number of reasons. *First*, NSBs vary in the effectiveness of their national consensus-building processes: "national mirror committees" are not always established, and diverse opinions are not always taken into account or may be at risk of being overwhelmed by powerful (industry and business) stakeholders. *Second*, national delegations to standardization debates are frequently imbalanced, comprised of delegates primarily from the industry and business sectors. *Third*, ISO, for its part, has traditionally shown great deference to Member Bodies: it has not monitored their national consensus-building procedures, nor has it interfered in the discretion of Member Bodies to determine the composition of their delegations to technical committees. *Fourth*, civil society NGOs often lack the resources and expertise necessary to participate in on-going, sometimes highly technical, meetings that take place all around the world (bearing in mind that participants in standardization debates are usually expected to bear the costs of their own participation). *Fifth*, civil society NGOs have further argued that the status of liaison organizations, although allowing for direct participation in ISO technical committees, is not sufficient to provide a fair and effective opportunity to participate in the standardization process and influence its outcomes. Liaison organizations enjoy neither voting rights nor a right to appeal against decisions of technical committees. As a matter of fact, it seems that most organizations enjoying liaison organization status are affiliated with the industry and businesses sectors (e.g., industry-oriented professional associations that possess sufficient resources and high technical expertise), rather than civil society NGOs.

The criticism against the under-representation of civil society NGOs in the standardization process has grown stronger as the scope of ISO's portfolio of standards has expanded to include issue-areas that involve public policy implications and touch on the public interest. As long as ISO's scope of standardization was limited to technical issues that concerned primarily industry stakeholders, either as producers or users, and perhaps also governments (e.g., when standards had a potential impact on international trade), civil society was generally indifferent to ISO's standardization. However, as ISO began to step out of this technical environment to issue areas where standardization, being a private case of rule-making, may have social policy implications or affect the public interest in one way or another, consumers, environmentalists, fair trade activists and other segments of international civil society responded by presenting

it with various legitimacy demands. While some still insist that ISO should stay away altogether from certain issue areas, others have sought to gain purchase in the standardization process and influence its outcomes from within.

How does ISO manage these legitimacy demands? It is suggested here that, in certain cases, particularly when international civil society legitimacy seems crucial to the effectiveness of the proposed international standards (in the sense of their widespread acceptance and adoption), ISO is attentive to NGO claims, and responds by adapting its standardization procedures in a way that facilitates NGO participation and allows NGOs greater opportunities to influence the standardization process at the international level. However, at least for the time being, ISO insists on upholding the principle of "national representation;" namely, NGO participation remains short of full, direct participation, which is still reserved for Member Bodies, and NGOs are expected to channel the interests that they advocate through them. The most significant developments in this regard have taken place in the areas of environmental standardization and social responsibility standardization, and are discussed very briefly below.

3.3. *The Case of Environmental Standardization*

Subsequent to the success and growing reputation of the ISO 9000 standards (Quality Management and Quality Assurance), which debuted in 1987, ISO launched the production of ISO 14000 standards, the first version of which was published in 1996. ISO 14000 is a family of ISO standards concerned with environmental management. Their goal is to provide organizations – corporations and others – with a framework for managing environmental issues in all aspects of their activities, including product development, process design, production and packaging, with the aims of minimizing harmful effects on the environment and achieving continual improvement in the organization's environmental performance. The cornerstone of the ISO 14000 family is ISO 14001, which outlines the criteria for an environmental management system (EMS) and is the only standard in the family against which an enterprise can be certified by a third party (by the end of 2010, over 250,000 ISO 14001:2004 certificates had been issued in 155 countries and economies, with the largest number issued in China and Japan). Being a "management system standard," ISO 14001 focuses on the organizational processes of the organization, rather than on the outcomes (be it products or services) or impacts of such processes, and thus does not specify any concrete levels of environmental performance.

To understand the significance of ISO 14000, it may be useful to look at some of the reasons why companies seek ISO 14001 certification. While

internally driven rationales, like improving their environmental performance or advancing eco-efficiency, definitely play a role, in seeking ISO 14001 certification companies are also often motivated by the desire to improve their corporate image among customers, regulators, and civil society; by implementing this standard, they may signal to these audiences their commitment to environmental protection. Market demand also makes such certification a *de facto* prerequisite for access to certain markets. Companies wishing to do business in such markets see themselves with no choice but to pursue certification. For example, large corporations like Ford, General Motors and Home Depot require their suppliers to be ISO 14001 certified; other companies encourage certification by including "environmental auditing" and "environmental management assessment" in the purchasing criteria that that they distribute to suppliers or potential suppliers. Similarly, governmental agencies and even international organizations, when acting in the market as procurers, often employ "green procurement" policies by making ISO 14001 certification one of their procurement criteria. Demands for ISO 14001 certification or, more generally, implementation of an environmental management system, may also come from other actors in the market, such as banks and insurers wishing to reduce their potential exposure to environmental harm, or environmentally conscious investors.

Governments, when acting as regulators, also play a determinative role in companies' decisions to certify as ISO 14001, either by specifically requiring such certification or by encouraging it otherwise. The motivation for such requirements may vary between developing and developed countries, the former more likely to use ISO 14001's scheme to compensate for the paucity of sound environmental legislation and enforcement, while the latter are more likely to regard ISO 14001 (or some other environmental management system certification programs) as buttressing their efforts to enforce preexisting environmental legislation and regulations. Zimbabwe, for instance, has incorporated ISO 14001 into its regulatory system, and China has endorsed the standard as a mechanism to enhance the enforcement of environmental laws and as part of its efforts to attract foreign investors. In the United States, ISO 14001 certification helps short-staffed and underfunded federal and state agencies allocate their enforcement resources more effectively, as it singles out companies that are already committed to the environment and presumably show stronger environmental performance. ISO 14001 certification or comparable certification schemes are thus often incentivized by regulators through technical assistance, financial subsidies for certification, and even promises for more lenient treatment (for example, by taking ISO 14001 certification into account in the monitoring and enforcement of regulations). Such certification may also prove useful when companies face legal proceedings. For instance, in some cases of environmental

law prosecution, ISO 14001 certification may be sufficient to invoke a "due diligence" defense, and in tort cases such certification may constitute the benchmark for the standard of "reasonable care." Finally, the significance of ISO 14000 standards is further illustrated by the fact that they are implemented not only by private sector companies but also by public undertakings and agencies.

Apparently, it is exactly this perceived significance of ISO 14000 standards (much of it already anticipated while the standards were still under deliberation) – their "greening" effect, their increasing nature as *de facto* requirements to do business in certain market sectors, their role in public regulation and litigation, and so on – that has prompted so much criticism against them among environmentalists, primarily represented by NGOs. Such criticism was above all addressed at the substance of ISO 14000 standards, primarily the complete absence of any environmental performance requirements. Furthermore, given this flexibility and substantive weakness of ISO 14001 on the one hand, and bearing in mind its brand identity and potential to create the perception of strong environmental performance on the other, concerns have been raised that it might lead to corporate "green-washing," or be used in lieu of more stringent and intrusive environmental arrangements set by national regulation, international treaties or civil society NGOs. These concerns have only been exacerbated by alleged shortcomings in the policy, practices, credibility and ethics of ISO 14001's conformity assessment. Finally, and most pertinent to the discussion here, much criticism has been directed at the standardization process of ISO 14000 standards, along the lines of the critique mentioned above with respect to the general under-representation of civil society interests in the standardization process. Thus, for example, it was argued that the standardization process, at both the international and national levels, was largely dominated by industry and in particular by transnational corporations and environmental consulting and certification firms, whose employees served as chairpersons and conveners of the majority of ISO's relevant sub-committees and working groups, respectively. Consumer or environmental groups, on the other hand, and even government agencies, did not play a significant role in the process.

ISO in general, and the leadership of ISO Technical Committee 207 (ISO/TC 207, under the umbrella of which ISO 14000 standards are developed) in particular, did not remain indifferent to the critique of NGOs. Although NGOs themselves are never the actual adopters of standards, in some areas, such as the environment, they can mobilize their influence to affect the decisions of those with the capacity to adopt ISO standards, be it industry, governments, legislators or intergovernmental organizations. From the standpoint of the standard adopter, having NGOs "on board" is particularly important when the standard whose adoption is being considered is intended to satisfy some

requirement made by civil society in the first place. Thus, for example, a company wishing to convince its customers that it is "going green" is more likely to prefer an environmental standard that is backed by environmental NGOs than one that is not. Having NGOs support the standard adds to its credibility and thus to the prospects that its adoption will be regarded by customers as a genuine effort on behalf of the company to improve its environmental performance. NGO legitimacy is also important in some issue-areas not only because of the positive benefits that may come with their support, but also because of the damage that it may help avoid, primarily having NGOs criticizing and tarnishing the standard, or even developing a competing standard of their own. In other words, NGOs can not only grant ISO standards legitimacy, they can also actively undermine that legitimacy – and, by extension, that of ISO itself more generally. Thus, for instance, the company in the above example is unlikely to adopt a standard that is condemned by influential environmental NGOs as a sham and "green-washing" simply because it will not accomplish the expected goals that led it to consider the adoption of an environmental standard in the first place.

In attending to the criticism of NGOs, ISO/TC 207 established several committees, comprised of both Member Bodies and NGOs, to examine ways to enhance NGO participation in the standardization process. Following this initiative, in 2005, ISO/TC 207 approved a set of measures to be taken to advance this goal. As part of the implementation of these measures, the ISO/TC 207 Chair circulated a letter in 2007 to the Member Bodies highlighting the importance of balanced stakeholder representation "to the legitimacy of the ISO process, assisting in the subsequent uptake and implementation of the standards," and calling upon all Member Bodies to make every effort to have balanced representation at all international meetings "to ensure that our processes are credible." Another measure that was approved was the establishment attendance lists of participants in transnational meetings according to attendees' organizational affiliations and category of stakeholder group. The lists, to be kept by the ISO/TC 207 secretariat, were intended to facilitate tracking of stakeholder participation and enhance transparency with respect to participants' affiliations. This in turn was expected to enable ISO and its Member Bodies to evaluate the degree to which input from all stakeholders is obtained. Further, a designated task force was assigned the task of reviewing those portions of ISO standardization procedures addressing stakeholder involvement, and, based on this analysis, developing operational guidance for ISO/TC 207 aimed at improving stakeholder balance.

However, despite the fact that the overwhelming majority of ISO/TC 207 members approved the above and other measures, several dissenting voices, especially those of the Member Bodies for the United Kingdom and France

(both highly influential members of ISO), eventually brought the implementation of these measures to an abrupt end. Arguing that efforts to improve stakeholder balance should focus on the national level rather than on the transnational level, and expressing the concern that some of the measures would slow down that standardization process and raise the costs of participation, these Member Bodies managed to block almost all of the initiatives introduced by NGOs and other Member Bodies, eventually leading to the resignation of all NGO representatives from the above-mentioned designated task force in 2008.

Taking stock of over a decade of NGO involvement in ISO/TC 207, it seems that NGO advocacy has, for the most part, resulted thus far in little gain in terms of improving NGO participation in the ISO/TC 207 standardization process. Nonetheless, at least in some areas of ISO 14000 standardization, such as eco-labeling and the application of ISO 14001 in the forestry sector, NGO participation, even if scarce, seems to have had significant influence on the content of standards. In addition, NGOs' efforts seem to have enhanced the transparency of the decision-making processes in ISO/TC 207. NGO activity also seems to have put the issue of improving stakeholder involvement high on ISO's agenda. For instance, one of the actions prescribed by the ISO Strategic Plan 2005-2010 as required in order achieve the key objective of "[e]nsuring the involvement of stakeholders," was to "[o]ptimize liaisons and involvement with representatives international organizations of stakeholders." Finally, some of the proposals to improve stakeholder balance that were initially raised (but rejected) in the framework of ISO/TC 207, were later picked up and implemented in the context of the social responsibility standardization process, where ISO and its Member Bodies seem to have been much more receptive to procedural innovations. These developments are discussed below.

3.4. *The Case of Social Responsibility Standardization*

The case of social responsibility standardization provides a fascinating example of the lengths to which ISO is willing to go in order to satisfy the legitimacy demands of civil society when such legitimacy is deemed essential to the standard's effectiveness, as well as the pivotal role that the standardization procedures play in these efforts. ISO was very hesitant before embarking on this standardization project; not only that this decision was taken despite the opposition of some industry and business stakeholders, and that the proliferation of extant corporate social responsibility (CSR) initiatives meant that a new ISO standard would face competition over market share, but the obvious public policy implications of a social responsibility standard also meant that ISO was

risking rigorous scrutiny and criticism from civil society. Unlike the case of ISO 14000 standardization, where the intensity of NGO criticism seems to have caught ISO by surprise, ISO approached the initiative of social responsibility standardization, which first came up in 2001, with great caution from the outset.

When a designated multi-stakeholder advisory group established by ISO to explore the plausibility of social responsibility standardization submitted its report in 2004, it drew a clear linkage between ISO's capacity to undertake the work and the suitability of its standardization process for the task. There seemed to be general agreement within the advisory group that the existing standardization process was unsatisfactory, although opinions diverged regarding the nature and extent of the necessary changes. Much as in the case of environmental standardization, the key to the legitimacy of a social responsibility standard is its credibility; this, in turn, depends on the process through which the standard is developed, and in particular on the question of who participates in that process. Furthermore, it was obvious that the development of a social responsibility standard, if undertaken, would be carried out under the watchful eye of concerned NGOs, in the shadow of the threat that they will withhold their support unless the standardization process employed satisfied their expectations. Not only that, but these actors may also work to delegitimize the standard and the standardization process by harnessing the networks that their members create to lobby governments and NSBs at the national level. NGO support was thus regarded as crucial to the effectiveness of the standard, and it was obvious that in order to win their support the necessary adjustments to the standardization process would have to be made.

And indeed, when the proposal to develop a social responsibility standard was approved by ISO's membership in 2005, it was further decided to introduce into the standardization process various procedural innovations to be followed by the designated working group that was set up for the task (WG SR). Many of these procedures seem to respond to criticisms made by NGOs in the past, as reviewed above. For instance, to address the concerns and criticisms regarding imbalanced stakeholder participation in ISO's standardization process, it was decided that representation in the Working Group would be organized within six stakeholder categories – consumers, government, industry, labor, NGO, and service, support, research and others – with specific guidelines carefully defining each (in addition, efforts were also made to achieve geographical and gender-based balance of participants, but these efforts exceed the scope of this section). Subsequent operating procedures that cover the different aspects of participation in the standardization process use these categories as a reference point. Thus, for example, each Member Body may nominate up to six experts and six observers to the Working Group, one expert and one observer each from the respective

stakeholder categories. An up-to-date register of all experts and observers, including their nominating body and stakeholder category was maintained, and a summary of which – including information on stakeholder category, developed/developing country of origin, and parent NSB/liaison organization – was made publically available. In an attempt to control and limit the oft-criticized excess influence of observers affiliated with the industry and business sectors, it was required that they be physically distinguished from experts in their nametags and sitting area, and their rights were defined in a very limited fashion.

The status and rights of liaison organizations, which, as mentioned above, had been the subject of much criticism in the past, were also regulated in a designated operating procedure that sought to strike the right balance between making the participation of civil society and other NGOs more meaningful on the one hand, and maintaining the overall balance of interest representation on the other. For instance, liaison organizations were entitled to nominate up to two experts and two observers to the Working Group. While they still lacked any voting rights, it was provided that their full and formal backing should be sought on drafts of the standard. The Working Group was further required to circulate a summary table to all Working Group experts clearly indicating the level of support on each draft from each liaison organization, and when deciding whether to approve the document, the overall level of support from liaison organizations was to be taken into account. Liaison organizations were also afforded a right of appeal to the Working Group Plenary on a decision of lower subsidiaries of the Working Group, and if the appeal had not been resolved to their satisfaction, they were granted the right to petition the Technical Management Board.

The social responsibility standardization process was also unique in its high degree of transparency. ISO created a public website for the social responsibility process, which included background information and many of the Working Group's working documents that are usually made available only to the participants in the standardization work. A subsidiary of the Working Group was tasked with providing information about the ongoing work and developing supporting tools for the dissemination of information on the social responsibility initiative. The media policy of the Working Group was the subject of heated controversy between consumer groups and NGOs on one side, and industry stakeholders on the other. While the former were in favor of opening up the process to the media, the latter were against this. The media policy eventually adopted allowed the controlled presence of media representatives at the site of meetings of the Working Group and in certain events (e.g., stakeholder group meetings), but, in order to allow free and open discussions, the policy prohibited media presence at meetings directly related to the standardization work.

In 2010, ISO published ISO 26000:2010, "Guidance for social responsibility". The new international standard is aimed at providing organizations – both private and public – guidance in their efforts to operate in a socially responsible manner (see also § VII.B.2 "OECD Guidelines for Multinational Enterprises: The *Aker Kvaerner* Case – Corporate Social Responsibility and Human Rights at Guantanamo Bay", by M. Goldmann, and § VII.B.3 "The Equator Principles: Voluntary Standards in Project Financing", by Y. Meer). The standard does not list specific requirement or outcomes, and, unlike ISO 9001 and ISO 14001, is not a system management standard and is not intended for certification. Rather, with the overarching objective being to maximize the organization's contribution to sustainable development, the standard offers organizations a common understanding of what social responsibility is, and explains what issues an organization needs to address in order to operate in a socially responsible manner, how it can integrate social responsibility throughout its systems and procedures, how to raise awareness on social responsibility, and how to communicate and report on social responsibility. In this regard, the standard sets out seven substantive principles of social responsibility: accountability, transparency, ethical behavior, respect for stakeholder interests, respect for the rule of law, respect for international norms of behavior, and respect for human rights. It advises organizations on how to recognize their own social responsibility, and how to identify and engage with their stakeholders. The standard further details seven "core subjects" of an organization's social responsibility, along with related actions and expectations: organizational governance, human rights, labor practices, the environment, fair operating practices, consumer issues, and community involvement and development. In an effort to complement other instruments and initiatives for social responsibility rather than replace them, the standard includes a non-exhaustive list of voluntary initiatives and tools related to social responsibility that address aspects of one or more of these core subjects, or cover the integration of social responsibility throughout an organization.

It can be cautiously observed that the procedural innovations adopted for purposes of social responsibility standardization have yielded improvement in the level of participation of stakeholder groups that are usually under-represented in the ISO process. Although civil society stakeholder groups were still somewhat under-represented due to various constraints, it has been acknowledged by various segments of civil society that the process of developing ISO 26000 was relatively inclusive. What implications might this experiment have on ISO's future standardization procedures in other issue areas? Already back in 2008, the Technical Management Board established a Process Evaluation Group (PEG) to "evaluate the process refinements implemented in the [social responsibility]

working group as an ongoing exercise." While upholding the commitment to participation in the standardization process via NSBs and liaison organizations (rather than, for instance, via direct participation of NGOs in the standardization process), among the products of the Process Evaluation Group's work were two guidance documents on stakeholder engagement and consensus decision-making published in 2010, one addressed to NSBs and the other to liaison organizations. These guidance documents are acknowledge explicitly ISO's motivation in producing them, namely the concerns expressed by various actors regarding the integrity of stakeholder engagement and consensus decision-making procedures within NSBs and liaison organizations, and their impact on the credibility of ISO standards and, ultimately, of the "ISO brand" itself. In other words, ISO acknowledges that, without responding to the legitimacy demands of civil society with adequate rule-making procedures, its effectiveness in the marketplace might be hampered. The Process Evaluation Group further considered alternative standards development processes and models of participation. It recommended that no specific alternative model was required, but proposed various process improvements designed, *inter alia*, for standards where broader public interest is a key driver.

4. *Issues: The Explanatory Power of Organizational Legitimacy in Understanding the Evolution of Global Administrative Law*

Organizations need legitimacy, understood here as social acceptability and credibility, to survive and thrive. Global regulatory bodies in particular depend on the legitimacy granted by their social environment. These bodies usually lack coercive powers or authority as we know it from the national sphere. To induce compliance with the rules and norms that they generate, the legitimacy that different social groups in their environment – constituents and stakeholders – can offer these bodies thus becomes essential. Although organizations cannot fully control whether others will grant them their support, they can employ a series of legitimacy-management strategies to help them gain, maintain, and where necessary also repair, the perception by others as legitimate. They are therefore engaged in an ongoing effort to respond to the demands presented to them by their different "legitimacy audiences," and resolve the challenges that arise particularly when such demands conflict with each other or are inconsistent with the functional requirements of the organization's core business.

The study of ISO illustrates the pivotal role that the rule-making procedures of global regulatory bodies can play in their legitimacy-management efforts. While this section focused on the role of ISO's standardization

procedures in its efforts to ensure that it is perceived as legitimate by international civil society only, a study of the legitimacy dynamic of ISO and its broader environment reveals that much of the design of, and changes in, ISO's standardization procedures can be explained as part of its efforts to gain and maintain the legitimacy granted by various stakeholders on whose support ISO is dependent for its success. Rational and instrumental considerations (i.e., ensuring the functional suitability of the standardization procedures to the "technical" goals of the standardization process) certainly remain relevant, but they fail to provide a full account of why ISO's standardization procedures are shaped the way they are. As the identity and relative salience of these legitimacy audiences may vary across subject-areas or over time, so do ISO's standardization procedures.

The case of ISO, particularly when studied through the lens of organizational legitimacy, may thus contribute to our understanding of global governance in general, and the evolution of global administrative law in particular. Previous attempts to explain the evolution of global administrative law have tended to focus on agency theories, perceiving administrative law as providing mechanisms of control primarily aimed at constraining and monitoring the exercise of discretion by an agent delegated with authority. However, as the case of ISO clearly illustrates, there are numerous examples in global governance where global administrative bodies exercise regulatory-like powers in the absence of any delegation from some principal. The framework of organizational legitimacy helps us to take account of the forces that empower and restrict the organization regardless of the existence of a principal-agent relationship. It further provides us with analytical tools that allow us to distinguish between the responses of the organization to different legitimacy audiences, as well as to identify trade-offs.

6. *Further Reading*

Organizational legitimacy

a. D. BODANSKY, "Legitimacy", in J. BRUNNÉE ET AL. (eds.), *The Oxford handbook of international environmental law* (2007), p. 704 et seq.;
b. D.L. DEEPHOUSE, M. SUCHMAN, "Legitimacy in Organizational Institutionalism", in R. GREENWOOD, C. OLIVER, K. SAHLIN, R. SUDDABY (eds.), *The SAGE Handbook of Organizational Institutionalism* (2008), p. 49 et seq.;

c. M. RUEF, W.R. SCOTT, "A Multidimensional Model of Organizational Legitimacy: Hospital Survival in Changing Institutional Environments", 43 *Admin. Sci. Q.* 877 (1998);
d. W.R. SCOTT, *Institutions and Organizations: Ideas and Interests*, 59 (3nd ed., 2008);
e. M.C. SUCHMAN, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 *Acad. Mgmt. Rev.* 571 (1995).

ISO 14000

f. International NGO Network on ISO (INNI) (http://inni.pacinst.org/inni/);
g. ECOLOGIA, *Engaging ISO 14000 for the Environment: Building Global Civil Society Through International Decision-making* (http://www.ecologia.org/ems/iso14000/);
h. J. CLAPP, "The Privatization of Global Environmental Governance: ISO 14000 and the Developing World", 4 *Global Governance* 295 (1998);
i. J. CLAPP, "ISO Environmental Standards: Industry's Gift to a Polluted Globe or the Developed World's Competition-Killing Strategy?", in O. SCHRAM STOKKE, Ø.B. THOMMESSEN (eds.), *Y.B. Int'l Co-operation on Env't & Dev. 2001/2002*, 27 (2001);
j. R. KRUT, H. GLECKMAN, *ISO 14001: A Missed Opportunity for Sustainable Global Industrial Development* (1998);
k. J. MORRISON ET AL., *Pacific Institute for Studies in Development, Environment, and Security, Managing a Better Environment: Opportunities and Obstacles for ISO 14001 in Public Policy and Commerce* (2000);
l. J. MORRISON, N. ROHT-ARRIAZA, "Private and Quasi-Private Standard Setting", in J. BRUNNÉE, D. BODANSKY, E. HEY (eds.), *The Oxford Handbook of International Environmental Law* (2007), p. 498 et seq.;
m. A. PRAKASH, M. POTOSKI, *The Voluntary Environmentalists: Green Clubs, ISO 14001, and Voluntary Environmental Regulations* (2006);
n. N. ROHT-ARRIAZA, "The International Organization for Standardization: Drafting of the ISO 14000 Series", in R.H. STEINBERG (ed.),*The Greening of Trade Law: International trade Organizations and Environmental Issues* (2002) p. 251 et seq.;

ISO 26000

o. ISO, *Social Responsibility – Background Materials* (http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/home.html?nodeid=4451259&vernum=0);

p. ISO, *ISO 26000 Project Overview* (http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_iso26000_overview.htm);
q. ISO, *ISO/SR/WG – Working Documents* (www.iso.org/wgsr);
r. K. TAMM HALLSTRÖM, "The use of democratic values in the ISO 26000 process on social responsibility", in G. SUNDSTRÖM, L. SONERYD, S. FURUSTEN (eds.), *Organizing Democracy: The Construction of Agency in Practice* (2010), p. 48 et seq.;
s. K. TAMM HALLSTRÖM, "ISO expands its business into Social Responsibility (SR)", in M. BOSTRÖM, C. GARSTEN (eds.), *Organizing Transnational Accountability: Mobilization, Tools, Challenges* (2008), p. 46 et seq.;
t. K. TAMM HALLSTRÖM, "ISO Enters the Field of Social Responsibility (SR) – Construction and Tension of Global Governance", in G. FOLKE SCHUPPERT (ed.), *Global Governance and the Role of Non-State Actors* (2006) p. 117 et seq.;
u. H. WARD, *ISO 26000 and Global Governance for Sustainable Development* (2012) (http://pubs.iied.org/pdfs/16507IIED.pdf?).

I.C.2 A Hybrid Public-Private Regime: The Internet Corporation for Assigned Names and Numbers (ICANN) and the Governance of the Internet

Bruno Carotti and *Lorenzo Casini*

1. *Background*

It is no longer necessary to demonstrate the importance of the internet. It has more than two billion users; data traffic has reached extraordinary levels; and it is possible to buy and sell goods, offer services, and communicate globally at the click of a button. The Internet is also re-configuring our ideas of freedom of information: newspaper policies are being reviewed, the role of citizen-journalism has spread and, perhaps most dramatically, the worldwide diffusion of secret documents (see § VII.C.1 "Wikileaks, Global Security and Democratic Control", by E. Chiti) has consecrated the global public-policy relevance of the medium.

The situation was originally very different. The information exchanged on the internet involved only a few servers or university laboratories, serving the demands of science and of military security. The latter, in particular, was the starting point of the phenomenon, driven by the need to construct new communications equipment capable of functioning even under wartime conditions. The project was developed under the auspices of the United States Government – in particular, the *Advanced Research Project Agency* (ARPA), which made the first project grants to university research centres.

It is necessary to separate the technical aspects ("how the internet works") from the informational contents and its control ("what circulates in the internet"). It is the former that will be analysed in this section (for the other one, see § VII.C.4 "The *Google* – *Vivi Down* Case: Providers' Responsibility, Privacy and Internet Freedom" by B. Carotti); from this perspective, it is worth noting that the spread of the internet was facilitated by the establishment of a particular standard: the combination of the Internet Protocol (IP) with the Transfer Control Protocol (TCP/IP). Together, these protocols enable the fragmentation of relevant data at its starting point and its reconnection at the point of destination.

The early internet community of computer engineers adopted the protocols spontaneously, using a method known as the *Request for Comments* (RFC). Every time a new proposal for a technical measure was made, the opinion

of the embryonic internet community was surveyed; if a large measure of agreement was reached, the technical measure was adopted. This model is founded on consensus and on the development of technical norms through bottom-up procedures. No specific institution has imposed these technical parameters; rather, they were chosen on the basis of their innovation and functionality (as determined by the experts).

The point of no return for the evolution of the internet was its international expansion and the discovery of its commercial potential in the last decade of the 20th Century. Particular attention was paid to domain names, which enable the communication of data. The net is composed of various sites, and to reach one of them (for instance, in order to access information or to send an email), it is necessary to know its address. Addresses are made up of a series of four numbers between 0 and 255, separated by a dot. It is clearly not practical to have to remember such a series: it is easier to use characters or words. The domain names also fulfil this function, by changing the numerical series into names. For instance, 128.122.255.255 becomes www.nyu.edu.

The increasing commercial importance of domain names has lead to the institutionalization of their management. Problems of allocation have arisen, as domain names constitute a scarce resource; and relevant intersections with trademark rights (domain names often correspond to corporations' names) have become clear. In this way, domain names have created the need to define specific, globally valid norms.

Domain names are divided into general and national categories: generic and country code top-level domain names (gTLDs and ccTLDs). The ccTLDs operate in a national context, corresponding to a particular geopolitical area (.es, .jp, .in, .us, .uk: there are around 250 of them).

The gTLDs are specialized for particular categories of users (".edu", for instance, refers to educational institutions). The initial rigidity of this subdivision has since given way to greater flexibility: currently, an individual may also register as a ".com", as it is no longer necessary for him to represent a commercial entity. With an 'historic' decision of June 2011, the free creation of gTLDs has finally been permitted, creating the possibility of using any acronym or title (for instance, ".casebook"). This means the end of gTDLs as a *numerus clausus*, creating in turn new market openings. The possibilities for the operators to work with the new codes are indeed increased: the greater the number of domain names, the greater the number of potential registration services.

Domain names are also divided into different levels: in the example given above, ".edu" is the first level domain name, and "nyu" is the second level domain name. Further levels can also be created. For instance, besides ".org",

there can also be "admin.org"; besides ".us", there can also be "ny.us". Thus, second, third (and so on) level domain names can be added to the first level.

Every level constitutes a zone: for each zone (every group of letters preceded by a "dot") a different body is responsible for domain name registration (on this point see § V.14 "Alternative Dispute Resolution: The ICANN's Uniform Dispute Resolution Policy (UDRP)", by B. Carotti). This allows the presence of a plurality of bodies responsible for domain name registration, helping to ensure its fair allocation. The system thus creates a form of "distributed administration".

It is however possible to speak of a central authority. This is the authoritative root server, which contains the "official" list of the existing first level domain names. If, for instance, ".it" were not listed in this server, it would not exist. Control of this infrastructure means authority over the internet as a whole.

There have been many controversies related to the control of the authoritative root server. The main participants have been the International Telecommunications Union (ITU), groups of experts (through the Internet Society, ISOC) and the American Government. The ITU and the expert groups proposed a separate, independent international sectorial authority (the International Council of Registrars, CORE); the US, on the other hand, proposed a model based on private self-regulation and coordination. This latter model is the one that finally prevailed: in 1998, the Internet Corporation for Assigned Names and Numbers (ICANN) was established as a non-profit corporation under Californian law; it began operating on the basis of a Memorandum of Understanding with the US Department of Commerce.

Nevertheless, the debate on internet governance has not diminished (on the relationship between media and democracy, see Section VII.C "Media"). The General Assembly of the United Nations, in a 2001 Resolution, asked the ITU to reconsider the issue during the World Summit on the Information Society (WSIS). During the first phase (in Genoa, 2003), a committee dedicated to this task was established, the Working Group on Internet Governance (WGIG). In the second phase (Tunisia, 2005), the WGIG put forward four proposals for reforming the control of the corporate body. UN involvement has not changed the position of ICANN, which still retains control over the sector: its continued and unquestioned role shows how global phenomenon are coped with new and original organizational structures, entrusted with functions that have a worldwide impact.

2. Materials and Links

- Working Group on Internet Governance, Report of the Working Group on Internet Governance, Chateau de Bossey, June 2005 (http://www.wgig.org/docs/WGIGREPORT.pdf);
- Internet Governance Forum (http://www.intgovforum.org);
- World Summit on Information Society, Declaration on Principles, Geneva, 2003 (Document WSIS-03/GENEVA/DOC/4-E) (http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf);
- General Assembly of the United Nations, Fifty-Sixth Session, Resolution A/RES/56/183, adopted December 21st, 2001 (http://www.itu.int/wsis/documents/background.asp?lang=en&c_type=res);
- Bylaws for Internet Corporation for Assigned Names and Numbers, as amended on 24 June 2011 (http://www.icann.org/general/bylaws.htm);
- Memorandum of Understanding between the US Department of Commerce and Internet Corporation for Assigned Names and Numbers (http://www.icann.org/general/icann-mou-25nov98.htm);
- Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as revised November 21st, 1998 (http://www.icann.org/general/articles.htm);
- Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, September 30th, 2009 (http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm);
- ICANN Approves Historic Change to Internet's Domain Name System, 20 June 2011 (http://www.icann.org/en/announcements/announcement-20jun11-en.htm);
- Internet Ad Hoc Committee, *Generic Top Level Domain Name-Memorandum of Understanding (gTLD-MoU)*, February 28th, 1997 (http://icannwiki.com/index.php/GTLD-MoU);
- Governmental Advisory Committee, Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains, April 5th, 2005 (http://gac.icann.org/web/home/ccTLD_Principles.rtf).

3. *Analysis*

ICANN was originally intended to operate on the basis of coordination amongst private actors. The internet was left to develop in an autonomous manner, without the involvement of either international organizations or national governments. With regard to the former, the original 1996-97 attempt by the ITU to internationalize internet management (the above-mentioned CORE project) was aborted; in relation to the latter, on the other hand, a particular committee in which national governments are represented – the Governmental Advisory Committee (GAC) – has been created. This achievement was due to the influence of the European Commission, which demanded a more active role in internet domain name governance both for the Union and the Member States.

Thus, on the one hand, the door to IOs was closed, leaving this sector to a national regulation; on the other hand, the organizational design was left to private actors, despite the fact that they were fulfilling a public function of global importance; ultimately, a specific place for public bodies was carved out inside a completely private model.

As this option did not work properly and the interests at stake were not adequately represented and protected, ICANN was reformed in 2002, to recalibrate the balance between users, operators and public bodies. The powers of the GAC were also reinforced, as testified to by a document that remains relevant today, in which governments affirm their will to preserve a role for national administrations in the management of the ccTLDs and in the definition of the sectoral policy agenda.

Important innovations also emerged in the international arena. Developing countries pressed for reform, asking for UN intervention. They argued that ICANN lacks true legitimacy, and that a single body could not govern the internet at the global level. Their favoured solution was a multilateral agreement, which would at least grant effective legitimacy to ICANN. In this context, the WGIG started to grow.

In general, the WGIG's position is based on the assumption that internet governance cannot be assigned to an individual government, making multilateral supervision necessary instead. It thus proposed four reforms, which would transfer control to the UN in different ways. Amongst them, the fourth is particularly worthy of mention, as it would have the most significant impact upon the current order, introducing a range of new features. In particular, it envisages the creation of three bodies: the Global Internet Policy Council (GIPC), the World Internet Corporation for Assigned Names and Numbers (WICANN) and the Global Internet Governance Forum (GIGF). The first body would be entrusted with the definition of new public policy, and would assign a prominent

role to national governments. The second, which would be directly rooted in the United Nations system, would be charged with governing the internet sector, in relation to the technical and economic aspects thereof. The third body would perform a coordinating function, in order to contribute to the evolution of the internet: specifically, it would be a forum for discussion, but without any decision-making power. Here, the private sector would play a leadership role.

In this way, a new form of trilateralism has been put forward, based on civil society, governments, and private actors. The search for a definition of governance has been central to the WGIG, which has proposed the following: "Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the internet".

None of these proposals has been put into effect. The main consequence of the WSIS, which left the actual structure of governance unchanged, was the creation of a new forum for annual discussions of relevant issues, the Internet Governance Forum.

4. *Issues: The Normative Functions of Global Private Bodies*

The system of management of domain names illustrates well a fundamental aspect of the institutional perspective related to globalization: it shows a mixed organizational solution, as an original body, incorporated into a national legal order and entrusted with global functions.

There are thus three interesting features to be highlighted. First, national governments, through ensuring constant presence within decision-making bodies, can penetrate and influence private self-regulation. Second, internet governance has been recognized as a global public policy issue. Third, the boundaries between the public and the private have become increasingly blurred as a result: we are witnessing the creation a new form of hybrid governance (as the creation of GAC shows). Fourth, the system that is emerging seeks to be responsive to the interests of all actors involved, by ensuring the participation of both public and private entities in the regulatory process.

There is a general trend towards the establishment of administrative structures that operate "beyond the State". ICANN raises the question of how international administrative bodies can include entities that were not created by interstate agreement (as are, for example, international organizations). The use of hybrid solutions is preferred in order to achieve a higher degree of efficiency, as these make possible a range of different institutional tools and mechanisms. To

give one example, the internet governance regime makes use of a significant variety of norms, from national law to private agreements (e.g. the Affirmation Of Commitments by The United States Department of Commerce and the Articles of Association of ICANN), and atypical acts (resolutions of GAC).

To address the question of which legal instruments ought to be used, it is first necessary to evaluate the interaction between public international law and other different regimes, norms and mechanisms. The involvement of several governments would suggest the adoption of a multilateral treaty; there is, however, the alternative of applying global administrative law principles to ICANN. Specific mechanisms that might be incorporated include broadening the scope of participation, through notice and comment procedures (art. III Bylaws); enabling complaints to internal bodies, entrusted with the review of Board decisions (Reconsideration through the Board Governance Committee, Ombudsman, Independent Review Panel, Arts. IV and V Bylaws); and, finally, the possibility of bringing claims before national courts, which functions as a kind of relief valve, bringing the task of supervising the regulatory body back into the national legal order.

A closely related issue concerns the choice over which body should be entrusted with internet governance, and the legitimacy of the institutions charged with regulating global regimes. The case of internet governance clearly shows the crisis of multilateralism, as the development of other mechanisms, which ensure greater flexibility, is preferred.

Does the spread of a new medium of communication, with a global reach, necessarily require governance at the international level? Can a national corporate body legitimately fulfil functions of global importance? What would happen, from an efficiency perspective, if the structure or the supervisory mechanisms of the regime were to be transformed?

Beyond these questions, conflicts have also arisen amongst the actors involved. From this perspective, it becomes clear that the choice of regulatory standards is not as "neutral" as it might seem: the decision to prefer one (such as the above-mentioned TCP/IP) over another brings significant advantages to those responsible for developing the standard eventually chosen (other possibilities, for instance, could have ensured a higher level of privacy, but they were developed under the ITU framework: consequently, their adoption would have implied a stronger role for the international organization in governing the sector).

Technological choices are not neutral: there are always political interests and considerations behind the selection of a particular standard. The "technical is political", and the process of institutionalization of global regimes provides us with a clear example of this simple truth.

5. *Similar Cases*

Certain problems have arisen relating to the existence of conflicting standards in the field of internet governance. One example of this concerns International Organization for Standardization (ISO) standard ISO-3166 (see § I.C.1 "Legitimacy without Authority in Global Standardization Governance: The Case of the International Organization for Standardization (ISO)", by E. Shamir Borer) and RFC 1591 (one of the most important standards in the field, still in use today), adopted by the Internet Names Assigned Authority (IANA, the predecessor of ICANN). Such standards define the categories of domain names and also apply to national administrations. Thus, private regulatory decisions can be independent from – and binding upon – national administrations.

The following question thus arises: can a private organization like IANA impose its standards on national agencies?

Relevant materials regarding these issues can be found at the following links:

- International Organization for Standardization (ISO) (http://www.iso.org);
- Iso 3166-1 and country coded Top-Level Domains (ccTLDs) (http://www.iso.org/iso/country_names_and_code_elements);
- Internet Assigned Numbers Authority (IANA) (http://www.iana.org);
- Request for Comment 1591 (http://www.ietf.org/rfc/rfc1591.txt?number=1591).

6. *Further Reading*

a. W. BENEDEK, V. BAUER, M.C. KETTEMANN (eds.), *Internet Governance and the Information Society. Global Perspectives and European Dimensions*, Utrecht (2008);
b. R. COLLINS, *Three Myths of Internet Governance. Making Sense of Networks, Governance and Regulation*, Chicago (2009), p. 173 et seq.;
c. L. DE NARDIS, *Protocol Politics: The Globalization of Internet Governance*, Hong-Kong (2009);
d. J.H.H. PERRITT JR., "The Internet is Changing the Public International Legal System", 88 *Kentucky Law Journal* 885 (1999-2000);

e. D.W. DREZNER, "The Global Governance of the Internet: Bringing the State Back In", 119 *Political Science Quarterly* 477 (2004);
f. M. FROOMKIN, "Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution", 20 *Duke Law Journal* 17 (2000);
g. J. GOLDSMITH, T. WU, *Who Controls the Internet?*, Oxford (2006);
h. J.P. KESAN, A.A. GALLO, "Pondering Politics of Private Procedures: The Case of ICANN, University of Illinois College of Law", Law and Economics Working Papers, n. 74 (2007) (http://law.bepress.com/uiuclwps/papers/art74);
i. D. LINDSAY, *International Domain Name Law: ICANN and the UDRP*, Oxford (2007);
j. J. MATHIASON, *Internet Governance. The New Frontier of Global Institutions*, London and New York (2009);
k. M. MUELLER, *Ruling the Root: Internet Governance and the Taming of Cyberspace*, Sabon (2002);
l. M. MUELLER, *State and Networks. Global Politics for Internet Governance*, Hong Kong (2010);
m. J. PALFREY, "The End of The Experiment: How Icann's Foray into Global Internet Democracy Failed", 17 *Harvard Technology Law Journal* 410 (2004);
n. E. SCHLESINGER WASS (ed.), *Addressing the World: National Identity and Internet Country Code Domains*, Lanham (2003);
o. J. VON BERNSTORFF, "The Structural Limitations of Network Governance: ICANN as a Case Point", in C. JOERGES, I.-J. SANDS, G. TEUBNER (eds.), *Transnational Governance and Constitutionalism*, Oxford and Portland (2004), p. 257 et seq.;
p. P.K. YU, "The Origins Of Cctld Policymaking", 12 *Cardozo Journal of International and Comparative Law* 387 (2004).

I.C.3 Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA)

Lorenzo Casini and *Giulia Mannucci*

1. *Background*

In July and August 2012, in London, over 10,000 athletes from 205 States – more than the 193 UN Members – will compete for medals at the most important sports event in the human history: the Olympics Games.

The Olympics provide us with the most significant example of the universal value of sport. Since the end of the 19th century, an incredibly complex system has been created to regulate this: the Olympic Movement. It is governed by the International Olympic Committee (IOC), and finds in the Olympic Charter its very own "Constitution", in which the fundamental principles and rules of the Olympic Games are set forth (see for instance the "Fundamental Principles of Olympism", in which it is proclaimed that "the practice of sport is a human right").

Beside the IOC, the system is built upon two categories of institutions: the International Federations (IFs) – which set the "rules of the game" for each sport, acting like global standard setters – and the National Olympic Committees (NOCs). The IOC recognizes only one IF for each sport, and only one NOC for each country. The National Federations (NFs, charged with the regulation of each sport in a national context) are then associated to the IFs and to the NOC of their own country. This structure has been described as a "double pyramid", one related to IOC and NOCs, the other related to IFs and NFs; but the system appears rather as a series of "multiple pyramids", formed by that between the IOC and the NOCs, on one hand, and by the many IFs of different sports (35, to count only those IFs that are within the Olympic Movement) and the respective NFs on the other. Moreover, these pyramids are linked together by several ties, both vertical and horizontal: for instance, to be recognized by the IOC, NOCs must include every NF affiliated to an IF (Olympic Charter, Art. 29).

The field of sports regulation has thus generated a very complex set of subjects and norms, even with a specific dispute settlement body (the Court of Arbitration for Sport): it is for this reason that some talk of "International Sports

Law", "Global Sports Law" or a *lex sportiva* (see also § V.13, "A "Judicial" Law-Maker: The Court of Arbitration for Sport" by G. Mannucci, on the role of the Court of Arbitration for Sport in the making of *lex sportiva*; §§ III.B.11 "Due process and Fairness in the Sporting Legal Orders", and III.A.5 "Global Judicial Review of National Decision: The Case *Carlos Queiroz v. Autoridade Antidopagem de Portugal*", both by A.E. Basilico). Many scholars, then, have taken sports regulation as a paradigmatic example for addressing the broader issue of the coexistence of many legal orders (following the theory of Santi Romano). There exists, in fact, one Olympic regime, ruled by the IOC, and many other international sports regimes (as many as there are international sports) ruled by each IF; most of the latter are within the Olympic Movement, but some fall outside the IOC's jurisdiction (such the International Cricket Council and the Federation International de l'Automobile).

The main characteristic of sports regimes is that they are private and voluntary; therefore, they do not belong to the field of public international law. The IOC is a non-governmental organization, based in Lausanne; and the IFs governing different sports are likewise all private bodies.

In spite of this, and in connection with the increasing relevance of sport in many fields (political, economical, and social), States and public authorities play an increasingly important role in global sports regulation. Moreover, NOCs are national bodies under the jurisdiction of their own States, and are even, in some circumstances, themselves qualified as public administrations (as in France and in Italy, for example).

The relationships between the sports regimes (and the Olympic regime in particular) and States can be categorized in (not strictly legal) terms of at least four different basic types.

The first is *acquiescence*, e.g. when the international community recognizes *de facto* the IOC, in the absence of a formal act that gives this body an international legal status: two examples are the protection of the Olympic symbol (see the Nairobi Treaty signed in 1981), and the Olympic truce (the "ekecheiria": see the resolution UN A/RES/62/4 *Building a peaceful and better world through sport and the Olympic ideal*, adopted in 2007 by the General Assembly).

The second type is that of *reciprocal influences*. There are many examples of how sports can produce effects on States: the "ping-pong diplomacy" between the USA and China in the 1970s; the fight against the apartheid and the exclusion of South Africa from the Tokyo Olympic Games in 1964; the reciprocal "boycotts" between the USA and the USSR during the Cold War. Moreover, the story of the journey of the Olympic torch to Bejing provides an other example of this relationship, albeit one that is political rather than legal in character: following European protests against the violent repressive action of the Chinese

government in Tibet, the President of the IOC emphasized the incompatibility between the Olympic values and any form of violence, and went on to ask China to reach a quick and peaceful solution to the controversy. Sometimes, however, it is States that influence the sports regimes, and not vice versa: this happens, for example, when the latter make use of concepts or tools taken from international or national legal orders, such the right of due process in disciplinary proceedings.

The third type is that of *conflict*. When States (including, on occasion, public NOCs) act in violation of the Olympic Charter or the regulations of the relevant IF, a conflict between public authorities and international sports institutions emerges. More common, however, is where the global regulation of sports begins to impact upon fields subject to the jurisdiction of States, as happens when sports norms affect fundamental rights or economic activities granted or regulated by law (on this, referring to EU Law, see *infra*, § VIII.1 "Relations between Global Law and EU Law", by E. D'Alterio).

The last type is that of *cooperation*. Examples of this can be found in the fight against the HIV virus led by the IOC and the UN, or by the agreements concluded by the ILO and the Fédération Internationale de Football Association (FIFA) intended to promote the fight against the use of child labour. The most important example of this kind of relationship between States and a sports regime, however, comes from the field of anti-doping. Acting in concert, States, sporting institutions and the international community more generally have created a body that is emblematic of the emergence of new forms of hybrid public-private governance in the global sphere: the World Anti-Doping Agency (WADA).

2. *Materials and Links*

- Olympic Charter (http://multimedia.olympic.org/pdf/en_report_122.pdf);
- Constitutive Instrument of Foundation of the Agence Mondiale Antidopage-World Anti-Doping Agency (http://www.wada-ama.org/rtecontent/document/constitutive_instrument_-foundation_En.pdf);
- Declaration adopted by the World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003 (http://www.wada-ama.org/rtecontent/document/copenhagen_en.pdf);
- WADA World Anti-Doping Code (http://www.wada-ama.org/rtecontent/document/code_v3.pdf);
- International Convention against Doping in Sport adopted by the General

Conference of United Nations Educational, Scientific, and Cultural Organization (UNESCO), 19 October 2005 (http://www.wada-ama.org/rtecontent/document/UNESCO_Convention.pdf);

- European Parliament resolution of 29 March 2007 on the future of professional football in Europe (2006/2130(INI) (http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007- 0100&language=EN);
- European Commission White Paper on Sport of 11 July 2007 (http://ec.europa.eu/sport/white-paper/staff-working-document_en.htm);
- Court of Justice of the European Union, *Case C-519/04 P, David Meca-Medina and Igor Majcen v. Commission of the European Communities*, 18 July 2006 (http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri);
- CAS 2011/O/2422, *USOC v. IOC*, award of 6 October 2011 (http://www.tas-cas.org/d2wfiles/document/5314/5048/0/Final20award202422.pdf).

3. *Analysis*

In response to the increase in cases of doping in sport (such as, for example, the scandal that shocked the cycling world in the summer of 1998), the IOC convened a World Conference on Doping in Sport. Held in Lausanne in February 1999, the Conference produced a Declaration on Doping in Sport, in which the creation of "an independent international anti-doping agency" was proposed. Pursuant to the terms of the Declaration, WADA was created on 10 November 1999 in Lausanne to promote and coordinate the fight against doping in sport internationally. In 2002 WADA moved its headquarters in Montreal (Canada) and four regional offices (respectively in Lausanne, Tokyo, Cape Town and Montevideo) were created.

From the legal perspective, WADA is a private foundation governed by its Constitutive Instrument, and by Articles 80 et seq. of the Swiss Civil Code. It has been set up under the initiative of the IOC, with the support and participation of intergovernmental organizations, governments, public authorities, and other public and private bodies fighting against doping in sport.

The "equal partnership between the Olympic Movement and public authorities" is reflected by the structure of the Foundation Board (of up to 40 members, up to 18 of whom are appointed by the Olympic Movement, with another maximum of 18 appointed by public authorities, and 4 appointed jointly by the two), and is clearly expressed in the Article 7 ("Organization of the

Board") of the WADA Constitutive Instrument of Foundation, in which it is also provided that "to promote and preserve parity among the stakeholders, the Foundation Board will ensure that the position of chairman alternates between the Olympic Movement and public authorities, and that in particular this occurs after two three-year terms, unless no alternative nomination is made. To further maintain equal partnership between the Olympic Movement and the public authorities, the vice chairman must be a personality nominated by the public authorities if the chairman is a person nominated by the Olympic Movement, and vice versa". There is also "equal partnership" on the financial side: since 2002, according to its Statute, WADA has been equally funded by the Olympic Movement and national governments.

WADA has the typical structure of most private foundations, with a Board, an Executive Committee, and an Auditing Body. This notwithstanding, however, it carries out a function – prevention and punishment of doping – that is of public relevance. The fight against doping, in fact, is not an goal of the sports system alone, insofar as the problem exists in fields other than that of professional sports. Some governments have passed legislation imposing severe penalties on doping (for instance, Italy and France), thus making doping a matter of public health. Moreover, doping has been on the EU's agenda for some time. Although sport was not mentioned, until 2009, in the European Treaties, doping was addressed in numerous Community documents: the Parliament adopted a 2007 resolution on the future of professional football, urging Member States to elaborate a policy aimed at preventing and combating doping (point 65); the Commission tackled the issue in a 2007 White Paper, where it stressed the need for a coordinated approach involving EU institutions, States and sports organizations (this point was restated in the Communication entitled "Developing the European Dimension in Sport" of 18 January 2011); in the *Meca-Medina and Majcen v. Commission* case of 2006, the Court of Justice argued that the anti-doping rules are subject to Community law and that derogations to Community law must be "inherent in the organisation and proper conduct of competitive sport" and proportionate with regard to the sporting objectives pursued; finally, Article 165 TFEU now provides that the EU "shall contribute to the promotion of European sporting issues".

The WADA cooperates in the fight against doping by performing the following tasks: 1) coordinating the fight at the international level by promoting the adoption of in- and out-of-competition tests (to this end, the Foundation cooperates with intergovernmental organizations, governments, public authorities and other public and private bodies); 2) reinforcing, at the international level, ethical principles for the practice of doping-free sport, and helping protect the health of the athletes; 3) encouraging, supporting, coordinating and, where

necessary, undertaking, in full cooperation with the public and private bodies concerned (in particular the IOC, IFs and NOCs), the organization of unannounced out-of-competition testing; 4) devising and developing anti-doping education and prevention programmes at the international level; and 5) promoting and coordinating research in the fight against doping in sport.

More importantly, WADA acts as a global standard setter. In particular, it is charged with carrying out three main tasks: 1) to establish, adapt, modify and update, at least yearly, for all the public and private bodies concerned the list of substances and methods prohibited in the practice of sport; 2) to develop, harmonize and unify scientific, sampling and technical standards and procedures with regard to analyses and equipment, including the homologation of laboratories, and to create a reference laboratory; 3) to promote harmonized rules, disciplinary procedures, sanctions and other means of combating doping in sport, and contribute to the unification thereof, taking into account the rights of the athletes.

The most significant outcome of these activities has been the World Anti-Doping Code, which was adopted in 2003 and entered into force on January 1, 2004. On March 5, 2003, at the second World Conference on Doping in Sport, over 1000 delegates representing 80 governments and international and national sports institutions unanimously agreed to adopt the Code as the basis for the fight against doping in sport (the Copenhagen Declaration). A revised version of the Code was adopted, after a consultation period, on 17 November 2007 and entered into force on 1 January 2009. In November 2011, WADA launched a new process of reform of the Code. The first phase of this process involves a consultation period starting in March 2012, during which stakeholders are allowed to propose amendments and new ideas for developing the fight against doping. The new Code will be approved at the Fourth World Conference on Doping in Sport in 2013, and will enter into force on January 1, 2014.

The Code works in conjunction with four international standards aimed at encouraging harmonization between anti-doping organizations: the Prohibited List, the International Standard for Testing, the International Standard for Laboratories, and Therapeutic Use Exemptions (TUEs). These standards have been the subject of lengthy consultation among WADA's stakeholders and are mandatory for all signatories of the Code.

The Code is the core document that provides the framework for the harmonization of anti-doping policies, rules, and regulations within sports organizations and among public authorities. For example, for the first time, it establishes universal criteria for considering whether a substance or method may be banned from use. Moreover, the Code sets the standard for minimum and maximum sanctions (two years for a first serious doping violation; a lifetime ban

for the second), while providing flexibility for the consideration of circumstances of each individual case; and, in 2009, the Code introduced a more flexible mechanism for determining sanctions. In addition, the Code provides important procedural guarantees, such the right to a fair hearing granted to any person who is alleged to have violated an anti-doping rule (Code, Art. 8, which establishes requirements such as that of a timely hearing before a fair and impartial body).

More than 570 sports organizations, including all 35 IFs of Olympic sports and the IOC itself, have thus accepted the World Anti-Doping Code. In addition, States have played an important role in improving the binding force of the Code. In October 2005, an international treaty, the International Convention against Doping in Sport, was unanimously approved by 191 governments at the United Nations Educational, Scientific, and Cultural Organization (UNESCO)'s General Conference. In particular, the Convention enables governments to align their domestic policy with the Code, thereby harmonizing global sports regulation and public legislation in the fight against doping in sport. The UNESCO Convention against Doping, to date ratified by 80 States, refers explicitly to the WADA and its Code, providing an illustration of good practice in cooperation between public and private authorities within the global context. Article 4.2 of the UNESCO Convention provides that the Code is not an integral part of the Convention and, therefore, does not impose on State Parties any binding obligations under international law. Nonetheless, this case demonstrates that States have gradually accepted as binding standards and rules set by a private body: a process made possible mostly as a result of the particular hybrid structure of the WADA.

The Court of Arbitration for Sport (CAS) also plays an important role in the harmonization and consolidation of anti-doping rules, when it adjudicates appeals concerning the application and the interpretation of the WADC. In several cases, the CAS has stated that the Code is "a contractual instrument binding its signatories in accordance with private international law" (see CAS 2011/A/2422 para. 8.21, holding that an IOC's anti-doping Regulation was invalid and unenforceable, because it was not in compliance with WADC). Another doping dispute, awarded in 2012, concerned a By-Law of the British Olympic Association (BOA), according to which any British athlete "who has been found guilty of a doping offence […] shall not […] thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals". The CAS found that this provision does not amount to a pure condition of eligibility, but rather to a doping sanction, which "is therefore not in compliance with the WADA Code" (CAS 2011/A/2658 para. 9.1). In the same case, the CAS stressed that its

decision is not "in opposition" to the sanction imposed by BOA, but it "simply reflect[s] the fact that the international anti-doping movement has recognized the crucial importance of a worldwide harmonized and consistent fight against doping in sport, and it has agreed […] to comply with such a principle, without any substantial deviation in any direction" (CAS 2011/A/2658 para. 8.41).

The fact that the anti-doping regime is a typical example of a public-private partnership emerges not only from the hybrid nature of the WADA, but also from the nature of the powers of control that WADA may exercise. The best illustration is power to review decisions on therapeutic exemptions adopted by National Anti-Doping Organizations (NADOs). According to the WADC (Article 4), the IFs and the NADOs may allow the athletes to use a substance (or a method) included in the Prohibited List for a therapeutic purpose. One of the most interesting procedural aspects is that WADA may at any time, on its own initiative or upon a request of an athlete, "reverse the decision" concerning an exemption (WADC, Article 4). This power of review, whereby WADA harmonizes the application and the interpretation of anti-doping rules, assumes particular relevance when the first-instance decision has been adopted by a public body. In fact, many NADOs – for instance, in Italy or in France – are themselves public entities.

4. *Issues: The Role of States within Global Private Regimes*

The structure and the functions of WADA within international sports regimes give rise to several kinds of issues.

The first concerns the emergence of global private regimes and of global private regulators. From this perspective, the WADC is an important example of global norms set by a hybrid public-private body. The specific relevance of this case, however, is due to the peculiar hybrid public-private structure of WADA. It provides us with a very significant institutional model for enabling a private regime to work together with public authorities. Moreover, considering the success of the Code, this model seems to work quite well. Could it be usefully extended to other fields? And might the hybrid public-private organization of WADA be a suitable option for making global regulators more accountable?

The second set of issues refers to the contents of the Code and to its binding force. The Code establishes procedural requirements and principles, such as the right to a fair hearing, thereby harmonizing the activity of more than 500 bodies, both public and private. Is this an example of "global" due process? Moreover, what is the real binding force of the Code? The UNESCO International Convention against Doping in Sport expressly refers to WADA and

its Code: does it mean that only the "traditional" treaty law was capable of making the Code genuinely binding? The Code is formally a private instrument (after all, WADA is a private foundation), but it is usually regarded as public law: why is that? Is it because States accept it as binding? Is this conclusion consistent with the fact that doping is qualified as a punishable criminal offence in only a few States (for instance, France and Italy)?

Lastly, the WADA example is particularly useful in illustrating the development of a global administrative space, in which both public and private bodies act together in furtherance of a common goal; in this case, the fight against doping, but it could equally be applicable to the fields of environmental or health regulation, in other circumstances. Is WADA an example of genuine global public administration? Does its existence provide evidence of the development of a global administrative law?

5. *Similar Cases*

There are other international bodies and regimes that might be compared with WADA and the regulation of international sports more generally.

Referring to the IOC's structure, some similarities exist with that of the International Federation of the Red Cross, and in particular with the network of national bodies governed by the International Committee of the Red Cross, a private institution located in Geneva. Other resemblances between these two regimes exist with regard to the international protection of their symbols.

A second comparable example comes from the International Organization for Standardization (ISO) and, more generally, any kind of global private standard-setter (see § I.C.1 "Legitimacy without Authority in Global Standardization Governance: The Case of the International Organization for Standardization (ISO)", by E. Shamir Borer). The technical rules set by IFs, as well as the WADA Code itself, recall the global standards created within such private regimes.

Finally, a third similar case is the governance of internet (see § I.C.2 "A Hybrid Public-Private Regime: The Internet Corporation for Assigned Names and Numbers (ICANN) and the Governance of the Internet", by B. Carotti and L. Casini; § V.14 "Alternative Dispute Resolution: The ICANN's Uniform Dispute Resolution Policy (UDRP)", by B. Carotti). Both ICANN and the IOC are private bodies; and the Domain Name System, with the rule of only one country-code top domain name (ccTld) for each State, bears resemblance to that of the NOCs. Moreover, other interesting comparisons can be made with regard to the role played by States and public authorities within these regimes: this is the

case, for instance, between ICANN's GAC and the composition of the WADA Board.

6. *Further Reading*

a. L. ALLISON (ed.) *The Global Politics of Sport. The Role of Global Institutions in Sport*, London (2005);
b. M. BELOFF, "Is there a *lex sportiva*?", *International Sports Law Review* 49 (2005);
c. I.S. BLACKSHAW, R.C.R. SIEKMANN, J. SOEK (eds), *The Court Of Arbitration For Sport 1984-2004*, The Hague (2006);
d. L. CASINI, "Towards Global Administrative Systems? The Case of Sport", in *Global Administrative Law: An Italian Perspective*, EUI RSCAS Policy Papers 2012/04.
e. L. CASINI, *Il diritto globale dello sport*, Milano (2010);
f. L. CASINI, "Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)", 6 *International Organizations Law Review* 421 (2009);
g. P. DAVID, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport*, Cambridge (2008);
h. D.J. ETTINGER, "The Legal Status of The International Olympic Committee", 4 *Pace Yearbook of International Law* 97 (1992);
i. K. FOSTER, "Is There a Global Sports Law?", 2 *Entertainment Law* 1 (2003);
j. E. GREPPI, M. VELLANO (eds.), *Diritto internazionale dello sport*, 2nd ed., Torino (2010);
k. M.S. GIANNINI, *Prime osservazioni sugli Ordinamenti giuridici sportivi* (1949), now in ID., *Scritti, volume terzo 1949-1954*, Milano (2003), p. 83 et seq.;
l. K. HENNE, "WADA, the Promises of Law and the Landscapes of Antidoping Regulation", 33 *Political and Legal Anthropology Review* 306 (2010);
m. F. LATTY, *Le Comité internationale olympique et le droit international*, Paris (2001);
n. F. LATTY, *La* lex sportiva. *Recherche sur le droit ransnational*, Leiden-Boston (2007);
o. J.A.R. NAFZIGER and S.F. ROSS (ed.), *Handbook on International Sports Law*, Cheltenham (2011);
p. J.A.R. NAFZIGER, "The Future Of International Sports Law", 42 *Willamette Law Review* 861 (2006);
q. J.A.R. NAFZIGER, *International Sports Law*, 2nd ed., New York (2004);
r. D. PANAGIOTOPOULOS, "International Sports Rules' Implementation-Decisions' Executability: The Bliamou Case", 15 *Marquette Sports Law Review* 1 (2004);

s. S. ROMANO, *L'ordinamento giuridico*, Pisa (1918);
t. A. RÖTHEL, "Lex mercatoria, lex sportiva, lex technica – Private rechtsetzung jenseits des Nationalstaats?", 62 *Juristen Zeitung* 755 (2007);
u. R.C.R. SIEKMANN, J. SOEK (eds.), *Lex Sportiva: What is Sports Law*, The Hague (2012);
v. A. VAN VARENBERGH, "Regulatory features and administrative law dimensions of the Olympic movement's anti-doping regime", *IILJ Working Paper* 2005/11 (Global Administrative Law Series);
w. C. VEDDER, "The International Olympic Committee: An Advanced Non-Governmental Organization and International Law", *German Yearbook of International Law* 232 (1984);
x. A. WAX, *Internationales Sportrecht: Unter besonderer Berücksichtigung des Sportvölkerrechts*, (2009);
y. M.R. WILL, "Les structures du sport international", in P. CENDON (ed.), *Scritti in onore di Rodolfo Sacco*, Milano (1994), p. 1211 et seq.;

I.C.4 The Marine Stewardship Council Sustainable Fishery Standards: Private Governance responding to Public Governance

Anastasia Telesetsky

1. *Background: The Marine Stewardship Council and Sustainable Fishery Certification*

The Marine Stewardship Council ("Council") is a private governance institution responsible for issuing sustainable fishing certification to individual fisheries that negotiated standards. The Council came into being after consultations between the World Wildlife Fund and Unilever, an Anglo-Dutch company whose subsidiaries sell frozen fish, led to the creation of a private partnership. Between 1997 and 1999, approximately 300 private stakeholders developed certification standards to be applied by third-party accreditors to specific marine fisheries (the standards do not apply to aquaculture activities). The Council has had a sizable impact on the US and Canadian markets. Almost half of the fish and seafood that are landed in North America either come from an accredited fishery or from a fishery that is in the process of seeking accreditation. Globally, approximately 250 fisheries have received or are seeking accreditation, with the bulk of these coming from North America, the United Kingdom, and Scandinavia. Only 13 fisheries have been certified outwith these areas. The certification process is open to all fisheries regardless of the scale of their operation. According to the Council, in the past two years, the amount of certified sustainable fish and seafood has tripled to 11,000 products being sold in 80 countries.

In addition to the accreditation program, the Council operates a supply chain traceability program so that consumers and purchasers of seafood can track the sustainability practices associated with a specific marine product. Fish processors, traders and retailers are encouraged to make public commitments to purchase fish products only from certified sources. Some fishery biologists are wary of the Marine Stewardship Council labeling efforts due to a recent exposé by scientists indicating that the alleged chain of custody on MSC labeled Chilean Sea Bass (Patagonian toothfish) was faulty. Of the fish bearing the sustainability label included in the study, some were not sea bass and others were not from the certified fishery.

2. *Materials*

- Marine Stewardship Council Fishery Standard: Principles and Criteria for Sustainable Fishing (http://www.msc.org/documents/msc-standards/MSC_environmental_standard_for_sustainable_fishing.pdf).

3. *Analysis*

The Council defines sustainable fishing as a food procurement practice that can be continued indefinitely by addressing key social and ecological factors associated with the industry. To be ecologically sustainable, industry must conserve the diversity, structure and function of the marine ecosystem and minimize its adverse effects on ecosystems. To be socially sustainable, the industry must ensure that fisheries continue to be economically and socially productive by continuing to offer good jobs and reliable products.

All certified fisheries are subject to a pre-assessment review followed by a full assessment. After certification, fisheries must submit annual reports. In order to be certified, fisheries must comply with three fundamental principles. Fisheries that fail to comply with the accreditation standards can lose their certification. In order to be eligible for accreditation, a fishery must demonstrate that it can implement three sustainability principles.

Principle One provides that a fishery must be conducted in such a manner as to prevent overfishing or depletion of a given stock. If a fish stock has already been depleted, then parties participating in that fishery are expected to proceed in a manner that promotes recovery of the stock in question. Drawing on wisdom from fishery managers and from seasoned fishing industry participants, this principle is included to create a long-term future for the industry. Participants in the accredited fishery must be able to demonstrate compliance with conservation measures that prevent irreversible alteration of a breeding population. Arguably, Principle One creates obligations for private actors that are similar to the obligations created between States under the United Nations Convention on Law of the Sea (UNCLOS) (see § III.B.4 "The International Tribunal for the Law of the Sea (ITLOS): The *Juno Trader* Case", by D. Agus and M. Conticelli; § V.8 "Settling Global Disputes: The *Southern Bluefin Tuna* Case", by B. Carotti and M. Conticelli).

Principle Two provides that participants in a given fishery must also protect the structure, productivity, function and diversity of the larger ecosystem

within which a commercial stock exists. While it is possible to implement conservation measures involving just one commercial species, these measures will be ineffective if the food source for the commercial species is depleted through inadvertent by-catch or the habitat upon which the commercial species depends is irreparably damaged. What has been happening in practice is that the fishing industry, after depleting certain commercial stocks, has begun to fish down the food chain, resulting in a rapid depletion of biomass. Principle Two explicitly promotes an ecosystem approach focused on holistic protection goals in order to promote the long-term health of a given fishery. Principle Two again creates obligations for private actors that are similar to the obligations created between States under the United Nations Convention on Law of the Sea and the Convention on Biological Diversity. Interestingly, this Principle calls upon private actors to apply the precautionary approach, which is the same approach adopted by States in the United Nations Agreement for the Implementation of Provisions of the UNCLOS, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (also know as the "Straddling Stocks" treaty – see § I.E.8 "Decision-Making Procedures in Fisheries Governance: The Role of the General Fisheries Commission for the Mediterranean (GFCM)", by N. Ferri).

Finally, Principle Three provides that a fishery must be subject to an effective management system "that respects local, national and international laws and standards". This principle is perhaps the most interesting from a global administrative perspective. It explicitly requires non-state actors to comply with inter-State agreements. Members of a fishery are prohibited from conducting fishing activities that represent a "unilateral exemption to an international agreement". What this appears to mean in practice is that private actors are increasingly seeking to hold other private actors to account, rather than the flag states of a given industry member.

Under this final principle, parties are expected to have fishery-wide management plans that include a process for monitoring and evaluating performance, and for acting on the resulting findings. The plan should include a dispute resolution mechanism for the fishery, and apply a precautionary approach when deciding on quotas and allocations. Parties are further expected to implement fishery-wide conservation measures including closing fisheries after catch limits are satisfied, setting catch levels that will maintain the target population as well as take account of by-catch species, avoiding fishing in critical or sensitive zones such as spawning and nursery areas and providing strategies for restoring depleted fish stocks by agreed-upon target dates. Finally, the specific fishery must demonstrate that it has implemented appropriate procedures for

monitoring, control, surveillance and enforcement and provides for specific corrective action where there are violations.

4. *Issues*

The principles for sustainable fishing negotiated under the leadership of the Marine Stewardship Council occupy a key "global administrative space" which is responsive to existing public international and domestic administrative law by asking sustainable fishing participants to respect local, national and international laws and standards. Yet at the same time as bolstering the public governance efforts to manage fisheries, the Council also offers a system of parallel governance by providing, through the voluntary certification process, strategic oversight of the key non-state actors in the fishing industries – the private fishing companies. This leads to an interesting hybrid arrangement located on the continuum between public and private governance. The MSC principles do not seek to replace public governance in the realm of fishing management; rather, they operate as a key stakeholder-driven supplement to pre-existing laws and rules. For those who participate in the accreditation process, the MSC principles improve compliance with public governance measures by requiring fisheries to demonstrate "respect" for pre-existing laws.

Since the principles are non-binding, however, there is some question as to how effective they can be as private governance tools for a dynamic and highly fragmented industry (for these aspects, see also Section II.A "Global Standards as Regulatory Devices"). While certain non-state actors in specific fisheries are clearly committed to implementing the principles in their management practices by engaging in the certification process, many other fishing industry actors have yet to subscribe to the principles and are arguably, through destructive fishing practices, destroying the very resource that the principles are designed to protect. What does this mean for the principles in terms of their legitimacy as industry standards? Even though the Marine Stewardship Council represents a very different model of governance from State-based regional fisheries management organizations, it seems to be plagued by the same limitations as the public administrators of fishing resources. Without participation by the largest fishing consortia, the principles remain largely aspirational in their reach, lacking a concrete normative impact on the industry. There is no obvious market-driven basis for cooperation between industry competitors, particularly where the competitors do not share a common culture or common consumers. Why should a Chinese fishing company seek accreditation when its primary consumers in Asia are indifferent to the sourcing of the fish in contrast to the pricing of the

fish?

Given that non-participation in the accreditation process threatens the effectiveness of the principles as shared rules, should the principles be made obligatory across the industry in order to provide an equitable sharing of benefits and burdens for all? Perhaps so; but the Marine Stewardship Council has no sanctioning power. It relies entirely on the power of persuasion and reputation coupled with a growing corporate social responsibility ethic for the adoption of its principles. If this proves insufficient, private actors such as industry members within a given certified fishery may very well need to create new norm-generating strategies to protect the competitiveness of their fishery. For example, they might put pressure on public administrators to adopt the sustainable fishing principles as international public standards or codes of practice within, for example, the Codex Alimentarius.

The principles represent an interesting case study for generating dialogues between public and private actors on marine resource security. On the one hand, private actors operating within a specific fishery might be able to leverage a uniform set of principles adopted by key actors as a source for new public law related to specific fish products. But this is not necessarily a one-way dialogue. Public actors in the Food and Agriculture Organization, working from the assumption that there is already some degree of industry consensus around compliance with the principles, may also be able to independently utilize the principles as a basis for future rulemaking.

5. Further Reading

a. W. GOYERT, R. SAGARIN, J. ANNAL, "The Promise and Pitfalls of Marine Stewardship Council Certification: Marine Lobster as a Case Study" 34 (5) *Marine Policy* 1103 (2010);
b. L. GULBRANDSEN, "The Emergence and Effectiveness of the Marine Stewardship Council", 33 (4) *Marine Policy* 654 (2009);
c. R. HOWES, "The Marine Stewardship Council Programme", in T. WARD, B. PHILLIPS (eds.) *Seafood Ecolabelling: Principles and Practice*, Oxford (2009);
d. J. JACQUET, D. PAULY, D. AINLEY, ET. AL., "Seafood Stewardship in Crisis", 467 *Nature* 28, 2 September 2010;
e. A. MASCARELLI, "Seafood suffers from fishy eco-labelling", *Nature News*, 22 August 2011 (http://www.nature.com/news/2011/110822/full/news.2011.496.html).

I.C.5 Between Vertical and Horizontal Financing: The Global Fund and the Global Aid System

Fabio Di Cristina

1. *Background*

Today, more than 33 million people in the world are infected with HIV (Human Immunodeficiency Virus), 14 million have tuberculosis and half of the world's population is at risk of malaria. About 31 million people with AIDS (Acquired Immune Deficiency Syndrome) are living in developing countries. In 2009, around 1.8 million people died of AIDS, 1.7 of tuberculosis and 800 thousand of malaria. These plagues thus have a tremendous effect on human well-being, and a striking impact on economic development, producing considerable economic losses for developing countries (in 2000, AIDS was declared a "developing crisis" by the WB).

Tackling those worldwide-spreading diseases in a more incisive and effective way, and strengthening the health systems in developing countries, requires a global response. During the Group of 8 Nations Summit of 2000 in Okinawa, the idea of creating the Global Fund to Fight AIDS, Tuberculosis and Malaria (GF) was launched. In 2001 the UN Secretary General Kofi Annan and the UN General Assembly called for the creation of a public-private global fund to implement a worldwide response to these diseases. In 2002 a Secretariat was established as a permanent accountable body of the GF, with the legal form of a foundation under Swiss law and operating through a staff of employees with the same legal status as those working for the WHO. In 2009, after a transitory period in which the GF had been acting within an administrative service agreement with the WHO, the GF became an autonomous global financing body.

The activities of the GF and of the "global aid system" deal with some relevant global policy issues that are closely interwoven and overlapping, such as the supply of global public goods, human rights, international relations and security, trade, development and economic growth. In theory, those issues may require a *hard-politics* response and a direct governmental political commitment. The GF, however, is a financial instrument using contracts and making grants; it is neither an "implementing authority", nor an administrative body with executive or settlement powers. It makes grants through a performance-based

system of funding and represents a *soft-politics* response to a global crisis. It coordinates State and non-State actors, thereby supporting public, private and public-private initiatives on healthcare and pharmaceutical procurement (almost 47% of the total amount of GF grants are used for this purpose), bringing together governments, firms, individual donors and foundations under the umbrella of a multi-stakeholder body, financed both vertically and horizontally.

Due to the GF's peculiar structure, both multilateral and multidimensional, efforts in preventing and combating AIDS, tuberculosis and malaria are achieving some significant results. Programs financed by the Global Fund are playing a pivotal role, together with a "global aid system" composed of the Health Systems Funding Platform (WBHSFP) and the Health, Nutrition and Population Program (WBHNP) of the WB, the WHO, UNAIDS and the Global Alliance for Vaccines and Immunization (GAVI). Due to its activities, new HIV infections have fallen by 20% in the last few years, as have new cases of tuberculosis in the six WHO regions, while the availability of antiretroviral, artemisinin-based combination therapies is increasing as their prices decrease, and diagnostic tests are now being administered even in the poorest areas of Africa and Asia.

2. *Materials and Sources*

- Organisation for Economic Co-operation and Development, *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action* (http://www.oecd.org/dataoecd/11/41/34428351.pdf);
- United Nations, *UN Staff College Case Study. The Massive Effort against Diseases and Poverty*, New York (2008) (http://www.unssc.org/web1/programmes/glnp/Knowledge_Sharing/case_studies/Massive_Effort_against_Diseases_of_Poverty_Case_Study.pdf);
- The World Bank, *Health System Funding Platform*, (http://web.worldbank.org);
- United Nations Joint United Nations Program on HIV/AIDS, *United Nations Declaration and Goals* (http://www.unaids.org);
- The GAVI Alliance, *About the Alliance* (http://www.gavialliance.org/about/);
- The Global Fund To Fight AIDS, Tuberculosis and Malaria, *Results with integrity: the Global Fund's response to fraud,* Geneva, April 2011 (http://www.theglobalfund.org/documents/core/whitepapers/Core_ResultsWithIntegrityResponseToFraud_WhitePaper_en.pdf);

- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Monitoring and Evaluation Toolkit. HIV, Tuberculosis and Malaria and Health Systems Strengthening*, Geneva (2009) (http://www.theglobalfund.org/documents/me/M_E_Toolkit.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Monitoring and Evaluation Manual. Performance-Based Funding and M&E in Practice*, Geneva, (2009) (http://www.theglobalfund.org/documents/me/ME_Manual_Module_1_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Monitoring and Evaluation Systems Strengthening Tool*, Geneva (2009) (http://www.theglobalfund.org/documents/me/M_E_Systems_Strengthening_Tool.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Guide to the Global Fund's Policies on Procurement and Supply Management,* Geneva, November 2009, (http://www.theglobalfund.org/documents/psm/pp_guidelines_procurement_supplymanagement_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Making a Difference. Global Fund Results Report 2011*, Geneva (2011) (http://www.theglobalfund.org/documents/publications/progress_reports/Publication_2011Results_Report_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *An Agenda for a More Efficient and Effective Global Fund*, Geneva, September (2010) (http://www.theglobalfund.org/documents/replenishment/2010/Agenda_More_Efficient_and_Effective_Global_Fund_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *The Framework Document of the Global Fund to fight AIDS, Tuberculosis and Malaria*, Geneva (2011) (http://www.theglobalfund.org/Documents/core/framework/Core_GlobalFund_Framework_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *By Laws*, Geneva (2011) (http://www.theglobalfund.org/documents/core/bylaws/Core_GlobalFund_Bylaws_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Board Operating Procedures*, Geneva (2011) (http://www.theglobalfund.org/Documents/board/core/Board_GlobalFundBoard_OperatingProcedures_en.pdf);

- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Committee Rules and Procedures*, Geneva (2011) (http://www.theglobalfund.org/documents/committees/Committee_RulesAndProcedures_RulesProcedures_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Committee Terms of Reference*, Geneva (2011) (http://www.theglobalfund.org/documents/committees/Committee_Standing_ToR_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Office of Inspector General Charter*, Geneva (2011) (http://www.theglobalfund.org/documents/oig/OIG_Charter_ToR_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Board Chair and Vice-Chair Terms of Reference*, Geneva (2011) (http://www.theglobalfund.org/Documents/board/core/Board_ChairViceChair_ToR_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Technical Reference and Evaluation Group Terms of Reference*, Geneva (2011) (http://www.theglobalfund.org/documents/terg/TERG_TERG_ToR_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Comprehensive Funding Policy*, Geneva (2011) (http://www.theglobalfund.org/documents/core/policies/Core_ComprehensiveFunding_Policy_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Fiduciary Agreements for Grant Recipients*, Geneva (2011) (http://www.theglobalfund.org/documents/core/grants/Core_Fiduciary_Arrangements_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Documents Policy*, Geneva (2011) (http://www.theglobalfund.org/documents/core/policies/Core_Documents_Policy_en.pdf);
- The Global Fund to Fight AIDS, Tuberculosis and Malaria, *Policy on Ethics and Conflict of Interest*, Geneva (2011) (http://www.theglobalfund.org/documents/core/policies/Core_EthicsAndConflictOfInterest_Policy_en.pdf);
- International Civil Society Support, *Meeting Report. Strategy Meeting on Resource Mobilisation for the Global Fund to Fight AIDS, Tuberculosis and Malaria*, Amsterdam, February 2011,

(http://icssupport.org/wp-content/uploads/2011/04/Strategy-Meeting-on-Resource-Mobilisation-for-the-GFATM-Feb-2011-Report.pdf).

3. *Analysis*

By way of an initial preliminary analysis, four main features of the global aid system must be pointed out: *i)* the legal nature of the GF and its relationships with domestic, international and global law; *ii)* the relationship between the individual entities forming the global aid system and between them and grant-receivers; *iii)* the type of administrative procedures found at the GF and other global aid institutions and the nature and scope of their effects (from a national and global perspective); *iv)* their degree of accountability.

i) The GF is an "atypical" international organization. The legal relationship between national, international and global administrative law is worth exploring here. The GF is a foundation under Swiss law (according to Art. 84 of the Swiss Civil Code, the Confederation can monitor the destination of the Funds assets with regard to the goals fixed in its certificate of incorporation), its employees have diplomatic status under international public law with the immunities and exemptions that this implies, its financial resources are protected by a Trust Agreement with the WB, and it has international legal personality. At the same time, the procedural side of its activity has a global impact, wider than that of many traditional international organizations, and it contributes to designing the informal governance of a global system for healthcare.

The GF bidirectional financing system (grants flow from State and non-State actors to the GF and then from the Fund to national and non-national entities) allows it to overcome the possible inadequacy or insufficiency of national financial resources. Moreover, its global dimension can be operative without necessarily funding State actors, which is a fundamental element of nation-driven initiatives.

ii) The relations between the GF and the other above-mentioned global institutions forming the global aid system are mainly based on international agreements and informal coordination. Each institution has formal legal relationships with their grant-receivers (State or non-State actors), structured methods for monitoring performance and sanctioning systems. Both those formal relations and the various forms of linkage between them are inspired by the main principles of global public law, such as fair cooperation, transparency and reciprocity.

Within the global aid system, the GAVI is a public-private institution with an administrative structure (an Independent Review Committee, a Secretariat and a Board) financed by national governments (France, Italy, Netherlands, Norway, South Africa, Spain, Sweden, United Kingdom and Australia), private donors (such as the Bill & Melinda Gates Foundation), international organizations (such as UNICEF, the WHO and the WB) and acting with a co-financing funding system similar to that of the GF but more government-oriented (only nation States can be grant receivers, or "GAVI-eligible"). It makes use of the regional offices of the WHO and UNICEF.

iii) The "global" procedures of the GF and the aid system have a relevant impact on domestic administrative procedures (generally speaking, this global administrative regime produces legal effects on domestic administrative laws, especially when domestic authorities and regulators are unable to avoid threats against their communities of citizens). For example, the GF urges national authorities or NGOs to develop or strengthen health systems within the national territory. Indeed, grant applicants are encouraged to include funding in respect of such activities. This is a basic characteristic that the Technical Review Panel, the body responsible for the GF funding system, looks for in successful proposals.

Moreover, the GF often formally asks its grant recipients to use international competitive bidding processes for certain pharmaceutical and drug purchases. Nonetheless the effects on national health program outcomes have been not always satisfying (see the Ajanta Pharma case in Kenya and Uganda, a firm which failed in its supply obligations under the drug procurement contracts).

iv) There are three different dimensions to the accountability of grant-givers in the global aid system that must be taken into account (the accountability of the institutions behind the HSFP, the HNP and UNAIDS, such as the WB or the UN, relate to international public law and will not be considered). One is *external*, between one of the institutions of the global aid system and the citizens of those countries receiving benefits from health programs), one is *internal* (between one of the institutions of the global aid system and a grant-receiver) and one is *domestic* (between the grant-receivers and the citizens directly involved in healthcare programs).

The first dimension is the weakest, because the GF, for example, is only a "financier" and is not directly responsible for the use of grants. The second is the strongest, because the disbursement of resources is approved by an independent technical body on the basis of transparent criteria, results achieved by grant-receivers are periodically monitored and evaluated, contributions are periodically examined and reviewed, and various measures to ensure both the integrity of the grant-receivers and the correct and efficient use of financial resources have been adopted or strengthened in recent years. The third dimension is regulated by

domestic law and its degree of strength is closely linked to the capacity of the domestic judicial system in protecting individual rights.

After discussing these preliminary issues, two more specific features of the GF and of the global aid system must be analyzed, which serve to highlight their global legal nature: *i)* the organization of the GF (the organization of the other components of the global aid system mirrors those of the international institutions behind them); and *ii)* the activities performed in the global administrative space.

i) The core structure of the GF is double-sided: one part is global, the other national. The GF's Secretariat is responsible for fund-raising and mobilizing resources from public and private actors, managing grants, providing financial, legal and administrative support to countries and grant-receivers, and reporting information on the GF's activities, both to the Board and the public. The GF's international Board includes representatives of private donors and recipient governments, NGOs, businesses, foundations, public-private partnerships, involved communities, and representatives of GF's international partners, such as the WHO, UNAIDS, UNITAID and the WB. It is responsible for the approval of grants, operating by consensus and benefitting from the collaboration of six temporary committees (Ethics, Finance and Audit, Policy and Strategy, Portfolio and Implementation, Market Dynamics, Commodities, and the Affordable Medicines Facility – Malaria) composed of international experts, WHO and WB representatives, and GF voting Board members. The Board relies on an independent Technical Review Panel, comprising international experts. It reviews eligible grant proposals and makes funding recommendations to the Board. Both the Secretariat and the Board also rely on a Technical Evaluation Reference Group, an advisory body providing independent assessments and advice on technical and managerial aspects of monitoring and evaluation. In 2005, the Office of the Inspector General was established by the Board, aiming at controlling all aspects of GF activities and of monitoring the integrity of grant receivers.

The GF has an executive structure, similar to that of a private corporation (the internal governance hierarchy is headed by an Executive Director, a Deputy Executive Director, a Chief of Staff and a group of Senior Advisors).

At the national level, the GF relies on structured Country Coordinating Mechanisms, domestic-level multi-stakeholder partnerships that develop and submit grant proposals to the Board and oversee grants after approval. Actors from both the public and private sectors (governments, agencies, NGOs, academic institutions, businesses and people living with the diseases) are represented. For each approved grant, every Country Coordinating Mechanism nominates some public or private Principal Recipients (the grant-receivers). Each

project is directly financed and must implement prevention, treatment and healthcare domestic programs. Local Fund Agents oversee, monitor, verify and report on grant performance.

To sum up, the organization of the GF is mainly based on independent evaluation by the different bodies and committees, and on the representation of all actors involved within a public company-like executive structure. In this case, the principle behind representation is financial contribution, typical of domestic commercial law. The GF executive structure is business-like, dependent on a global organization but acting in various national contexts. Moreover, the global aid system coordinates its activities in an informal way, with the collaboration of public and private actors and without a national administrative center.

ii) The GF Secretariat is responsible for publishing "calls for proposals": the Country Coordinating Mechanisms prepare proposals, the Secretariat screens them and declares the appropriate ones eligible (after 2011 and the approval of the National Strategy Application, the number of potential eligible countries is limited). The Technical Review Panel then reviews them and makes recommendations for acceptance, and finally the Board approves the most cost-effective grants. An Internal Appeal Mechanism is provided for rejected applicants (the appeal procedure comprises two stages: an Independent Appeal Panel, composed of an expert nominated by the Stop TB Partnership, Roll Back Malaria Partnership and UNAIDS, in close collaboration with the WHO, along with two current members of the Technical Review Panel, and respecting the principle of *nemo iudex in re sua,* assesses the merits of the appeal and makes a recommendation to the GF Board, which again takes the final decision).

In 2009, the performance-based funding principles of the GF were strengthened by a modification of the grant architecture. According to the "Single Stream of Funding", the GF is able to maintain only one funding agreement for each Principal Recipient, which can be improved with additional funding after the periodic review (one every "implementation period" of three years).

As outlined above, the use of contractual instruments on a global level is widespread. Effects on the accountability of grant-receivers are relevant because obligations arising from the contract are clearly designed and could be contested. The cost-effectiveness and the preservation of contributors' money from misuse are consequently better protected. The funding system of the GAVI and of the WBHSFP is similar to that of the GF, mainly based on agreements and private law instruments, while that of the other global aid institutions is based on the procedures of international organizations, such as the WHO or the UN.

GF activity in protecting grant money with continuous monitoring and evaluations is closely linked to combating corruption, one of the main

dysfunctions of the global healthcare system. The healthcare sector is vulnerable to bribery, embezzlement, trading in influence, abuse of functions, illicit enrichment (which refers, in this case, to public and private entities involved in the GF financing system that engage in "corrupt, fraudulent, coercive, collusive, anticompetitive" practices). It is characterized by an imbalance of information, a high degree of complexity, and difficulties in the assignment of responsibilities between State and non-State actors. The GF in particular has set down a Code of conduct to tackle and combat corruption in the health sector, and involves grant-receivers therein. Suppliers and suppliers' representatives are expected to act in a fair and transparent manner, to maintain accurate and complete records in appropriate books of account of all financial and business transactions under GF-financed contracts for a minimum period of five years, to cooperate with the GF and comply with any reasonable request of the GF Office of the Inspector General, to allow GF inspector to access relevant accounts or records, to disclose to the GF any cases of actual or potential conflicts of interests, and generally to respect the UN Global Compact (see § VII.B.1 "The United Nations Global Compact", by Y. Meer).

State obligations in terms of combating corruption must be fulfilled according to domestic law, international public law and international organization norms, such as the WHO General Comment on the Right to Health and the UN International Covenant on Economic, Social and Cultural Rights. International public law, which includes international agreements or covenants, usually does not impose obligations or responsibilities on private actors. Conversely, even where they have no general resonance and are limited to the process of obtaining grants, obligations arising from the relationship with a global institution (such as those put in place by the GF) can have a direct impact on both public and private conduct, mainly due to their "functional" scope, imposing legal duties, responsibilities and sanctions in cases of misconduct.

4. *Issues: Institutions for Financing Healthcare in the Global Administrative Space*

Global administrative law permeates both the organization and the activities of the GF and of the other financial institutions in the global fight against AIDS, tuberculosis and malaria. Four main elements are representative of their global nature and are quickly summarized: *i)* the hybrid forms of financing; *ii)* the informal governance of relations between those institutions; *iii)* the effects on public and private conduct and the use of contractual instruments; *iv)* the governance methods inspired by commercial law, reflecting the commixture of public and private law in the global administrative space.

i) The GF and the global aid system are characterized by a double form of financing, both "vertical" (from nation States and other State actors) and "horizontal" (from businesses, foundations, and NGOs). The hybrid and heterogeneous financing systems of global institutions with a private law derivation breaks the traditional relation between State-driven policies, even at an international level, and public finance: global policies do not require a complete financial coverage from national institutions. The potential or real inadequacy of national responses to global crises, both in terms of health and development, is compensated for by international organizations, private financiers and civil society, acting together in the global law arena.

ii) The governance of the global aid system is predominantly informal. Duties and responsibilities do not overlap; on the contrary, they mutually reinforce one another. The effectiveness of global financial institutions in the healthcare sector depends on the "indirect administrative action" performed by grant-receivers.

iii) "Global obligations" have a direct effect on both public and private conduct. Global institutions for financing healthcare do not have any direct executive power. That is why, as financial institutions, they make use of contracts, thereby enhancing "global obligations" and not replacing State or private obligations provided by domestic law.

iv) The forms of governance and executive structures of the majority of the institutions considered here are those traditionally used by the private sector: they are very similar to those of private equity or international investment funds. But, at the same time, global health governance is based on public accountability, independent evaluation, representation and transparency. At the level of global law, legal principles of public and private law are perpetually interacting and amalgamating, creating a functional legal system with composite elements.

5. *Further Reading*

a. D. ABDUL AZIZ, "Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria", in symposium on "Global Administrative Law in the Operations of International Organizations" (eds. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6 (2) *International Organizations Law Review* (2009);

b. O. AGINAM, *Global Health Governance: International Law and Public Health in a Divided World*, Toronto (2005);

c. S. BENATAR, S. GILL, I. BARKER, "Making Progress in Global Health: the Need for New Paradigms", 85 *International Affairs* 347 (2009);
d. G.W. BROWN, "Safeguarding deliberative global governance: the case of The Global Fund to Fight AIDS, Tuberculosis and Malaria", 36 *Review of International Studies* 511 (2010);
e. G.W. BROWN, "Multisectoralism, Participation, and Stakeholder Effectiveness: Increasing the Role of Nonstate Actors in the Global fund to Fight AIDS, Tuberculosis, and Malaria", *Global Governance* 169 (2009);
f. T.M. BROWN, M. CUETO, E. FEE, "The World Health Organization and the Transition from International to Global Health", 96 *American Journal of Public Health* 62 (2006);
g. C. DOYLE, "Civil society organizations and global health initiatives: problems of legitimacy", *Social Science & Medicine*, 24, May 2008;
h. S. DRÄGER, G. GEDIK, M.R. DAL POZ, "Health workforce issues and the Global fund to fight AIDS, Tuberculosis and Malaria: an analytical review", *Human Resources for Health*, 1, 2010 (http://www.human-resources-health.com/content/4/1/23);
i. A.M. GROSS, "The Right to Health in an Era of Privatisation and Globalisation: National and International Perspectives", in D. BARAK-EREZ, A.M. GROSS (eds.), *Exploring Social Rights: Between Theory and Practice,* Oxford (2007);
j. J. HARRINGTON, M. STUTTAFORD (eds.), *Global Health and Human Rights. Legal and Philosophical Perspectives*, London (2010);
k. J. HEIMANS, "Multiactor Global Funds: New Tools to Address Urgent Global Problems", United Nations University-World Institute for Development Economic Research, Research Paper, Helsinki, 47, 2004;
l. P.S. HILL ET AL., "The Health Systems Funding Platform. Is this where we thought we were going?", 7 *Globalization and Health* (2011) (http://www.globalhealthobserver.org/publication/global/health-systems-funding-platform-thought-going/);
m. J. HOOVER, "Increasing Civil Society Impact on the Global Fund to Fight AIDS, Tuberculosis and Malaria: Strategic Options and Deliberations", International Civil Society Support, Amsterdam (2007) (http://icssupport.org);
n. R. LABONTÉ, M.L. GAGNON, "Framing Health and Foreign Policy: Lessons for Global Health Diplomacy", 6 *Globalization and Health* (2010) (http://www.globalizationandhealth.com/content/6/1/14);
o. W. MURASKIN, "The Global Alliance for Vaccines and Immunization: Is It a New Model For Effective Public-Private Cooperation in International Public Health?, 11 *American Journal of Public Health* (2004);

p. G. NEWTON, "The Global Fund to Fight AIDS, Tuberculosis and Malaria: a New Type of International Organization", IRPA Working Paper n. 2012/4 (http://www.irpa.eu/wp-content/uploads/2012/01/IRPA_WP_Newton.pdf);

q. S. PHUANAKOONON, K.H. NEMA, S. MOUNIER-JACK, R. COKER, "Critical interactions between Global fund-supported programmes and health systems: a case study in Papua New Guinea", 25 *Health Policy and Planning* 48 (2010);

r. S. RADELET, *The Global Fund to Fight AIDS, Tuberculosis and Malaria: progress, potential and challenges for the future*, Centre for Global Development, Washington DC (2004);

s. A. ROGERSON, A. HEWITT, D. WALDENBERG, "The International Aid System: Forces For and Against Change", Overseas Development Institute Working Papers, London, 235, 2004;

t. J.W. RUDGE, R. PHETSOUVANH, C. CHANTHAPADITH, R. COKER, "Critical interactions between Global fund-supported programmes and health systems: a case study in Lao People's Democratic Republic", 25 *Health Policy and Planning* 37 (2010);

u. J.W. RUDGE, W. ADISASMITO, S. MOUNIER-JACK, R. COKER, "Critical interactions between Global fund-supported programmes and health systems: a case study in Indonesia", 25 *Health Policy and Planning* 43 (2010);

v. S. RUSHTON, "AIDS and International Security in the United Nations System", 25 *Health Policy and Planning* 495 (2010);

w. K.I. SANDBERG, "A New Approach to Global Health Institutions? A Case Study of New Vaccine Introduction and the Formation of the GAVI Alliance", 7 *Social Science and Medicine* (2010);

x. C. THOMAS, M. WEBER, "The Politics of Global Health Governance. What Happened to Health For All by the Year 2000?", 10 *Global Governance* (2004);

y. R. TREN, K. HESS, R. BATE, "Drug procurement, the Global fund and misguided competition policies", 8 *Malaria Journal* 305 (2009) (http://www.malariajournal.com/content/8/1/305);

z. T. TVEDT, "The International Aid system and the Non-governmental Organisations: A New Research Agenda", 5 *Journal of International Development* 48 (2006).

I.D INTERGOVERNMENTAL AND TRANSNATIONAL NETWORKS

I.D.1 The G8, the Others and Beyond

Martina Conticelli

1. *Background*

For 37 years, the Head of State and Government of the most industrialized countries have held regular meetings. Their partnership derives from the sharing of common values, both political and economic. The main advantage of having such discussions, for those who take part in them, consists in knowing in advance the movement of the other players, and in coordinating their action as a result. The first meetings were held to tackle common issues mainly linked to the oil crisis, and the failure of the so-called Bretton Woods institutions. Those events soon highlighted the increasing levels of economic interdependence, the lack of efficiency of international organisations and the fragility of even the strongest economies. On the other hand, the main issues of discussion, such as trade, relations with developing countries, energy, and terrorism, were of concrete relevance not only for those participating in the group. The key features of this "non institution" were its light organizational framework and the informality of the discussions.

Nevertheless, the G8 holds a central position in the current developments in global governance. Judging from the output of the annual meetings, the group coordinates and addresses a broader range of issues than that with which it is formally tasked (the G8 process); similarly, the activities of the group affect a wider range of actors (the G8 system) than those that comprise its actual membership. Since the 70s, the G8 summits have undergone considerable changes, the most important of which include the wider range of topics discussed (and of decisions taken), the broadening of participation to include ministers

other than those for the economy, and the empowerment of its bureaucratic support through the inclusion of civil servants within national administrations and the involvement of other actors.

In many areas, the G8 plays a central role in international decision-making processes. Good examples of this include the G8's conflict prevention activities, its contribution to the HIPC Initiative, and its leading role in the resolution of the conflict in Kosovo. Nevertheless, one of the main issues when considering the G8 from a legal perspective remains the effectiveness of the decisions taken during its meetings and the consistency of their follow up.

How can this be explained? In order to answer this, in what follows I will discuss the effects of certain decisions, not only on members but also on Countries and international organisations that do not formally belong to the G8. I will highlight which procedures – if any – are followed in order to produce external effects, and the ways in which these differ from those of traditional international law. Once the existence of a follow up for the decisions adopted by the G8 is proved, other issues will need to be raised, such as the need of legitimacy, transparency and participation within the G8 decision-making process.

2. *Materials*

Official documents, reports and G8 related publications are available at the following url: http://www.g8.utoronto.ca/

- UN Security Council S/1999/516, 6 May 1999 (www.un.org/peace/kosovo/s99516.pdf);
- Proposals of the G8 Presidency in the light of the Discussions on Civilian Implementation in Kosovo, Gürzenich/Cologne, 10 June 1999 (http://www.dfait-maeci.gc.ca/g8fmm-g8rmae/proposal_kosovo-en.asp);
- Conclusions of the meeting of the G8 foreign ministers, Gürzenich/Cologne, 10 June 1999, §6 (http://www.g8.utoronto.ca/foreign/fm9906010.htm);
- OECD, Helping Prevent Violent Conflict Orientations for External Partners, April 2001 – DCD/DAC(2001)6/Final (http://www.oecd.org/document/45/0,3746,en_2649_33693550_1886125_1_1_1_1,00.html);
- G8 Miyazaki Initiatives for conflict prevention, Document of the Ministers for Foreign Affairs, Miyazaki 2000, §2

(http://www.mofa.go.jp/policy/economy/summit/2000/documents/initiative.html);
- IMF, 1999 Heavily Indebted Poor Country (HIPC) Debt Initiative: Review and Consultation, Washington, February 9, 1999 (http://www.imf.org/external/pubs/ft/pam/pam51/contents.htm);
- G-8 Statement, Genoa, 21 July 2001, Debt relief and beyond, Report transmitted by G7 Finance Ministers to the Heads of State and government (www.g8.utoronto.ca/finance/index.htm);

3. *Issues: Case Studies*

The cases I will examine illustrate the relevance of G8 activities in governance decision-making processes more generally, highlighting how decisions adopted by the Group have significant impacts beyond its members: either by being formally included in the rule-making instruments of other actors, or even by being referred to or simply recalled within such instruments. Through such a mechanism, what discussed by the eight comes out from the group and acquire a certain, even if indirect, relevance for other actors.

The first case study concerns conflict resolution and in particular UN Security Council S/1999/1244 on the situation in Kosovo, which made explicit reference to the decision of G8 Foreign Ministers adopted on 6 May at the Petersberg meeting, in which they adopted a number of "general principles on the political solution to the Kosovo crisis: Drawn up by the Ministers for Foreign Affairs of the G8, the draft decision was amended after negotiations took place with the European Union, Russia and the Serbian government, and the resulting version was subsequnetly endorsed by the Security Council in the above-mentioned Resolution.

The second case study is taken from conflict prevention policy. After including conflict prevention among the "global challenges" that the G8 should address, the Foreign Ministers adopted the "Miyazaki Initiatives for Conflict Prevention". Later on, the Development Assistance Committee (hereafter DAC), an OECD body, reproduced in one of their documents the content of the Miyazaki Initiatives, and made reference to some of the principles that had emerged during G8 discussions.

The third case study concerns development assistance policy. The G8 decision in question here relates to debt rescheduling and relief procedures, both in the development projects of the World Bank and the International Monetary Fund (hereafter WB and IMF). The WB and IMF have, since 1996, adopted

comprehensive intervention strategies. The so-called "Heavily Indebted Poor Countries Initiative" and the "Enhanced Structural Adjustment Facility" have involved all of the creditors in the development field, both individually and through the Paris Club (an informal grouping of creditors that seeks to develop "coordinated and sustainable" solutions for debtor nations who are having difficulty repaying their loans). With regard to both the WB/IMF programmes and the direct relations between creditors and debtors, the G8 acts to identify debt treatment formulas that include progressive rescheduling and relief quotas which are conditional upon the fulfilment of specific requirements. Such "terms" are adopted during G8 summits and periodically updated on the basis of input from the developing countries concerned and observations by the international financial institutions involved. The major financial institutions and the multilateral organizations of creditors and debtors regard the "Houston terms", the "Naples terms", and the "Cologne terms", debt treatment formulas which were ratified at the related G8 meetings (Houston in 1990, Naples in 1994, and Cologne in 1999, respectively) – in the language commonly used in official documents – as standard terms of treatment.

These examples of G8 action display both common elements and differences. In each, the G8 decision was preceded by intense preparatory activity that developed through different stages, and which was characterized by the participation of the administrations of the member States, but also of other States and of intergovernmental and non-governmental organisations.

On the other hand, the examples differ in terms of the key players involved in G8 decisions and their implementation. In terms of the former, the examples illustrate different models of global administration. These include the so-called treaty based organizations, such as the UN Security Council, the OECD and the WB; the model of "distributed administration" in which national bodies play a role in administering global regimes (in this case, with regard to those national administrations actively involved in the implementation of conflict resolution programmes, the drafting of decisions on conflict prevention, and in the management of development assistance programmes); a committee, the DAC, that can be defined as a transnational network of government officials, international civil servants, and G8 representatives; and, finally, some organizations that can be ascribed to the club model, such as creditors' and debtors' associations. Implementation of the G8's decisions takes place in three different ways. In the first case, the UN Security Council makes reference to the text of the G8 decision (reference); in the second, the DAC incorporates certain norms developed by the G8, without, however making explicit reference to the Group (incorporation); finally, in the third case, the debt rescheduling and relief

quotas and the connected terms adopted by the G8 are commonly used as standards by creditor countries as well as by debtors (direct application).

These examples illustrate how decisions adopted by the G8, despite their lack of formally binding legal status, can have a genuine impact even on countries and other actors that are not members. The UN comprises members of the G8 and other States: compared to the former, the G8 is a limited legal order within a wider one (we might picture them as concentric circles). The DAC is a limited organ of the OECD, with which the G8 coincides only partially (these are more like intersecting circles within a wider legal order). The Paris Club is another such partially overlapping grouping, while the debtor nations and their legal orders remain entirely separate from that of the G8. The overall picture, then, is one of partially intersecting and partially distinct normative orders all encompassed within a broader framework – that provided by the WB and the IMF.

In the first example, the G8 addressed an issue that was entirely external to it, as its Decision dealt with Kosovo – a region within a UN (but not a G8) member State. Serbia, however, took part in the deliberation stage and approved a draft of the Decision prior to its adoption. In the second example, the guidelines adopted by the G8 are in fact used by a Committee of an entirely different international organisation. Finally, in the third example, there is a strong link between those that have developed the norms in question (the G8 countries) and those that will use them, given that the G8 bring together most of those who will be affected by the decision (on the creditors' side at least). Each result reflects a complex interplay between different actors; and in each case, the G8 acts within, and contributes to, a wider legal order.

Its main contribution is the development, introduction and circulation into other legal orders of norms that it develops itself, making use of the various different links – institutional and otherwise – between different actors in the global arena. Common features of the three examples include the fact that in each case the G8 has sought to "graft" its own norms onto already-existing procedures in other regimes, and that the content of the measures has been shaped through forms of regulation in which the different levels of decision-making tend to merge.

This approach differs from that of traditional international law, in which a rule is accepted by the actors involved under a treaty and transposed into domestic legal systems either upon ratification or implementation by the national legislature. In each of these examples, however, domestic transposition is merely the "tip of the iceberg", under which vastly complex institutional relations and mechanisms, formal and informal, are concealed. In this regard, the "circulation" of G8-developed norms is facilitated by the fact that their formation is itself the outcome of a concurring "web" of public powers.

In this way, the G8 plays an essential coordination role within the global arena, without requiring the establishment of a formal institution. Born from a meeting of seven countries, the Group has also created other bodies, some exclusively at the ministerial level and other open to the participation of other authorities. The expanded role of the G8 has required a like expansion in the actors involved in its decision-making processes. Annual meetings are now preceded and followed by an intense system of related meetings, which sometime demonstrate a degree of autonomy from the G8 itself. Other bodies, such as the G20, are now attracting growing attention within global decision-making processes. Although it shares with the G8 its organizational structure, decisional mechanisms and implementation strategies, the G20 differs both in its functions and the degree of participation it affords other actors. It is now acquiring a leading role in the formulation of global responses to the 2007 financial crisis.

4. *Further Reading*

a. A. BAILIN, *From Traditional to Institutionalized Hegemony*, 6 G8 GOVERNANCE, WORKING PAPER (2001);
b. N. BAYNE, *Hanging in There: The G7 and G8 Summit in Maturity and Renewal*, Aldershot (2000);
c. P. HAJNAL, *The G7/G8 System: Evolution, Role and Documentation*, Aldershot (1999);
d. J.J. KIRTON, J.P. DANIELS, A. FREYTAG, *Guiding Global Order: G8 Governance in the Twenty-first Century*, Aldershot (2001).
e. R.D. PUTNAM, N. BAYNE, *Hanging Together: The Seven-Power Summits*, Cambridge (1984);
f. E. KOKOTSIS, *Keeping International Commitments: Compliance, Credibility, and the G7, 1988-1995*, New York (1999).

I.D.2 Public-Private Harmonization Networks: The Case of the International Conference on Harmonization (ICH)

Ayelet Berman

1. *Background*

The International Conference on the Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH) was set up in 1991 and is composed of drug regulatory authorities and R&D pharmaceutical industry associations (i.e. actors dealing with the development of *new* drugs) from the US, EU and Japan. Anne Marie Slaughter originally termed collaboration between public regulators as "transgovernmental regulatory networks". In this case, given the involvement of private parties, and their goal of harmonizing rules, "Public-Private Harmonization Networks" would appear to be a more appropriate description of the ICH and similar bodies.

The purpose of the ICH is to harmonize the technical requirements of drug registration rules concerning the quality, efficacy and safety of drugs. The ICH has issued about 50 guidelines so far. These guidelines have become *de facto* global standards, adopted by its members as well as by companies and countries beyond the ICH regions.

The ICH public parties are the US Food and Drug Administration (FDA), the European Commission DG Health and Consumers, the European Medicines Agency (EMA), the Japanese Ministry of Health, Labor & Welfare (MHLW) and the Japanese Pharmaceuticals and Medical Devices Agency (PMDA). The private parties are the Pharmaceutical Research & Manufacturers Association of America (PhRMA), the European Federation of Pharmaceutical Industries' Associations (EFPIA) and the Japanese Pharmaceutical Manufacturers Association (JPMA). Certain observers and interested parties may attend too, such as the WHO, Swissmedic (the Swiss drug regulator) on behalf of EFTA countries, Health Canada, and the International Generic Pharmaceutics Alliance (IGPA) (as well as other *ad hoc* observers). The Secretariat is run by the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA).

The ICH has expert working groups and a Steering Committee. Regulators and industry have an equal amount of seats on both organs and decisions are

reached by consensus. The ICH has also set up a Global Cooperation Group and a Regulators Forum to communicate with regional harmonization networks and with countries that aren't ICH members but have an interest in or a history of adopting ICH guidelines.

2. *Materials and Sources*

Websites

- The ICH official website (www.ich.org);
- US Food and Drug Administration (http://www.fda.gov/InternationalPrograms/HarmonizationInitiatives/default.htm);
- European Medicines Agency (http://www.ema.europa.eu/ema/index.jsp?curl=pages/partners_and_networks/general/general_content_000225.jsp&mid=WC0b01ac05801df582).

Publications

- P.F. D'ARCY, D.W.G. HARRON, Proceedings of the first International Conference on Harmonisation: Brussels 1991 (Queen's University at Belfast, 1992).
- Harmonization I, Proceedings of the Tenth International Conference of Drug Regulatory Authorities (ICDRA) - Hong Kong, China, 24 - 27 June 2002 (http://whqlibdoc.who.int/hq/2003/a79903_(chp6).pdf);
- Harmonization II, Proceedings of the Tenth International Conference of Drug Regulatory Authorities (ICDRA) - Hong Kong, China, 24 - 27 June 2002 (http://whqlibdoc.who.int/hq/2003/a79903_(chp7).pdf);
- ICH, *The Value and Benefits of ICH to Industry*, (2000) (http://www.ich.org/fileadmin/Public_Web_Site/ABOUT_ICH/Vision/Value_Benefits_for_Industry_2000.pdf);
- ICH, *The Value and Benefits of ICH to Drug Regulatory Authorities: Advancing Harmonization for Better Health*, (2010) (http://www.ich.org/fileadmin/Public_Web_Site/News_room/C_Publications/ICH_20_anniversary_Value_Benefits_of_ICH_for_Regulators.pdf).

Domestic Procedures

- 21 CFR 10.115 FDA Good Guidance Practice
- FDA, "International Harmonization; Policy on Standards (Notice)" 60 FR 53078 (11 October 1995)
- European Medicines Agency, "Procedure for European Union Guidelines and Related Documents within the Pharmaceutical Legislative Framework" (http://www.ema.europa.eu/docs/en_GB/document_library/Scientific_guideline/2009/10/WC500004011.pdf).

3. *Analysis and Issues: Regulatory Capture and Accountability*

The ICH develops the guidelines in accordance with a specified 5-step procedure. According to this procedure, when the experts working group has developed a draft guideline, the draft is released for consultation. Consultation takes place in each of the member regions (e.g. in the US, they undergo notice and comment in accordance with the FDA's Good Guidance Practice). Comments may also be submitted directly to the ICH. After all comments have been transferred to the working group, a renewed consensus building process takes place. If a consensus is reached, the guideline will be adopted by the Steering Committee as a harmonized guideline. The guidelines are legally non-binding; nevertheless, they have all been adopted domestically by the member regulatory authorities. Domestically they are usually adopted as legally non-binding rules (e.g. FDA guidance documents or EMEA guidelines).

The first issue concerns the (in)adequacy of the guideline development procedure: while the (domestic and transnational) consultation procedures provide opportunity for input, and hence some accountability towards stakeholders, in the absence of any reasoning on behalf of the ICH and/or the regulators as to the acceptance or rejection of comments, and with the lack of an appeals mechanism at the transnational level, the meaningfulness of the consultation rests in doubt.

A second issue is related to the inclusion of industry in the harmonization process: on the one hand, the inclusion of industry generates many advantages for the effectiveness of the process. Most importantly, it enables the information imbalance between regulators and industry to be bridged. 95% of research takes place within industry, and so it is several years ahead of regulators on new scientific developments. Industry is also best informed about the regulatory differences that constitute obstacles to trade. To effectively regulate, the input of industry actors is therefore crucial.

On the other hand, the inclusion of industry raises concerns of regulatory capture: while public interest stakeholders, such as patients organizations, may comment on drafts, they are not at the table with the pharmaceutical industry and the regulators when these drafts are beign developed in the working group sessions. Indeed, according to some accounts, ICH guidelines promote faster and cheaper drug development that benefits the industry, but do so at the expense of patient security. This raises the question of whether NGOs representing patients (or other public interests) should be allowed at the table. Alternatively, should the ICH become a regulators-only forum in which industry no longer enjoys equal-member?

A third issue is related to the fact that ICH guidelines have become de facto global standards that are adopted or relied on by non-ICH countries and their local drug developers or producers. The problem is that the content of the ICH guidelines reflects the interests of high-income countries and the commercial interests of their industries, but does not take into account the interests of developing countries. The problem manifests itself when local industries in non-ICH countries follow these guidelines that were never tailored to their needs. The guidelines often reflect a standard that is unattainable or unaffordable, while their high or complicated requirements are not necessarily justified from a public health perspective. For example, there have been claims that ICH's quality guidelines are unnecessarily stringent (that is, not justified by quality or safety concerns), and are too costly, with the result that local generic drugs producers are squeezed out of the market. This, in turn, affects the availability of drugs to the local population in developing countries. Claims have also been raised regarding the inappropriateness of the ICH clinical trials guidelines for developing countries, arguing that this has lead to a decline of clinical trials in these countries (again, with adverse effects on the availability of drugs geared to the needs of the local population).

Acknowledging the growing interest in ICH guidelines, the ICH set up the "Global Cooperation Group" that since 2003 has brought together the ICH members, observers and six regional harmonization networks (APEC, ASEAN, EAC, GCC, PANDRH, and SADC). Since 2007, countries with a history of ICH implementation and/or where major production and clinical trials are carried have also been invited. These include Australia, Brazil, China, Chinese Taipei, India, South Korea, Russia and Singapore. In addition, in 2007 The Regulators Forum, a forum for discussion among these regulatory authorities and those of ICH members' regulatory authorities, has also been established.

While these bodies improve the communication among ICH members and non-members, it is questionable whether they actually correct the concerns raised above. How then should this problem be addressed? Should ICH standards be

adapted to take the interests of developing countries into account, and how might this be achieved? Should significantly affected countries receive full membership? Should the WHO be more involved? Or should adaptation take place domestically within each country, in accordance with local needs?

4. *Similar Cases*

The ICH is only one (even if the most significant) of a group of similar public-private harmonization networks that are in the business of harmonizing registration rules for health products. These other networks are the International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Products (VICH) (dealing with veterinary drugs), the Global Harmonization Task Force (GHTF) (dealing with medical devices), and the International Cooperation on Cosmetics Regulation (ICCR) (dealing with cosmetics). The drug regulatory authorities and respective industry associations from the US, EU, Japan (and Canada and/or Australia in some cases) are the core members of these networks. The membership, the governance structure, and the guideline development procedures of these networks are very similar to that of the ICH.

There are also several regional harmonization networks that seek to harmonize the technical requirements of drug registration rules in their regions. These regional networks are linked with the ICH and closely follow its activities, through, for example, the Global Cooperation Group. These are the networks set up by Asia-Pacific Economic Cooperation (APEC), the Association of Southeast Asian Nations (ASEAN) (see § I.D.3 "ASEAN International Investment Agreements: The Incorporation of Global Regulatory Governance", by M. Ewing-Chow and G.R. Fischer), the Gulf Cooperation Countries (GCC), the Pan American Network on Drug Regulatory Harmonization (PANDRH), the South African Development Community (SADC), and the East African Community (EAC).

5. *Further Reading*

a. J. ABRAHAM, "The Pharmaceutical Industry as a Political Player", 360 *The Lancet* 1498 (2002);
b. J. ABRAHAM, T. REED, "Reshaping the Carcinogenic Risk Assessment of Medicines: International Harmonization for Drug Safety,

Industry/Regulator Efficiency or Both?", 57 (2) *Social Science & Medicine* 195 (2003);

c. A. BERMAN, "The Role of Domestic Administrative Law in the Accountability of Transnational Regulatory Networks" (2011) (http://graduateinstitute.ch/ctei/home/working_papers.html);

d. A. BERMAN, "The Public-Private Nature of Harmonization Networks" (2011) (http://graduateinstitute.ch/ctei/home/working_papers.html);

e. J.G. CONTRERA, "The Food and Drug Administration and the International Conference on Harmonization: How Harmonized Will International Pharmaceutical Regulations Become?" 8 *Administrative Law Journal of the American University* 927 (1995);

f. Prescrire, "ICH: an exclusive club of drug regulatory agencies and drug companies imposing its rules on the rest of the world", 19/108 *Prescrire International* 183 (2010);

g. D. JORDAN, "International Regulatory Harmonization: A New Era in Prescription Drug Approval", 25 *Vand. J. Transnational Law* 471 (1992);

h. D. VOGEL, "The Globalization of Pharmaceutical Regulation", 11 (1) *Governance* 1 (1998);

i. WHO, "Global Harmonization and the ICH", 30 *Essential Drugs Monitor* (2001) (http://apps.who.int/medicinedocs/en/d/Jh2977e/4.html);

j. WHO, "Report of a WHO Meeting: The Impact of Implementation of ICH Guidelines in Non-ICH Countries", 9 *Regulatory Support Series* (2001) (http://apps.who.int/medicinedocs/pdf/h2993e/h2993e.pdf).

I.D.3 ASEAN International Investment Agreements: The Incorporation of Global Regulatory Governance

Michael Ewing-Chow and *Geraldine R. Fischer*

In 2008, the ASEAN Charter entered into force, and established a new legal framework for ASEAN. In the Charter, ASEAN Member States committed to act in accordance with the principle of Rule of Law as well as "adher[e] to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration [...]". The ASEAN Member States, therefore, envisage that rules of law and the Rule of Law will become a major feature in the future of ASEAN (see also § I.B.7 "The ASEAN Charter: The Legalization of ASEAN?", by M. Ewing-Chow and L. Bernard).

At the same time, ASEAN has also seen its investment flows change. Data from UNCTADSTAT shows that from 2005 to 2010, ASEAN's capital exports increased from approximately USD151 billion to USD 432 billion – a boost of 285%. These figures are derived from data compiled from each of the ten ASEAN members and as such reflect intra-ASEAN investments. However, as each ASEAN member is responsible for its own investment policies, this still reflects the rise in capital exports from ASEAN members as a whole. While its capital exports are still significantly lower than its capital imports (USD938 billion in 2010), ASEAN's role as a major capital exporter has resulted in a greater concern for protecting its outbound investments through new International Investment Agreements (IIAs) provisions, which create structures, procedures and normative standards for regulatory decision-making. These new IIA provisions include more significant obligations related to transparency and notifying certain information to investors. Consequently, ASEAN states are also undertaking commitments to conform to these global regulatory governance principles domestically, and further strengthen the Rule of Law.

Indeed, as we will see in more detail below, the ASEAN States' desire to protect outbound investments (including intra-ASEAN investments) is evident even in provisions conventionally seen as carve-outs to protect a sovereign's right to regulate. In this chapter, we will scrutinize certain key provisions of these IIAs to demonstrate that, while the host State retains its regulatory rights, these are tempered with conditions that we believe were intended to encourage more transparent administrative processes, which may not be mirrored in the domestic

legal systems of many ASEAN States. This development is in line with the ASEAN objective as stated in Articles 1 and 2 of the ASEAN Comprehensive Investment Agreement (ACIA) to "create a liberal, facilitative, transparent and competitive investment environment in ASEAN" as well as to improve "transparency and predictability of investment rules, regulations and procedures conducive to increased investment among Member States".

One might even suggest that ASEAN countries have undertaken these international obligations in order to strengthen their domestic administrative structures. Even if this was not the conscious intent, it could be an unintended consequence of the developments discussed below.

1. *ASEAN Investment Agreements*

In 2009, the ASEAN member countries signed four agreements related to investment. The first, the ACIA, governs the international investment regime among the members. The ACIA builds on the region's two earlier investment agreements, the 1987 ASEAN Agreement for the Promotion and Protection of Investments and the 1998 Framework Agreement on the ASEAN Investment Area. The ACIA was signed on 26 February 2009, and it entered into force on 29 March 2012.

After solidifying the international investment regime among the ASEAN member countries, ASEAN countries signed the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), which includes a chapter dedicated to investment, the very next day, 27 February 2009. Shortly thereafter, the ASEAN countries signed Agreements on Investment under the Framework Agreement on Comprehensive Economic Cooperation with the Republic of Korea and the People's Republic of China (AKIA and ACHIA) on 2 June 2009 and 15 August 2009, respectively. As of July 2012, only AKIA has yet to enter into force. These four investment agreements, the ACIA, AANZFTA, AKIA, and ACHIA, will be known collectively as the "ASEAN IIAs" throughout this paper.

We will focus on the following ASEAN IIA provisions: (1) the "Approval in Writing" requirement; (2) the General Exception; and (3) the Expropriation Annex. We believe that these provisions all emphasize the importance of transparency and accountability of governmental regulation of investments. We will examine these provisions in detail to illustrate our thesis that the ASEAN states seek to preserve the right to regulate within a Rule of Law framework in the investment context, which also functions to protect outward-bound investments. These provisions reflect ASEAN's evolution from traditional

capital-importing states with limited administrative procedures to their new role as capital exporters.

A. *The "Approval in Writing" Requirement*

Article II(1) of the 1987 ASEAN Agreement on the Promotion and Protection of Investments provided that:

> *This Agreement shall apply only to investments* brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and *which are specifically approved in writing* and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.

Therefore, in order for an investment to be protected by the 1987 Agreement, it had to be "approved in writing."

The ACIA and AKIA retain the requisite "approval in writing", but provide that "[f]or the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1 (Approval in Writing)." While this does not on the face of it appear to be a paradigm shift from the 1987 Agreement, this Annex outlining the "approval in writing" prerequisite is a major innovation.

This Annex is particularly important in light of the *Yaung Chi Oo Trading PTE v. Gov't of Union of Myanmar* (hereinafter "YCO") decision, 42 I.L.M. 540 (2003), the only public investment arbitration award that has dealt with prior ASEAN investment agreements. The YCO tribunal held that it did not have jurisdiction, because the investor could not provide evidence that Myanmar had officially approved an existing investment. In fact, Myanmar never specified an explicit process for approval. With the inclusion of Annex I, these ASEAN IIAs now provide some discipline, and perhaps transparency, to the authorization process.

Through Annex 1 of the ACIA and AKIA, the Member States are compelled to have a more transparent procedure for approving investments. In particular, Annex 1 of the ACIA and AKIA obliges each Member State that requires "specific approval in writing" for "covered investments" to:

> (a) *inform* all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;
>
> (b) in the case of an incomplete application, *identify and notify* the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;
>
> (c) *inform* the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and
>
> (d) in the case an application is denied, *inform the applicant in writing of the reasons for such denial*. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application."

With respect to the approval process, the ASEAN host State must at the very least provide the investor with these procedural protections. The obligations to "inform", "identify and notify" and provide "reasons for such denial" are clear actions that the host State must undertake; a failure to do so could result in judicial or administrative review or international arbitration. In the past, many ASEAN states failed to provide a transparent process for approval and could reject the investment without providing reasons. Now the host State will have to comply with the transparency obligation and justify any denial. This, we believe, will inevitably encourage better process-oriented governance in the respective ASEAN Member State.

B. *The General Exception Similar to GATT Article XX*

The ASEAN IIAs, with the exception of the AANZFTA, provide a broad General Exception clause, similar to the well-known Article XX of the General Agreement on Tariffs and Trade (GATT), aimed at protecting a State's right to regulate in important areas, such as health. The AANZFTA does not contain such a broad general exception clause, only incorporating the national treasure exception for investment obligations in Chapter 15, Article 1(4).

This General Exception provision was first incorporated in ASEAN in the 1998 Framework Agreement on the ASEAN Investment Area. Although traditionally viewed as a provision to carve out broad regulatory policy space, one may also understand the exception as providing general guidance to the host

State. The General Exception clause shows the State how to regulate by focusing on the valid justification for such regulations, and the processes for introducing such regulatory measures.

The General Exception clause (like the chapeau and list of GATT Article XX) elaborates that nothing in the agreement prevents a party from adopting or enforcing certain measures related to sensitive areas, specifically those that are:

- necessary to protect public moral or to maintain public order;
- necessary to protect human, animal or plant life or health;
- necessary to secure compliance with laws or regulations not inconsistent with this agreement, including those related to:
  (i) prevention of deceptive/fraudulent practices to deal with effects of a default on a contract;
  (ii) protection of the privacy of individuals in relation to processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and
  (iii) safety;
- aimed at ensuring the equitable or effective imposition or collection of taxes in respect of investments/investors;
- imposed for the protection of national treasures or artistic, historical or archaeological value;
- relating to the conservation of exhaustible natural resources if made effective in conjunction with restrictions on domestic production or consumption.

The General Exception clause provides a State a very limited exemption from its IIA obligations if certain conditions are met. First, the State measure must be undertaken in pursuit of one of the objectives listed in the clause, and this measure must be "necessary . Second, the General Exception Clause's chapeau (like GATT Article XX) stipulates the measure in question should not be applied in an arbitrary or unjustifiably discriminatory manner where like conditions exist, and the measure must not be a disguised restriction on investors or protected investments.

In the case of the ASEAN IIAs, although the General Exception clause not only creates policy space for developing capital importing states, it also helps manage the administrative limitations of the ASEAN countries. The General Exception can be read as a quasi-transparency provision providing notice to investors that a State may take the regulatory measures as outlined in the provision, but the State's measures must be applied in the prescribed manner,

which further strengthens the Rule of Law. With the exception of the Philippines, the domestic jurisprudence of most ASEAN states on administrative review is limited. Thus, while the ASEAN States have become more welcoming of foreign investment and its protection, it may be that these exceptions, most notably the General Exception, provide additional regulatory guidance and limits on how to regulate rather than what to regulate.

C. *The Expropriation Annex*

The ASEAN IIAs also circumscribe a State's right to expropriate or nationalize a covered investment. Under these agreements, the host State retains its sovereign right to expropriate or nationalize an investment, but only when carried out in accordance with certain conditions.

Following the customary international law standard, the ACIA (Article 14(1)), AANZFTA (Chapter 11, Article 9(1)) and the AKIA (Article 12(1)) permit expropriations, if they are executed:

- for a public purpose;
- in a non-discriminatory manner;
- on payment of prompt, adequate and effective compensation; *and*
- in accordance with due process of law.

The expropriation provision in ACHIA (Article 8), on the other hand, is tied to domestic legislation. Under ACHIA, a Party may not expropriate, nationalize or take similar measures unless it is done:

- for a public purpose;
- in a non-discriminatory manner;
- in accordance with applicable domestic laws including legal procedures; *and*
- upon payment of compensation.

The ACIA and AANZFTA both include an Expropriation Annex that further elaborates on certain expropriation principles. Article 27 of the AKIA provides that Parties agreed to enter into discussions on an Expropriation Annex within five years of the date of entry into force unless the Parties agree otherwise.

This Expropriation Annex is noteworthy in that it contains certain factors that a tribunal should consider when determining whether an indirect expropriation has occurred. These factors are similar, albeit not identical, to those

laid out in the 2004 and 2012 U.S. Model BIT's Annex B "Expropriation", which are based on the U.S. Supreme Court's decision *Penn Central Transportation v. New York City* 438 U.S. 104 (1978). In addition, the ACIA and AANZFTA Expropriation Annex clarify the Parties' position on measures taken to protect legitimate public welfare objectives.

There have been several investment arbitration cases brought as a result of host State regulations taken to protect, for example, health and the environment, which investors have claimed amount to indirect expropriation. Perhaps ASEAN negotiators have considered these awards when drafting the ACIA and AANZFTA Expropriation Annex. One such case is *Methanex v. U.S.* In this case, Methanex Corporation, a Canadian methanol distributor and marketer, pursued a claim against the U.S. alleging its investment had been expropriated as a consequence of California's ban on a gasoline additive, which uses methanol,. Ultimately, the *Methanex* tribunal dismissed all the investor's claims. In the award, the *Methanex* tribunal explained that:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.
>
> *Methanex v. United States of America* NAFTA (UNCITRAL) Part IV Chapter D para 7, (Award, 3 Aug. 2005).

We will analyze the ACIA and AANZFTA Expropriation Annex in light of this case.

Pursuant to Annex 2(3) of the ACIA and the AANZFTA, the tribunal should consider the following factors in a fact-based case-by-case inquiry when deciding if there was an indirect expropriation:

- the economic impact of the government action, although the fact that an action or series of

> actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
> - whether the government action breaches the government's prior binding writing commitment to the investor whether by contract, license or other legal document; and
> - the character of the government action, including its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1) [Expropriation and Compensation].

Interestingly, the ACIA and AANZFTA Expropriation Annex elucidates that the investor must prove the State had specifically undertaken a written commitment. This is even more stringent than the *Methanex* tribunal's understanding that the breach of specific commitments made by the regulating government, which are not necessarily written, could lead to a finding of expropriation. Similarly, neither the U.S. nor Canada's model investment treaty contains such a writing requirement. We believe that the writing requirement attempts to accommodate ASEAN Member States that may have limited administrative capacity and internal clearing processes.

Moreover, the ACIA and AANZFTA Expropriation Annex clarifies that a Party's non-discriminatory measures that are "designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment do not constitute an expropriation of the type referred to in sub-paragraph 2(b) [describing indirect expropriation]." This provision expressly safeguards the host State's right to regulate to protect legitimate public welfare objectives as long as the measure is not applied in a discriminatory fashion. In other words, if the tribunal were to find that the host State issued regulations to protect public health, for example, that were implemented in a neutral manner, the tribunal would be barred from finding there was an indirect expropriation even if the foreign investment protected by the IIA was severely impacted.

In the ACIA and AANZFTA Expropriation Annex, there is no explicit due process requirement for these small category of non-discriminatory measures related to a limited sub-set of legitimate public welfare objectives (such as public health, safety and the environment). The ASEAN negotiators appear to have deviated from the *Methanex* tribunal's interpretation of general international law, which it estimated required that such measures be "enacted in accordance with

due process." This again appears to be an accommodation for the limited administrative capacities of certain ASEAN countries.

Although the ASEAN Member States' right to regulate is relatively unfettered for this limited category of regulations to protect legitimate public welfare objectives, the ACIA and AANZFTA Expropriation Annexes provide some guidance for a host State as to which actions would be more likely to rise to the level of a breach—most notably, one that contravenes a written commitment to an investor.

2. *Conclusion*

The ASEAN IIA provisions described above will be exceedingly important to both the host State and the investor as they guard the sovereign's right to regulate while circumscribing the parameters within which it may do so.

These obligations, therefore, function as guidelines to create certain administrative structures, which in turn create a transparent and hence investment-friendly atmosphere.

ASEAN IIAs seem to be incorporating elements of global regulatory governance for investments in Asia, because of the importance of ASEAN in the Asian manufacturing supply chain. The ASEAN member countries may access any of the protections and corresponding dispute settlement procedures in any of the ASEAN IIAs, which creates a "race to the top" (at least as between the ASEAN Member countries, if not the others). The ability of the ASEAN IIAs to attract capital could lie in the promise of securing good governance rather than merely the scope of the substantive rights guaranteed. As such, it is suggested that these innovations should be interpreted not merely as carving out more policy space for ASEAN Member States, but rather as encouraging a more transparent regulatory process for investments while recognizing the inherent administrative limitations in the less developed members.

3. *Further Reading*

For more details and elaboration, please see a similar paper albeit with a different emphasis found in Transnational Dispute Management:

M. EWING-CHOW & G.R. FISCHER, *ASEAN IIAs: Conserving Regulatory Sovereignty While Promoting the Rule of Law?*, TDM 5 (2011) (www.transnational-dispute-management.com).

I.D.4 An Unaccountable Transgovernmental Branch? The Basel Committee

Mario Savino and *Maurizia De Bellis*

1. *Background: "Vertical" and "Horizontal" Transgovernmental Networks*

The global legal order rests upon a dense cluster of transgovernmental bodies, composed of fragments of national administrative systems. From a structural viewpoint, those bodies can be divided into two broad categories.

The first is composed of "horizontal" transgovernmental bodies, which have three main features. To begin with, these committees are autonomous or "headless", as they are not incorporated into an international organization (IO). In addition, they are not regulated by treaties, but rather by informal agreements between independent or quasi-independent national agencies. They do not make formal decisions, binding upon States. Finally, they exist for different reasons – for example, to coordinate or facilitate information-sharing among national regulators, to draft guidelines and spread best practices, or to set (legally non-binding) international standards. The most well-known examples of such bodies are the International Organization of Securities Commissions (IOSCO) (see § I.D.5 "IOSCO: 'Democracy' vs. 'Leadership' in the Transnational Regulation of Finance?", by M. De Bellis), the International Association of Insurance Supervisors (IAIS), the G-10 committees, such as the Committee on the Global Financial System, the Committee on Payment and Settlement Systems, and the Basel Committee on Banking Supervision (hereafter, Basel Committee).

The other category comprises "vertical" transgovernmental bodies. These are, by contrast, auxiliary or secondary bodies operating within IOs to set harmonization or standardization rules or to monitor the correct implementation of decisions. These bodies are typically composed not only of national (middle or high-level) officials but also of supranational officials, i.e. civil servants working within international secretariats. As a consequence, these fora open up national systems not only "laterally", to promote dialogue between domestic administrations, but also "vertically", to foster cooperation among supranational and national bodies. This group of "mixed" or "vertical" transgovernmental networks includes most of the EU committees (comitology or executive committees, Council or legislative committees, and expert governmental

committees, assisting the Commission – see § VIII.3 "The Comitology Reform. A New Role under the Lisbon Treaty?", by M. Savino), and most IO auxiliary bodies (to name but a few, WTO secondary bodies administering multilateral or plurilateral agreements; the UN "functional committees", exercising consultative functions; and the so-called Codex Committees, assisting the Codex Alimentarius Commission in the drafting of food-safety standards – see § II.A.5 "Competing Interests: Food Safety Standards and The Codex Alimentarius Commission", by D. Bevilacqua).

2. *Materials*

About the membership of the Basel Committee:

- BCBS, *Basel Committee Broadens its Membership*, Press Release, 10 June 2009, (http://www.bis.org/press/p090610.htm).

About "Basel III" and "Basel II":

- BCBS, *Basel III: A global regulatory framework for more resilient banks and banking systems (revised version)*, 1 June 2011 (http://www.bis.org/publ/bcbs189.htm);
- BCBS, *Basel III: International framework for liquidity risk measurement, standards and monitoring*, 16 December 2010 (http://www.bis.org/publ/bcbs188.htm);
- Basel Committee on Banking Supervision (BCBS), *Basel II: International Convergence of Capital Measurement and Capital Standards: a Revised Framework* (June 26, 2004) (http://www.bis.org/publ/bcbs107.htm).

Global consultation on the global standards for capital requirements

a) proposed "Basel III" standard
- BCBS, *Consultative proposals to strengthen the resilience of the banking sector announced by the Basel Committee*, 17 December 2009 (http://www.bis.org/press/p091217.htm);
- *Comments received on the consultative documents "Strengthening the resilience of the banking sector" and "International framework for liquidity risk measurement, standards and monitoring"*, April 2010 (http://www.bis.org/publ/bcbs165/cacomments.htm).

b) proposed "Basel II" standard :

- BCBS, *A New Capital Adequacy Framework - Consultative Paper*(June 3, 1999) (http://www.bis.org/publ/bcbs50.pdf);
- BCBS, *Basel II: The New Basel Capital Accord - Second Consultative Paper* (January 2001) (http://www.bis.org/bcbs/bcbscp2.htm);
- BCBS, *Basel II: The New Basel Capital Accord - Third Consultative Paper* (April 2003) (http://www.bis.org/bcbs/bcbscp3.htm);
- BCBS, *The New Basel Capital Accord: Comments received on the Second Consultative Package* (http://www.bis.org/bcbs/cacomments.htm);
- BCBS, *The New Basel Capital Accord: Comments received on the Third Consultative Package* (http://www.bis.org/bcbs/cp3comments.htm).

Domestic consultation on the proposed "Basel III" standard:

a) In the United States

- U.S. *House of Representatives, Committee on Financial Services*, *Hearing entitled "Financial Regulatory Reform: The International Context"*, 16 June 2011 (http://financialservices.house.gov);
- D.K. Tarullo, *Capital and Liquidity Standards*, *Hearing Before theHouse of Representatives Committee on Financial Services*, 16 June 2011 (http://financialservices.house.gov/UploadedFiles/061611tarullo.pdf).

b) In the European Union

- EU Commission, *Possible Further Changes To The Capital Requirements Directive*, Commission Services Staff Working Document, February 2010, (http://ec.europa.eu/internal_market/consultations/docs/2010/crd4/consultation_paper_en.pdf);
- EU Commission, *Consultation Document: Countercyclical Capital Buffer*, October 2010 (http://ec.europa.eu/internal_market/consultations/docs/2010/capitalbuffer/consultation_paper_en.pdf);
- EU Commission, *Consultation Document: Counterparty credit risk: Capitalisation of bank exposures to central counterparties: Treatment of incurred credit valuation adjustments*, February 2011

(http://ec.europa.eu/internal_market/consultations/docs/2011/credit_risk/consultation_paper_en.pdf);
- Comments on the third exposure draft: (http://ec.europa.eu/internal_market/consultations/2011/credit_risk_en.htm)
- EBA, *The EBA details the EU measures to restore confidence in the banking sector*, 26 October 2011 (http://www.eba.europa.eu/News--Communications/Year/2011/The-EBA-details-the-EU-measures-to-restore-confide.aspx);
- EBA, *Recommendation on the creation and supervisory oversight of temporary capital buffers to restore market confidence*, EBA/REC/2011/1, 8 December 2011.

Domestic consultation on the proposed "Basel II" standard:

a) In the United States
- Federal Reserve Announcement, *Agencies to accept comments on Basel proposal to amend capital adequacy framework* (January 16, 2001) (http://www.federalreserve.gov/boarddocs/press/general/2001/20010116/);
- Federal Reserve Announcement, *Request for public comment on implementation of the New Basel Capital Accord in the United States, and on related draft supervisory guidance* (July 11, 2003) (http://www.federalreserve.gov/boarddocs/press/bcreg/2003/20030711/);
- *Proposed framework for risk-based capital guidelines; implementation of new Basel capital accord*, 68 Federal Register 149 (August 4, 2003) (http://www.gpo.gov/fdsys/pkg/FR-2003-08-04/html/03-18977.htm);
- U.S. House of Representatives, Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services, *The New Basel Accord: In Search of a Unified U.S. Position* (June 19, 2003) (http://archives.financialservices.house.gov/archive/hearings236.shtml);
- Board of Governors of the Federal Reserve System (Fed), Federal Deposit Insurance Corporation (FIDC), Office of the Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), *Banking Agencies To Perform Additional Analysis Before Issuing Notice of Proposed Rulemaking Related To Basel II*, 29 April 2005 (http://www.federalreserve.gov/boarddocs/press/bcreg/2005/20050429/default.htm);
- Federal Reserve System (Fed), Federal Deposit Insurance Corporation (FIDC), Office of the Comptroller of the Currency (OCC), Office of

Thrift Supervision (OTS), *Risk-Based Capital Standards: Advanced Capital Adequacy Framework–Basel II, Joint Final Rule and Supporting Board Documents*, 2 November 2007 (http://www.federalreserve.gov/generalinfo/Basel2/FinalRule_BaselII/)

- *Notice of Proposed Rule Implementing the Basel II Standardized Risk-Based Capital Framework in the United States, Joint Notice*, 26 June 2008 (http://www.federalreserve.gov/generalinfo/Basel2/NPR_StandardizedApproach/).

b) In the European Union

- European Commission, *Working Document of the Commission Services on Capital Requirements for Credit Institutions and Investment Firms*, Cover Document (November 18, 2002) (http://ec.europa.eu/internal_market/bank/docs/regcapital/dialogue/2002-workingdoc/200211-workingdoc-articles_en.pdf);
- European Commission, *Review of Capital Requirements for Banks and Investment Firms – Commission Services Third Consultation Paper*, Explanatory Document (July 1st, 2003), and related consultative documents (http://ec.europa.eu/internal_market/bank/docs/regcapital/cp3/200307-workingdoc/explanatory-doc_en.pdf) and (http://ec.europa.eu/internal_market/bank/regcapital/cp3/2003-consultpaper3_en.htm);
- Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/l_177/l_17720060630en00010200.pdf).

3. *Analysis of the Basel Process*

The Basel Committee is a "horizontal" transgovernmental body that was established in 1974. For most of its existence, membership of the Committee has been heavily restricted: from its inception until 2009, the heads of the central banks and banking regulatory agencies of only twelve countries were involved (Luxembourg, plus the eleven members of the G-10 – Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, the United States and the United Kingdom). In response to the global financial turmoil that started in 2008, the membership of the BCBS has been broadened to include representatives from the G20 countries (Argentina, Indonesia, Saudi Arabia,

South Africa and Turkey, together with Hong Kong and Singapore).

Assisted by the Secretariat of the Bank for International Settlements, the Committee carries out an important function in the internationalization of banking standards. The standards it develops are not legally binding. However, because of a number of institutional and market incentives, the Basel standards are implemented worldwide: not only by the Committee members, but also by many other States.

More than 100 States complied with the first Basel Capital Accord, known as "Basel I" and approved in 1988. The second Capital Accord ("Basel II"), published in 2004, was also intended to be implemented worldwide: However, the financial crisis of 2008 slowed down the implementation process; while it had been completed in the EU, it was only partially so in the US (where implementation had proved difficult even before the financial turmoil began). In this distressed financial context, substantial criticisms were raised against the global rules for capital requirements, which lead to a new revision of the Accord ("Basel III").

As a result of the crisis, the Basel Capital Accords are now a particularly controversial case of the setting of global standards by informal regulatory networks. On one hand, strengthening the rules on capital requirements for banks is considered to be a key element for restoring global financial stability; not only by the Committee itself, but also by the other two global institutions which took the lead in financial reforms after 2008 (the G20 and the Financial Stability Board (FSB)). On the other hand, however, the content of Basel rules has been subjected to significant criticism over the years. According to most economists, Basel I lead to "regulatory arbitrage", encouraging banks to securitize assets through instruments with low capital charges, and this is the main reason it was subsequently revised.

Basel II, approved in 2004 after an extensive consultative process, allows banks to choose between two methodologies for calculating the capital requirements for credit risks: the "standardized" approach (according to which risk weights – and, consequently, the capital requirements that a bank has to respect – depend on the issuer's credit rating), and the "internal ratings-based" (IRB) approach (according to which qualifying banks can use their own estimates to quantify their exposure). With the spread of the financial crisis, criticisms of the new approach increased accordingly. The most common of these highlighted the pro-cyclical effect of Basel II, and also called into question the capacity of either methodology to guarantee an appropriate level of capital (for instance, the accuracy of the credit ratings used has been a major issue).

Following the recommendations of the G20 and the FSB, the Basel Committee reviewed its global standard for capital requirements, a revised

version of which was published in 2010 (referred to as "Basel III"). The changes introduced seek to encourage banks to have more and higher-quality capital (to this end, banks' common equity is set at 7% of risk-weighted assets, including a 2.5% capital conservation buffer). In order to address the criticisms of pro-cyclicalicity, a countercyclical buffer has been added. Such improvements will increase banks' capital requirements; nevertheless, the basic methodologies used in Basel II have not been changed, and this has been highlighted as a major weakness of the new accord. Moreover, the new rules are likely to affect growth – a shortcoming that appears more and more crucial in the context of the European debt crisis.

Is there a link between the regulatory output – the controversial rules for capital requirements, examined above – and the standard-setting process?

The Basel Committee steadily increased its transparency over time, through an extensive use of notice and comment mechanisms. From this point of view, the turning point was the approval of Basel II: the Committee published three consultative papers, each followed by a call for comments. In this first stage of the procedure, the Committee received 250 comments. The second draft standard received 148 comments, the third 200. Most of the commentators were banks, self-regulation organizations and national regulators.

These procedural amendments have been welcomed as a positive trend, effectively strengthening the Committee's accountability. Nevertheless, the limits of the BCBS' consultation process have also been emphasized: in particular, the increased participation involved mostly the regulated entities, and not the general public. In the aftermath of the financial turmoil, criticisms that might have lead to the "regulatory capture" of the Committee by the banks intensified.

The approval of Basel III also provided opportunities for participation, but significantly fewer: instead of three notice and comment rounds, only one consultative paper was published, in December 2009. The final document was approved only one year later: a much shorter process than the five years that lead to Basel II. Even though participation opportunities were reduced due to the pressures of the financial crisis, more than 200 comment letters were sent to the Committee. The participants involved did not change much from the past: they were mostly banks and financial institutions.

Thus, the approval process for Basel III differed from that of its predecessor in being both simpler (only one consultation draft) and shorter; it did not change in terms of the type of stakeholders involved. Potentially more significant changes occurred, however, in the national implementation processes and related consultations.

The "global" consultation procedure for Basel II was mirrored by similar national consultations both in the US and in the EU; these apparently similar

processes, however, led to very different outcomes in terms of actual implementation of the global accord.

In the US, the regulatory agencies of the banking sector invited all interested parties to comment on both the draft agreement before its final discussion in Basel and on the subsequent national implementing measures. The US Congress was also involved in the internal process for the definition of the national position to defend in Basel. Post-approval hearings before the Congress brought to the surface certain conflicts of interest between large banks on one hand, and small- to medium-sized banks on the other (the full implementation of Basel II would have been at the expenses of the latter). These conflicts delayed domestic legislation implementing Basel II until 2007; and even then, it implemented only the IRB method, not the "standard" approach.

In the EU, the use of a similar notice and comment procedure had a very different outcome. The Commission, which sits on the Basel Committee as an observer, adopted notice and comment procedures on the developing regulation. In so doing, it pursued the twofold goal of promoting dialogue between the regulators in Member States and financial actors, and helping to determine the implementing measures necessary for complying with the international standards. As a result, the Basel II Accord was relatively quickly implemented into EU law through Directive 2006/48/EC, the so-called Capital Requirements Directive (CRD).

The implementation process for Basel III is ongoing. In the US, hearings on implementation have started. The consultation process is likely to be similar to previous ones. It remains to be seen whether it will facilitate the implementation of global rules, or whether it will instead create obstacles to it. Moreover, the approval of the Dodd-Frank Act, in 2010, could make this process more complex (due to some inconsistencies between the two, for example concerning regulatory references to ratings, see also § II.A.3 "Regulating the Raters: Toward Convergence in the Discipline of Credit Ratings" by E. Cavalieri).

In the EU, consultations have taken place in a manner similar to the implementation of Basel II. Three consultation drafts were published, two shortly after the BCBS's exposure draft, and the third after Basel III had been approved. Participation was significant: more than 150 letters of comments were submitted to the first consultative document, and more than 300 to the third one (the second related to a specific aspect, not the entire document, and was hence perceived as less relevant). There were, however, two significant changes. On one hand, the European Banking Authority (EBA) has been established. If this new authority were to be further strengthened, implementation through a delegated rule-making act (rather than a directive) would become theoretically possible.

Even in the absence of such a power, it has played a significant role , forcing EU banks to comply with some of Basel III requirements already in 2012 (whereas the Basel Committee agreed on later deadlines: 2015 for some of the requirements set in the Accord, 2018 for others). On the other hand, the role of the Council has steadily changed, as strong differences of opinion between Member States seem to have emerged during the approval process for the the revision of CRD (the so-called "CRD IV"). Similarly to the implementation of Basel II in the US, where the more detailed scrutiny of Congress lead to the global rules being only partially implemented, the much more substantive role of the Council in the context of Basel III could result in an implementing Directive that is less consistent with the global rules than its antecedent.

4. *Issues: Notice-and-Comment as a Global Model?*

A vast array of international rules and standards are defined by transgovernmental networks, both horizontal and vertical in nature (the main institutions of IOs, usually entrusted with formal decision-making power, often merely rubber-stamp the agreements reached at committee level). Transgovernmentalfora exercise a *de facto* decision-making power beyond the reach of the accountability mechanisms traditionally associated with domestic or international law. Firstly, the decision-makers are not representative members of national governments or plenipotentiary diplomats; they are, rather, bureaucrats, operating largely outside the traditional avenues of political responsibility. Secondly, the resulting international rules and standards, even when they are *legally* non-binding, are *de facto* implemented by national regulators. Thirdly, many global transgovernmental "colleges" are less than plenary in nature: the need for decision-making efficiency implies that committees should be composed of a limited number of participants; however, this weakens the consensus-based legitimacy of the decision (consensus requires a plenary composition, i.e., the involvement in the negotiation of all those national regulators that must later implement the result of the administrative process). Herein lie the accountability gaps endemic to most transgovernmental decision-making processes. How ought these problems to be addressed?

As mentioned above, the Basel Committee has mainly relied upon notice and comment procedures. This procedure, borrowed from the US administrative law tradition, provides the interested parties with information regarding a draft measure and with the opportunity to express their views to the decision-making authority. With the internet, this mechanism has become quite successful in opening up the global decision-making process to the public. However, the

adoption of the notice and comment procedure at the global level raises serious doubts. The first, general, one relates to the relation between the quantity and the quality of participation: is the number of commenters a reliable indicator of the effectiveness or the efficacy of participation? Is there any relation between that number and the impact of the comments on the final decision? If so, how can this impact be measured?

A second doubt pertains to the coherence between the means (notice and comment) and the end (accountability). The affirmation that global institutions in general and transgovernmental bodies in particular, are not accountable needs to be qualified. As has been noted, they are often much more accountable to the States and bodies that create and fund them, and to other powerful economic actors, than they are to diffuse societal interests, or those of weaker actors. The problem does not consist in a generalized accountability deficit, but rather in the global regulator's responsiveness to less influential States and private parties. The key questions are thus the following: are notice and comment-like procedures the appropriate means to resolve this specific responsiveness problem? Since they evolved in adversarial legal systems, such as the American one, and given that American (and other Anglo-Saxon) regulators and regulated actors are already trained for this kind of procedural exercise, doesn't the cure risk making the patient worse? This doubt arises from the previous one. If direct participation through notice and comment would strengthen the legitimacy of global regulation (legitimacy-enhancing) rather than the accountability of global regulators (responsibility-enhancing), should we search for alternative or complementary ways to fill the gap? One possible solution – as the Basel process shows – is the adoption of national consultative procedures to complement the global consultation. In the EU, as well as in the US, internal procedures exist through which national positions take shape, although procedures of this sort are lacking in most national legal systems.

In addition, the EU has set up a "neo-corporatist" system of participation, where socio-economic positions are "filtered" in the European decision-making process through sectoral interest committees. Similar interest-representing bodies operate in various IOs. Given the shortcomings of a global notice and comment procedure, outlined above, what if this pluralistic model were to be combined with or supplemented by a neo-corporatist paradigm? What are the pros and cons of each option? Does the EU composite system provide us with any meaningful indications in this regard?

5. *Further Reading*

a. O.B. AREWA, "Financial Market and Networks – Implications for Financial Markets Regulation", 78*University of Cincinnati Law Review* 613 (2009-2010);
b. M.S. BARR, G.P. MILLER, "Global Administrative Law: The View from Basel", 17 *European Journal of International Law* 15 (2006);
c. A. BLUNDELL-WIGNALL, P. ATKINSON, "Thinking Beyond Basel III: Necessary Solutions for Capital and Liquidity", May 2010, in *OECD Journal: Financial Market Trends*, 2010 (www.oecd.org/dataoecd/42/58/45314422.pdf);
d. J. CARUANA, "Regulatory reform: remaining challenges", 7 July 2011 (http://www.bis.org/speeches/sp110711.htm);
e. M. DE BELLIS, "Global Financial Regulation. The Challenges Ahead and GAL", in *Global Administrative Law: An Italian Perspective*, EUI Robert Schuman Centre For Advanced Studies (RCSAS) Policy Papers 2012/04, p. 41 ss. (http://cadmus.eui.eu/bitstream/handle/1814/22374/RSCAS_PP_2012_04.pdf?sequence=1);
f. M. DE BELLIS, *La regolazione dei mercati finanziari*, Milano (2012);
g. R. J. HERRING, "The Rocky Road to Implementation of Basel II in the United States", 35 *Atlantic Economic Journal* 411(2007);
h. E.J. PAN, "Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks", 11 *Chicago Journal of International Law* 244 (2010);
i. K. RAUSTIALA, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", 43 *Virginia Journal of International Law* 1 (2002);
j. M. SAVINO, "The Role of Transnational Committees in the European and Global Orders", 6 *Global Jurist Advances* (2006) (http://www.bepress.com/gj/advances/vol6/iss3/art5);
k. D. TARULLO, *Banking on Basel: The Future of International Financial Regulation*, Peterson Institute, Washington D.C. (2008);
l. A.M. SLAUGHTER, "Global Government Networks, Global Information Agencies, and Disaggregated Democracy", in K.-H. LADEUR (ed.), *Public Governance in the Age of Globalization* (2004), p. 133 et seq.;
m. P.-H. VERDIER, "US Implementation of Basel II: Lessons for Informal International Lawmaking", in J. PAUWELYN, R. WESSEL, J. WOUTERS (eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, Oxford (2012);
n. P.-H. VERDIER, "Transnational Regulatory Networks and Their Limits",

34 *Yale Journal of International Law*113 (2009);

o. D. WOOD, *Governing Global Banking. The Basel Committee and thePolitics of Financial Globalization*, Aldershot, Ashgate Publishing (2005)

p. D. ZARING, "Informal Procedure, Hard and Soft, in International Administration", 5 *Chicago Journal of International Law* 547 (2005);

q. D. ZARING, "International Institutional Performance in Time of Crisis", 10 *Chicago Journal of International Law* 474 (2010).

I.D.5 IOSCO: "Democracy" vs. "Leadership" in the Transnational Regulation of Finance?

Maurizia De Bellis

1. *Background*

The International Organization of Securities Commissioners (IOSCO) was established in 1983. It was built on the existing Interamerican Association of Securities Commissions, which dated back to 1974 and was then re-organized on a worldwide basis. Incorporated as a non-profit corporation in Quebec with its secretariat in Montreal, in 1999 it moved its headquarters to Madrid.

Together with the Basel Committee on Banking Supervision (BCBS; see § I.D.4 "An Unaccountable Trans-Governmental Branch? The Basel Committee" by M. Savino and M. De Bellis), the IOSCO is one of the most well known examples of a transgovernmental regulatory network (TRN): organizations composed of sub-units of different governments but not controlled or closely guided by the policies of the cabinets or chief executive of those governments, consisting rather of informal and loose cooperation between domestic regulatory authorities.

IOSCO has two more features in common with the more famous banking TRN. First, similar to the BCBS (set up after the *Bankhaus Herstadt* crisis), the IOSCO was established shortly after the *Banco Ambrosiano* collapsed. Second, its legal basis is uncertain. Contrary to the BCBS – which does not have a specific statute – the IOSCO's objectives and structures are set out in its bylaws (even if these are not published on the organization's website).

IOSCO has four main objectives:

a) *cooperation:* national securities authorities aim to cooperate to promote high standards of regulation in order to maintain just, efficient and sound markets;
b) *exchange of information*: to exchange information on their respective experiences in order to promote the development of domestic markets;
c) *standard setting*: to unite their efforts to establish standards and an effective surveillance of international securities transactions;

d) *mutual assistance*: to provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses.

TRNs are usually established with the main purpose of fostering cooperation among their members; standard-setting functions are assigned later. The evolution of the BCBS followed this trajectory. In the case of IOSCO, however, standard setting has been included among the Organization's objectives since its inception. A possible explanation might be that when the IOSCO was established, the first BCBS standard, the Concordat, was already in place: the TRN for securities may well have taken into account the experience of its banking counterpart in establishing its own tasks.

One function not included in IOSCO's objectives from the beginning was the harmonization of accounting standards, added during the Organization's annual conference in 1987. During the 1990s, however, a private organization, the International Accounting Standard Committee (later renamed as the International Accounting Standard Board (IASB): see § II.A.4 "Public Accountability of a Global Private Regulator: the IFRs Foundation Ongoing Constitution Review, the IASB and the Monitoring Board" by M. De Bellis) established itself as the global standard setter for accounting, and the IOSCO formally endorsed its activity.

Some commentators have claimed that the banking TRN is not only more famous than that for securities, but also much more effective. This has been explained on the basis of the different membership of the two organizations: while the Basel Committee's membership is restricted to G20 banking regulatory authorities (since 2009; until then, only G10 authorities were admitted), the IOSCO, with its universal membership, is considered to be an example of "democracy" in global financial governance. In turn – it has been argued – the IOSCO lacks the effectiveness of its counterpart for banking. A closed membership is considered to be a factor strengthening the Basel Committee's "leadership".

Data relating to IOSCO's structure and activities suggest that this evaluation should be partly reassessed: the dichotomy in the structure of the two networks is less strong than it initially appears, and IOSCO's activity includes not only standard-setting, but also cooperation with other global regulators. Since the global financial crisis, the number of IOSCO standards has increased, rather than diminishing. In turn, accountability concerns are not significantly less pressing for the Securities TRN than for the more famous Basel Committee.

2. *Materials and Sources*

- *International Organization of Securities Commissioners* (http://www.iosco.org/);
- IOSCO, *Structure of the Organization* (http://www.iosco.org/about/index.cfm?section=structure);
- IOSCO, *Consultation Policy and Procedure*, April 2005 (http://www.iosco.org/library/pubdocs/pdf/IOSCOPD197.pdf).
- IOSCO, *Membership Categories and Criteria* (http://www.iosco.org/about/index.cfm?section=membership);
- IOSCO, *Technical Committee invites Brazil, China and India to join its membership*, 19 February 2009, IOSCO/MR/002/2009 (http://www.iosco.org/news/pdf/IOSCONEWS136.pdf);
- IOSCO, *Resolution of the Presidents' Committee on IASC Standards*, May 2000 (http://www.iosco.org/library/index.cfm?section=resolutions);
- IOSCO, *Objectives and Principles of Securities Regulation*, 2010 (https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf);
- IOSCO, *Code of Conduct Fundamentals for Credit Rating Agencies*, Report of the Technical Committee of IOSCO, May 2008 (http://www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf);
- *The Role of Credit Rating Agencies in Structured Finance Markets – Final Report,* Report of the Technical Committee of IOSCO, May 2008 (http://www.iosco.org/library/pubdocs/pdf/IOSCOPD270.pdf);
- IOSCO, *Regulation of Short Selling*, Report of the Technical Committee of IOSCO, 19 June 2009 (http://www.iosco.org/library/pubdocs/pdf/IOSCOPD292.pdf);
- IOSCO, *Hedge Funds Oversight*, Report of the Technical Committee of IOSCO, 22 June 2009 (http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf);
- IOSCO, *Unregulated Financial Markets and Products*, Report of the Technical Committee of IOSCO, 4 September 2009 (http://www.iosco.org/library/pubdocs/pdf/IOSCOPD301.pdf)

3. *Analysis*

As mentioned above, IOSCO has universal membership (while that of the BCBS is restricted). IOSCO members represent more than one hundred jurisdictions and 95% of the world's securities markets.

There are three categories of membership within IOSCO: ordinary (open to primary securities regulators), associate (a public regulatory body with competence over aspects of securities, if another national regulatory body is already an ordinary member, and any other eligible body with an appropriate responsibility for securities regulation) and affiliate (a self-regulatory body (SRO), or an international body, with an interest in securities regulation).

The structure of IOSCO includes a Presidents' Committee, with tasks similar to those of a general assembly, and an Executive Committee, which is the executive decision-making body.

There are also a number of committees, the most relevant of which are the Technical Committee and Emerging Markets Committee, which perform similar functions: this is where standards are first proposed and drafted, even though the Presidents' Committee and the Executive Committee are competent for their final approval. Yet, their composition is different, the Technical Committee being smaller and representing the securities regulators of advanced economies, while the Emerging Markets Committee brings together authorities from emerging economies. In February 2009, in the aftermath of the spread of the global financial crisis and when the G20 was emerging as the new forum for international cooperation (its London summit took place shortly afterwards), Brazil, China and India were invited to join the Technical Committee.

Not only does the composition of the Technical and the Emerging Markets Committee differ, but also their respective significance in IOSCO's standard setting activity does also. The number of standards emanating from the first Committee is much higher than those drafted by the second (in 2011, the IOSCO Technical Committee published seventeen reports, and the Emerging Markets Committee only two).

The existence of the Technical Committee shows that the opposition between BCBS (with a limited membership, and hence an example of "leadership") and IOSCO (with its more "democratic" universal membership) is less strong than usually claimed: there is a club within the "democratic" TRN for securities, and it is within this smaller club that major decisions are taken.

As for the activity of IOSCO, there are at least two aspects that must be taken into account in order to assess its effectiveness: its standard-setting, and its influence upon other global regulators.

From the latter point of view, it must be recalled that, during the 90s, IOSCO effectively influenced the global private standard setter for accounting, the IASC (now IASB). In 2000, IOSCO formally endorsed the international accounting standards (IAS) then drafted by the IASC, stating that "the Presidents' Committee recommends 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". This endorsement, however, was conditioned on a number of prerequisites. In order secure the endorsement, the transnational network forced the private organization to revise some of its own standards and to follow some due process requirements (such as the duty to give reasons). Hence, the role IOSCO has been playing in global financial governance is significant, not only as a standard-setter, but also as a coordinator of other bodies, such as the IASC.

The standard-setting activity of the IOSCO has also been increasing over time: in 1989, the network only produced two standards, while it now publishes twenty documents per year, on average, for a total of more than three hundred standards and guidelines.

Some of IOSCO's most well known standards are the Objectives and Principles of Securities Regulation, drafted in 1998 upon request of the G7 and revised in 2003 and in 2010. Among other things, IOSCO's Principles set forth conditions for the independence and the organization of domestic securities regulators, specifying that "1. The responsibilities of the Regulator should be clear and objectively stated; 2. The Regulator should be operationally independent and accountable in the exercise of its functions and powers; 3. The Regulator should have adequate powers, proper resources and the capacity to perform its functions and exercise its powers; 4. The Regulator should adopt clear and consistent regulatory processes; 5. The staff of the Regulator should observe the highest professional standards, including appropriate standards of confidentiality; 6. The Regulator should have or contribute to a process to monitor, mitigate and manage systemic risk, appropriate to its mandate; 7. The Regulator should have or contribute to a process to review the perimeter of regulation regularly; 8. The Regulator should seek to ensure that conflicts of interest and misalignment of incentives are avoided, eliminated, disclosed or otherwise managed".

IOSCO's Objectives and Principles are one of the twelve key standards for financial stability, highlighted within the Financial Stability Board (FSB) Compendium of Standards and used by the International Monetary Fund (IMF) and the World Bank in their Reports on the Observance of Standards and Codes (ROSCs), aimed at assessing compliance with global financial standards.

Another significant example among IOSCO's standards is the Code of Conduct Fundamentals for Credit Rating Agencies (CRAs), intended to reduce the risk of conflict of interests in the activity of these companies (see § II.A.3 "Regulating the Raters. Toward Convergence in the Discipline of Credit Ratings" by E. Cavalieri). Albeit extremely controversial in its content, and hence revised in the aftermath of the global financial crisis, it has been used as a common basic standard for recent European and US regulation on CRAs, which seem to build

on the general provisions of the global Code, specifying them and making them stricter. Also under this regard, therefore, the role played by IOSCO is noteworthy.

After the crisis, the areas in which IOSCO has been most active – often following the recommendations of the G20 and the FSB – are short selling, the regulation of hedge funds and unregulated financial markets and products. Even if the G20 and the FSB play now a pivotal role in global financial governance, IOSCO is still a key actor in it.

Given the structure of IOSCO – which is less inclusive than it might at first appear, due to the nesting of smaller committees with relevant standard-setting functions within it – and because of the significant role it plays within global financial governance, the accountability of the network must – in a manner similar to the previously-discussed BCBS (see § I.D.4 "An Unaccountable Trans-Governmental Branch? The Basel Committee" by M. Savino and M. De Bellis) – be attentively scrutinized.

For IOSCO also, therefore, one way of fostering its accountability would be through strengthening due process guarantees within the Organization. The BCBS went from being extremely secretive to opening up its standard-setting procedure, through the use of extensive notice and comment. Yet this evolution is still characterized by serious limitations: participation within BCBS' procedure is granted on a case by case basis, and hence varies over time and across standards. The procedure for the setting of standards other than those relating to capital requirements is not as open. Moreover, participation is unpredictable.

The IOSCO has gone one step further in amending its own due process requirements, but perhaps not yet far enough. In 2006, IOSCO published its Consultation Policy and Procedure, where it identified some key elements of its own procedure. First, the objectives of participation are set out: by allowing comments on its drafts, the Organization aims to gain expertise and substantive input, and to promote transparency along with its own role in financial governance more generally.

Second, IOSCO has adopted a flexible approach: it does not bind itself to a specific procedure, but it specifies the factors that it will take into account in determining whether to seek public consultation on work projects. These factors are: "the scope and applicability of the work project, including whether the work project is targeted to particular users or participants in the markets; the extent to which the application of the work project will affect the business practices of regulated entities; the extent to which technical or industry-specific information is necessary to the articulation of appropriate conclusions in a report or any associated principles or regulatory standards that will be adopted as part of a report; the likelihood that other international, regional or domestic bodies are

considering, or planning to consider, similar or related issues; the degree to which public comment from the international financial community will otherwise contribute to the fulfillment of the objectives of the work project; the practicality of requesting comments and the urgency of the need for an IOSCO response; the existence of any confidentiality concerns". In any event, IOSCO specifies that, as a general rule, "work projects that contemplate the issuance of international standards and principles for the securities sector will generally include the conduct of a public consultation as part of the project". Hence, the transnational network still has a discretionary power in granting participation, even though it limits its own discretion by setting *ex ante* the conditions for its exercise.

When IOSCO follows the procedure set forth in the Consultation Policy, it provides for broad participation: the category of "interested parties" who can participate covers the full spectrum of the international financial community, and the procedure can include three periods for comments. Along with the principles of participation and transparency, IOSCO has also established a duty to give reasons, as its final decision must give a summary explanation of how the public comments it has received have been addressed.

4. *Issues*

IOSCO seems to be less well known than its banking counterpart not because of a weaker structure or because it has elaborated fewer standards, but because the area in which it operates was, until recently, less controversial. Proof of the relevance of its activity can also be found in the number of documents in which the G20 and the FSB have recently called for action from this network.

The structure and the functioning of the IOSCO seem to address many of the concerns usually raised about TRNs better than do those of the BCBS: IOSCO's universal membership (despite the limitations due to the composition of its internal committees) guarantees more inclusiveness than the limited one of the BCBS; and, moreover, IOSCO has established clear rules on its own due process, while the banking network still decides on a case by case basis.

5. *Further Reading*

a. J. DIPLOCK, Chairman of the Executive Committee, *IOSCO – A Global Standard Setter*, Speech at the Hong Kong Special Administrative Region,

May 11 2006;

b. E.J. PAN, "Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks", 11 *Chicago Journal of International Law* 243 (2010);

c. A.A. SOMMER JR., "IOSCO: Its Mission and Achievement", 17 *Northwestern Journal of International Law & Business* 15 (1996 – 1997);

d. G. TANZER, *Secretary General*, *The International Organization of Securities Commissions: coordinating securities regulators' response to managing systemic risk in a post-crisis world*, 2010 (http://www.law.harvard.edu/programs/about/pifs/symposia/europe/2010-europe/briefing-book/concept-papers/tanzer.pdf);

e. P.-H. VERDIER, "Transnational Regulatory Networks and their Limits", 34 *Yale Journal of International Law* 113 (2009);

f. D. ZARING, "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations", 33 (2) *Texas International Law Journal* 281 (1998);

g. D. ZARING, "Informal Procedure, Hard and Soft, in International Administration", 5 *The University of Chicago International Law Journal* (2005) (http://ssrn.com/abstract=692764).

I.D.6 Challenging Bureaucratic Inertia: The Multilateral Fund for the Implementation of the Montreal Protocol

Francesco Albisinni

1. *Background*

In 1974 a group of scientists developed for the first time a hypothesis about the correlation between the human emission of certain gases, in particular chlorofluorocarbons (CFCs) and halons, and the erosion of the ozone layer. The ozone layer, a sheet of O3 molecules, provides protection against the ultraviolet radiation of the sun and against temperature increases in the stratosphere. The identified gases, used commonly as refrigerants, air conditioner coolants, and in aerosol-spray cans, were previously considered harmless for mankind and environment. Scientists noticed, however, that these gases rise near the ozone layer, where ultraviolet rays break them down, releasing chlorine and bromine that erode the ozone layer.

The issue was included as a matter of urgency in the agenda United Nation Environment Programme, which drafted a global convention on protection and preservation of the ozone layer. Subsequently the Vienna Convention for the Protection of the Ozone Layer was agreed in 1985. The Convention constitutes a framework agreement, under which the parties commit to mutual co-operation in legal, scientific and technical assistance to address the ozone problem, supporting research on the ozone layer, and agreeing to adopt "appropriate measures" to reduce or prevent activities that have a negative impact on the ozone layer. Consistent with the nature of the framework agreement, the Vienna Convention contains only general principles and obligations for the parties, and does not establish specific limits in the emission of Ozone Depleting Substances (ODS); and neither does it require the achievement of predetermined objectives.

Within the framework provided by the Vienna Convention, the Montreal Protocol on Substances that Deplete the Ozone Layer (MP) was adopted in 1987 and became binding, according to international law, in 1989. The MP establishes specific limits for the consumption and production of several types of ODS

chemicals, requiring State parties to implement control measures on these substances, and foresees a dynamic evolution of the agreements, establishing a time period for the progressive reduction of consumption and production of ODS, until the final phase-out.

The MP represented two notable departures from previous international agreements. First of all it was one of the first international environment agreements to impose trade sanctions to achieve its goals. The unprecedented agreement to impose such sanctions against states not complying with the established thresholds resulted from the perceived importance and urgency of the ozone issue, which required effective enforcement at the global level.

It was also the first case at the global level where the principle of "common but differentiated responsibility" was reflected in an international agreement. According to this principle, although all countries are responsible for environmental issues, developed countries, which have contributed the most to the current problem, are required to contribute to a greater extent to solving it. This principle also takes into account the legitimate right of developing countries to economic growth and sustainable development.

This principle was initially reflected in the provision of Article 5 MP, according to which the developing countries (according to the MP, countries in which consumption of the controlled ODS was less than 0.3 kilograms per capita) enjoyed a grace period before the application of the obligations of the MP, and a longer period of time for the phase-out, due to financial, technical and institutional difficulties they faced and which wealthy nations did not share.

Notwithstanding these specific provisions, developing countries (especially India and China, two of the most important producers of ODS at that time) were not satisfied with the provisions of the MP (on specific aspects relating to environment and China, see § I.E.3 "Lobbying and Exporting Technology in Emissions Trading: Enel – China", by F. Lebensohn). They held the position that developed countries should pay all the incremental costs resulting from the prohibition of the use of ODS and for the technological progress necessary for the transition to the use of alternative substances. The MP instead included only some generic provisions about financial aid that the developed countries could give to developing countries. As a consequences of the distrust in the MP, the first version of the Protocol was only signed by forty-six States (and not ratified by all of these), a number absolutely inadequate to address the adverse effect on the ozone layer caused by the emission of ODS.

The MP was therefore modified, in June 1990 in London, during the second Meeting of the Parties of the MP. The most important feature of the London Amendment was the establishment of a financial mechanism, which was intended to cover all the incremental costs of developing countries to enable

their compliance with the control measures of the MP. The Parties intended that this complicated task be entrusted to a newly instituted Multilateral Fund. These new conditions persuaded a large number of States to implement the Montreal Protocol. The creation of the Multilateral Fund is today considered, 20 years after its establishment, the principal reason of the success of the Vienna Convention and of the MP (which were the first environment protection treaties to achieve universal ratification).

2. *Materials*

- Vienna Convention for the Protection of the Ozone Layer http://ozone.unep.org/new_site/en/Treaties/treaty_text.php?treatyID=1
- The Montreal Protocol on Substances that Deplete the Ozone Layer (http://ozone.unep.org/new_site/en/Treaties/treaty_text.php?treatyID=2
- The London Amendment (1990) - The amendment to the Montreal Protocol agreed by the Second Meeting of the Parties (London, 27–29 June 1990) (http://ozone.unep.org/new_site/en/Treaties/treaty_text.php?treatyID=3&secID=92);
- Report on the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Decision II/8: Financial Mechanism (UNEP/OzL.Pro.2/3) (http://ozone.unep.org/Meeting_Documents/mop/02mop/MOP-2-3e.pdf);
- Report on the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Decision IV/18: Financial Mechanism (UNEP/OzL.Pro.4/15) (http://ozone.unep.org/Meeting_Documents/mop/04mop/4mop-15.e.pdf);
- Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer, Eighth Edition (2009) (http://ozone.unep.org/Publications/);
- Multilateral Fund for the Implementation of the Montreal Protocol – Policies, Procedures, Guidelines and Criteria, July 2011 (http://www.multilateralfund.org/Our%20Work/policy/Shared%20Documents/Policy64.pdf);
- Multilateral Fund for the Implementation of the Montreal Protocol – Phase-out Plans and Projects, April 2011

(http://www.multilateralfund.org/Our%20Work/policy/Shared%20Documents/Policy63Plans.pdf);
- Report of the Sixty-fifth Meeting of the Executive Committee of the Multilateral Fund, 13-17 November 2011 (http://www.multilateralfund.org/65/English/1/6560.pdf).

3. *Analysis*

The Multilateral Fund for the Implementation of the Montreal Protocol (MLF) was established under the provisions of Article 10 MP, as modified by the London Amendment. To date, donor countries have provided funds totalling more than USD 2.9 billion, on the basis of a replenishment process scheduled every three years.

The MLF performs two main functions. First, it provides money to the developing countries, on a grant or concession basis, to the extent necessary to cover all the incremental costs that these countries incur in complying with the control measures of the MP, and in making the transition and technology changes necessary to produce and use non-ODS chemicals.

Second, the MLF assists developing countries in several ways. Specifically, it prepares and publishes specific country studies to identify particular areas for cooperation in developing countries; it provides technical cooperation to meet these identified needs; it disseminates information and holds workshops and training sessions to support developing countries; and it monitors further co-operation activities that involve developing countries.

These tasks are coordinated and supervised by the MLF Executive Committee, which develops the MF's policies and guidelines (like criteria for project eligibility), controls their implementation and takes the final decision in approving country programmes and specific projects.

The Executive Committee has fourteen members, who represent fourteen of the States parties to the MP. Membership is rotated every year, in accordance with a decision of the MP at a meeting of the Parties. The composition of the MLF Executive Committee seeks to ensure equal North-South representation, with half the members chosen from developed countries, and the remaining seven from developing countries. The voting mechanism is also structured in such a manner as to avoid disparity. The general rule is that decisions are taken by "consensus", therefore only when unanimity is reached. Whenever this is not possible, decisions are reached by a two-thirds majority vote representing individual majorities of each group, therefore ensuring that neither donors nor recipients can dominate the operations of the MLF.

To receive assistance, countries must submit for approval a "country program" on production and consumption of controlled substances, which sets out an institutional structure that will enable the country to comply with the obligations undertaken, and which also indicates a contact person for the country's program implementation. Since the institution of the MLF, many different projects have been supported in order to help to eliminate the use of ozone-depleting chemicals in many different fields, and a phase-out plan has been developed and approved for almost all developing countries.

There is no doubt that the activity of the MLF is one of the principal reasons that enables compliance with the obligations stemming from the MP. The activity of the MLF is not, however, primarily directed at ensuring compliance with MP obligations, rather, it seeks only to facilitate such compliance. The role of the MLF is to provide for the implementation of the MP indirectly, in a proactive way, and not through the activation of a non-compliance procedure (a task entrusted to a dedicated Implementation Committee). For this reason, the activity of the MLF (e.g. the decision of whether or not to award a grant to a developing country) is not directly linked to the situation of compliance or non-compliance with the MP of the State party concerned; decisions regarding the funding of projects are not related taken on this basis.

In this perspective the MLF is not just a tool for providing funds to developing countries. Instead, it provides concrete support to countries in the complicated tasks set out in the MP. It ensures technical assistance and encourages the switch to ozone-friendly technologies, by meeting all the incremental costs of the switch over and stimulating the development of alternatives; it encourages countries to develop goals and phase-out plans, and to establish regulations and policies to promote technology change; facilitates the establishment of national information focal points responsible for the fulfilment of the obligations that arise from the MP.

4. *Issues*

The case of the preservation of the ozone layer provides a global dimension to the pursuit of a genuinely public good. While pollution can be considered an environmental issue that can be addressed at national or regional level, ODS act on a global level. The global impact of this issue required a worldwide response, involving a consideration and balancing of different positions.

States that had not previously contributed to the erosion of the ozone layer, due to their limited use of ODS, had to be "convinced" to be part of the

solution. The solution, the creation of the MLF, contains a number of lessons for future initiatives.

One key for the effectiveness of the MP was that it reflected in its global regulatory regime and through the implementation of the MLF the economic and structural inequalities in terms of the North-South divide. Assistance was not merely financial but also included technological support, which was necessary for fulfilment of obligations under the MP.

The MLF also shows that compliance may be advanced through financial incentives rather than recourse to the historical tools of treaty enforcement. A proactive attitude was necessary in this context because of the seriousness of the situation. This proactive approach was characterized by a high degree of flexibility, reflected in the powers of the MLF Executive Committee, which has autonomous authority to determine the steps necessary to ensure the implementation of the MP (see also § I.E.2 "Rigidity and Flexibility in the Clean Development Mechanisms", by M. De Bellis).

The importance of the MLF in more general terms is that it exemplifies the transition from classic international law, where supra-national issues were almost exclusively addressed through the signature of international agreements, to an approach where the key to a solution's effectiveness lies in the administrative activity performed within the regulatory regime.

5. *Further Reading*

a. E. BROWN WEISS, H.K. JACOBSON (eds.), "Engaging Countries: Strengthening Compliance with International Environmental Accords", Massachusetts Institute of Technology Press, Cambridge (1998);
b. E.R. DESOMBRE, J. KAUFFMAN, "The Montreal Protocol Multilateral Fund: Partial Success Story", in R.O. KEOHANE, M.A. LEVY (eds.), *Institutions for Environmental Aid: Pitfalls and Promises*, Massachusetts Institute of Technology Press, Cambridge (1996), p. 87 et seq.;
c. D. KANIARU (eds.), *The Montreal Protocol: Celebrating 20 Years of Environmental Progress*, Cameron May, London (2007);
d. L. KELLY, *The Multilateral Fund for the Implementation of the Montreal Protocol: Addressing Challenges of Globalization: An Independent Evaluation of the World Bank's Approach to Global Programs: Case study*, The World Bank Operations Evaluation Department (2004) (http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/1F099B2068ADC1C285256F640069653D/$file/gppp_mlf_wp.pdf);

e. R. LUKEN, T. GROF, "The Montreal Protocol's Multilateral Fund and Sustainable Development", 56 *Ecological Economics* 241 (2006);
f. K. MADHAVA SARMA, K.N. TADDONIO, "The Role of Financial Assistance by the Multilateral Fund in Technology Change to Protect the Ozone Layer", in C. ZEREFOS, G. CONTOPOULOS, G. SKALKEAS (eds.), *Twenty Years of Ozone Decline*, Springer, Berlin-Heidelberg (2009), p. 441 et seq.;

I.E COMPLEX GOVERNANCE FORMS: HYBRID, MULTI-LEVEL, INFORMAL

I.E.1 The Great East Japan Earthquake: Disasters Risk Reduction and the Policy of the International Community

Stefano Nespor

1. *Background*

On 11 March 2011, an earthquake and a subsequent tsunami hit the Pacific coast of Japan. It was the most powerful earthquake ever to hit Japan, and one of the most powerful earthquakes to have occurred anywhere since accurate recording began, early last century.

Although Japan is well known throughout the world for the extensive precautionary measures it has adopted and implemented to limit the effect of earthquakes, the event caused several thousand deaths, the destruction of important infrastructure, damage worth more than 200 billion dollars, and a serious nuclear accident at the Fukushima I Nuclear Power Plant Complex.

The disaster, along with previous number of others in recent years (earthquakes in Chile and New Zealand, Hurricane Katrina in the US, to name just a few), shows that scientific progress and improvements in technology do not necessarily reduce the impact of such events. On the contrary, the damage caused by catastrophic events is steadily increasing: it was estimated to amount to 40 billion dollars in the 1960s, increasing to 120 billion dollars in the 1980s, and to more than 200 billion dollars in the first ten years of this century (due mainly to damage caused by Hurricane Katrina).

In fact, although in 1989 a UN Resolution declared 1991-2001 to be the International Decade for Natural Disaster Reduction (IDNDR) in order to raise awareness about the need to adopt risk reduction policies, and despite efforts at the national and international level, human and economic losses resulting from natural disasters are rising year on year.

Two other lessons can be drawn from the recent earthquake in Japan.

Firstly, that disasters will happen is predictable: UN statistics show that approximately every three weeks a catastrophe occurs somewhere in the world, often in countries that are wholly unable to cope with the human and economic consequences.

Secondly, there is much that can be done to reduce the damage and ensuing consequences. The former Secretary General of the UN, Kofi Annan, took the view that even if you cannot always prevent disasters, you should always be able to limit damage and death.

During the 1970s the UN established the Office of the United Nations Disaster Relief Coordinator to deal with relief and humanitarian aid: the UN Disaster Relief Organization (UNDRO).

In 1992, the office was merged into the Department of Humanitarian Affairs (DHA), based in Geneva and New York, and a new Secretariat was created, the International Strategy for Disaster Reduction (ISDR). Two year later, in May 1994, the ISDR organized a World Conference in Yokohama, the Yokohama conference on Disaster Reduction, where a Strategy and Plan of Action for a Safer World was adopted.

The Plan also marks an important change, encompassing not only natural but also industrial or environmental disasters, if they have an impact on the socio-economic and cultural system of the affected country. This change follows the approach of the European Union, where consideration has traditionally been focused on the prevention of relevant industrial accidents and the reduction of the ensuing risks (Seveso Directive 1 of 1976 and Seveso Directive 11 of 1994 are the key regulations covering these issues).

Over the years that followed, the Yokohama Plan has been frequently modified.

From 18 to 22 January 2005, in conformity with UN General Assembly Resolution 58/214 of 23 December 2003, a second conference, the World Disaster Reduction Conference (WDRC), was held in Kobe to update the Yokohama Strategy. There, 168 UN member states adopted the Hyogo Framework for Action (HFA), a 10-year plan to make the world safer from natural hazards. In order to implement the HFA, the World Meteorological Organization (WMO) has placed a Disaster Risk Reduction (DRR) Programme at the core of its mission.

The HFA describes the work that is required to reduce disaster losses, outlining five priorities for action:

1. Ensure that DRR is both a national and a local priority.

2. Identify, assess and monitor disaster risk, and enhance early warning systems.
3. Use knowledge, innovation and education to build a culture of safety and resilience at all levels.
4. Reduce underlying risk factors.
5. Strengthen disaster preparedness for effective response at all levels.

The goal of the HFA is to reduce loss of life, and losses in social, economic, and environmental terms by 2015, by improving the resilience of nations and communities to disasters.

The Hyogo Declaration, adopted as a conclusion of the Conference, states that "States have the primary responsibility to protect the people and property on their territory from hazards, and thus, it is vital to give high priority to disaster risk reduction in national policy", before going on to acknowledge the "intrinsic relationship between disaster reduction, sustainable development and poverty eradication, among others, and the importance of involving all stakeholders, including governments, regional and international organizations and financial institutions, civil society, including non-governmental organizations and volunteers, the private sector and the scientific community".

The Hyogo Conference, held a few weeks after the Indian Ocean earthquake and tsunami of 26 December 2004 that hit many countries in South-East Asia, set in motion the creation of an agency to deal with the huge humanitarian problems in the aftermath of the tsunami. The Tsunami Evaluation Coalition (TEC) was formally established in February 2005. It comprised more than 50 agencies, including the United Nations, donors, non-governmental organisations and the Red Cross. Its task was to carry out joint evaluations of the response to the disaster in the relief and development sector. The goal was to improve policy and practice in the relief and rehabilitation sector; to provide accountability to the public, and to improve evaluation in the relief and rehabilitation sector by learning from the TEC process itself.

2. *Materials: Norms and Relevant Documents*

- History of Natural Disasters (in French) (http://www.linternaute.com/histoire/categorie/117/a/1/2/histoire_des_catastrophes_naturelles.shtml);
- U.N. Economic and Social Council – Resolution 1994/31 (http://www.un.org/documents/ecosoc/res/1994/eres1994-31.htm);

- World Disaster Reduction Conference (WDRC) and Hyogo Declaration (http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=392&ArticleID=4707&l=en) and (http://www.unisdr.org/2005/wcdr/wcdr-index.htm);
- World Meteorological Organisation (WMO)Disaster Risk Reduction Programme (http://www.wmo.int/pages/prog/drr/);
- Tsunami Evaluation Center (http://itic.ioc-unesco.org/);
- Tsunami Evaluation Coalition, Synthesis Report: Expanded Summary, Joint evaluation of the international response to the Indian Ocean tsunami (http://www.alnap.org/resource/5536.aspx);

3. *Analysis*

Over the last 50 years, mainly as a consequence of the efforts of the international community to promote action by national governments, the traditional perception of disasters has changed in four relevant ways.

Firstly, disasters, traditionally considered as "acts of God" and as divine retribution for the sins of the population concerned (a belief still widely held), have been increasingly treated as events whose impact on people and property can be reduced by adopting preventive measures, and coordinating efforts at relief and rebuilding after the event.

Secondly, the distinction between natural and man-made disasters has become much less clear. In fact, in both types there are manmade *effects:* the consequences on population and property depend mainly on human activities or omissions before the disaster, (prevention, precaution and information), or afterwards (relief, aid organization). Moreover, in many cases the distinction itself is inconsistent: disasters often combine *causes* both natural and technological: the Yokohama Conference introduced the term "natech" to describe such situations. Two examples illustrate this point.

Hurricane Katrina was a natural phenomenon. But the subsequent disaster was largely created by human activity and development. The flood was also caused by negligent maintenance of the canal levees and the old flood control system; and, after the hurricane hit, by the slow response and lack of preparation of the local and federal authorities, and the lack of coordination with other relief organizations. If preventive measures and subsequent action had been more effective, the number of victims and the extent of the damage would probably have been much more limited.

The second example is that of the climate. Climatic events are natural phenomena. Yet, the present scale of these events in both frequency and intensity, indicate that the climate is changing, and this is being caused by human activities – primarily the emission of carbon dioxide and other greenhouse gases, the accumulation of which has gradually altered the composition of the atmosphere. What at first glance appears to be a natural event is, on the contrary, mainly a consequence of human development.

In both cases, the disaster is the result of an interaction between natural and human causes.

Thirdly, there is an increasing awareness that disasters, although very different (earthquakes, floods, the outbreak of an epidemic, the explosion of a chemical plant, the derailment of a train), have something in common. This has led to the development of a specific discipline: kindunology, a science studying the social and economic aspects of disasters (many think that the forerunner to this discipline was Samuel Henry Prince, with the publication of his *Catastrophe and Social Change* at the beginning of the last century).

Fourthly, there is also an awareness now that very similar disasters may produce hugely different effects in relation to the social and economic situation of the affected area. The reason poor countries generally incur the greatest damage is due to the lack of adequate preventive measures, the lack of efficient organization and infrastructure at local and national level, and the lack of adequate financial means to supply aid to the affected areas. Disaster reduction policies have therefore emerged as a fundamental element of sustainable development.

4. *Issues*

Two main issues concerning the effects of disasters are worthy of consideration.

The first relates to the long-term economic effects of disasters. Contrary to common belief, recent research shows that in the rich world disasters do not necessarily have negative effects on economic growth, as generally happens in the poorest countries.

In fact, they may even have positive effects, offering an opportunity to update the capital stock and fostering the substitution of old infrastructures with new technologies. This is known as the "jacuzzi effect". Again, Japan illustrates this Schumpeterian "destructive creativity": in 1995 the city of Kobe and the nearby harbor (the sixth in the world in terms of naval traffic) were completely destroyed by an earthquake. After a year the traffic in the harbor and the associated industrial activity were as intense as before the earthquake.

The second issue worthy of consideration relates to responsibility.

The increasing attention paid to the technological and manmade effects of catastrophic events has eroded the "act of God" view, according to which disasters were regarded as unforeseeable, and as occurrences for which nobody could be held accountable. As the link between human activity and climatic disasters has grown, so has the demand for accountability, and the related search for legal responsibility and liability.

It is not simply the climatic or geophysical hazard which kills: it is the political, economic and social structures which determine the vulnerability of the population that bear responsibility.

This shift of attitude, common to all the countries of the rich world, is reflected in many concurrent trends: the expansion of the principles of legal responsibility into new areas, the perceived unfairness of leaving the damages to be borne exclusively by the victims, and a general increase in risk aversion.

Consequently, many believe that where governments have failed to prevent, or mitigate the worst effects of natural disasters, the governments involved may be considered to have violated the human rights of the victims. If this can be established, then the international community would have a specific "responsibility to protect" lives, not only in the circumstances of genocide, war crimes, ethnic cleansing and crimes against humanity, but also in situations in which aid is not provided to victims of a natural or manmade disaster by the responsible government.

5. *Further Reading*

a. J.C. CUARESMA, J. HLOUSKOVA, M. OBERSTEINER, "Natural disasters as Creative Destruction? Evidence from Developing Countries" 46 *Economic Inquiry* 214 (2008);
b. L.GROW SUN, "Disaster Mythology and the Law", 96 *Cornell L. Rev.* 1131 (2011);
c. M. SKIDMORE, H. TOYA, "Do Natural Disasters Promote Long-run Growth?", 40 *Economic Inquiry* 664 (2002);
d. M. WAHLSTROM, "Disaster Risk and its Reduction: Who Is Responsible?", 33 *The Fletcher Forum of World Affairs Journal* 153 (2009).

I.E.2 Rigidity and Flexibility in the Clean Development Mechanism

Maurizia De Bellis

1. *Background*

Established under Article 12 of the Kyoto Protocol (Joint Implementation and Emissions Trading are established under Articles 6 and 17, respectively), the Clean Development Mechanism (CDM) provides for a mechanism under which an Annex I party can earn carbon credits (Certified Emission Reductions (CER)) for an investment in an emission-reduction project in developing countries (see also § I.E.3 "Lobbying and Exporting Technology in Emissions Trading: Enel – China", by F. Lebensohn). These CERs can be used by industrialized countries to meet part of their emission reduction targets under the Kyoto Protocol, or they can be traded and sold on a secondary market (the financial market for spot future and options transactions for CERs).

The aim of the CDM, as clearly stated in Article 12 of the Kyoto Protocol, is twofold: on the one hand, to assist Annex I countries in achieving compliance with their reduction commitments, and, on the other hand, to contribute to sustainable development in developing countries.

The CDM emerged late in the negotiations at the third session of the UN Framework Convention on Climate Change (UNFCCC) Conference of the Parties (COP), and because of this and of the speed of with which consensus was achieved it was soon labeled as the "Kyoto surprise". It is the result of a compromise between developed countries – anxious to get access to lower-cost emission reductions in developing countries – and developing ones – eager to get additional financing for development.

It is considered a great success: by April 2012, it had registered more than 3,000 projects, and it is expected to create carbon credits equivalent to more than 2.7 billion tons of greenhouse gas emission reduction by 2012. In 2007 and 2008, the CDM primary market reached the value of USD 15 billion. Considering the primary CDM and the secondary CDM together, financial flows in the CDM market have continued to grow, notwithstanding the financial turndown, reaching a total volume of USD 33 billion.

CDM success is built on a drastic change in the paradigm of support for

developing countries under environmental agreements, leading to the involvement of developing countries in the Kyoto Protocol (even though, as it has been pointed out, the geographical balance of the countries taking advantage of the financial flows is biased, as projects counterpart are, in the majority of cases, China, Brazil and India, and countries in Sub-Saharan Africa are seldom involved).

A key feature of the CDM is that it relies heavily on markets and private actors' involvement. Emission reductions achieved through CDM generate tradable emission credits that can be used by Annex I parties in meeting their emission targets. Because the credits generated are used for compliance purposes, they are subject to third-party validation and verification, aimed at checking the effectiveness of the emission reduction project. As much as it is a key component of its success, however, markets' and private actors' involvement has recently been criticized, as it risks undermining the effectiveness of the mechanism.

A general critique against the CDM highlights the fact that its very success has raised expectations, and that, in order to cope with the rapidly growing volume of work, the mechanism needs more resources than it actually has available it. More specific critiques, though, argue that the CDM fails to pursue one of its two objectives, as its operation is seldom conducive to sustainable development; on the contrary, this goal is widely considered to be in potential conflict with that of pursuing the cheapest emission reductions. Second, its effectiveness in achieving emission reductions has also been attacked, mostly because of the controversial functioning of the so-called "additionality test", which – in the absence of a cap for emissions – is absolutely central to the success of the regime in achieving the reduction of the emissions.

The limits of the structure of the CDM cycle and its decision-making process are alleged to have undermined the effectiveness of the mechanism itself. A closer look at the functioning of the CDM cycle is necessary, in order to evaluate the balance between rigidity and flexibility that it strikes and to assess its likely impact on emission reductions.

2. *Materials and Sources*

- *Clean Development Mechanism* (http://cdm.unfccc.int/about/index.html);
- UNFCC COP/MOP, *Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol*, Decision 3/CMP.1, FCCC/KP/CMP/2005/8/Add.1, 30 March 2006 (http://unfccc.int/resource/docs/2005/cmp1/eng/08a01.pdf#page=6);

- CDM EB, Annex 2, Procedure For Accrediting Operational Entities by the Executive Board of the Clean Development Mechanism (CDM), (Version 10.1) (http://cdm.unfccc.int/Reference/Procedures/accr_proc01.pdf);
- CDM EB, Procedures for Request for Registrations of Proposed CDM Project Activities (http://cdm.unfccc.int/Reference/Procedures/reg_proc07.pdf);
- CDM EB, Tool for the demonstration and assessment of additionality, EB 39, Version 5.2, 2008 (http://cdm.unfccc.int/methodologies/PAmethodologies/tools/am-tool-01-v5.2.pdf);
- The CDM in numbers (http://cdm.unfccc.int/Statistics/index.html).

3. *Analysis*

The CDM relies on a multi-stage process for the review of projects and resulting emission reductions. There are eight main stages. First, the project developer has to present a *project design document* (PDD), including an explanation of its purpose and a technical description. Moreover, at this stage the proposed baseline methodology to be used for assessment in the following stages must be indicated. Second, in order to be considered for validation, the project must be *approved* by the designated national authority (DNA) of the host country involved, confirming that the project activity assists it in achieving sustainable development. After this approval, the PDD goes through a *validation* stage, in which a *designated operational entity* (DOE) – a legal entity accredited and designated by the CDM Executive Board (EB) – independently evaluates whether a project meets the CDM requirements. If the DOE considers the project to be valid, it submits to the EB a request for *registration*. Once a project is registered, the project participant (PP) provides a *monitoring report* – including all relevant data for measuring emissions occurring within the project area during the crediting period and all the control procedures put in place during the project activity – to a second DOE, in charge of the verification of the project. *Verification* is a periodic independent review, in which the DOE reviews monitoring results, on the basis of the data provided but also seeking additional information and performing on-site inspections, and subsequently *certifies* the amount of emission reductions achieved by the project, during a given time period, that would not have occurred in its absence. When a project's actual emission reductions or removals are verified and certified by the DOE, a request for *issuance* of CERs equal to the

verified amount of reductions is transmitted to the CDM Executive Board. While a share of the proceeds is subtracted to cover administrative expenses, and 2% of the CERs finance the Adaptation Fund, the remaining credits are issued in the CDM registry, from which they are distributed to the accounts of project participants.

There are numerous very diverse bodies involved in the CDM cycle. As the CDM was established under Article 12 of the Kyoto Protocol, the first entity to be taken into account is the "Conference of the Parties serving as the Meeting of the Parties" (the COP/MOP) to the Protocol, which is its governing body. Second, the Executive Board (EB), a subsidiary body working under the authority and guidance of the COP/MOP, is responsible for day-to-day activities, including both a rulemaking (such as approving new methodologies on subjects such as new baselines and monitoring plans) and adjudication role (as it is responsible for accrediting the DOEs and for developing and maintaining the CDM registry).

A pivotal and controversial role is played by the DOEs, which carry on two fundamental activities within the CDM cycle: the validation of the proposed projects, leading to their registration by the EB, and, later on, the verification on the actual implementation of the projects. The DOEs can be looked at as performing administrative functions at the global level. The DOEs – being private firms, most of which are large multinational corporations, specialized in consulting, certification and standardization – correspond to the "private administration" model.

At first, criticisms focused on the low number of DOEs, which raised the risk of oligopoly, thus compromising the independence of their judgments. Concerns of this sort seem, however, to have become less meaningful in recent years, which have seen a significant increase in the number of these bodies. The market for validation and verification has become more competitive, which has reduced not only prices but also the average time that a DOE spends in validating a project, giving rise to concerns over the accuracy of the verification process. The core problem concerning DOEs is not related to the number of such entities, but to the potential conflict of interests entailed in the type of activity they perform and the source of their financing: being private firms which are paid by the project developers, their interest in maximizing profits could lead to a loose interpretation of the regulations concerning the criteria for validation and verification.

The CDM architecture puts in place several mechanisms to avoid this risk. One of the measures intended to ensure that the DOEs would not approve projects simply in order to increase profits is the general rule concerning the separation between the two activities that a DOE is entitled to perform: the

DOE responsible for verifying the project and certifying that the reductions have actually taken place must be different from the DOE which validated the project in the first place. Yet, there is an exception to this rule, and it seems to have been used very often.

Apart from this attempt to separate the two types of activities, the CDM structure aims at ensuring that the DOEs are accountable to the EB: in order to perform validation and registration within the CDM project cycle, DOEs have to be accredited by the EB, which therefore checks whether the entity in question meets the accreditation criteria.

Several remedies to enhance the accountability of the DOEs have been suggested. Given that the majority of concerns relate to the possible conflicts of interests (and the resulting risk of a lack of thoroughness in the verification process), those proposals that seek to reduce the potential for such conflicts to arise are likely to be effective.

The CDM's shortcomings do not depend only on its structure (such as on the independence of the DOEs), but also from the methodologies being used to evaluate the (potential and actual) emission reductions achieved by the projects. In the CDM project cycle, there are two phases in which the impact of the project is measured: validation looks at the potential impact of projects that still have to be approved, while verification focuses on measuring actual emission reductions. A number of elements of the validation and verification procedures have been criticized. For instance, the lack of predictability in the procedure has led to increasing discontent among the private parties affected by the decisions, giving rise to numerous threats of legal proceeding from project participants.

Validation and verification aim at checking whether the project concerned will lead, or has led, to emission reductions that are "additional" to those which would have occurred in its absence. The importance of these procedures in the CDM cannot be overstated: as its goal is, in part at least, to provide a means for developed countries to meet their reduction commitments by gaining "credits" for projects in developing countries, if the amount of credits (CERs) issued as a result of the additionality test outweighs the actual emission reductions achieved, then the CDM itself would lead to an overall increase in the total amount of emissions. Hence, the proper functioning of validation and verification is crucial for the environmental integrity of the mechanism. The EB periodically updates a *Tool for the demonstration and assessment of additionality*, setting out methods to be followed in assessing additionality.

The additionality requirement is controversial. The crucial point seems to be that any additionality test needs to be conducted against a *baseline*: the amount of GHG emissions that would have existed if the project had not been implemented (on such kind of emissions in the context of a domestic

programme, see § I.E.4 "The Californian 'Clean Cars Law': Global Warming and Domestic Distribution of Competences", by B. Carotti). Because the baseline scenario is, however, counterfactual by definition, it is also uncertain. First, there is proof that the use of the different methodologies allowed under the CDM to calculate the baseline can lead to different evaluations. Moreover, there is a high risk of manipulation, because both the seller and the buyer of emission reductions have an incentive to inflate the baseline. This has led the EB to test additionality on a project-by-project basis, and not at the program level, as some had at first suggested, and to adopt a very conservative approach. Even under this restrictive approach, manipulation of the baseline by project developers has occurred in a number of cases, as recent studies show.

Many remedies have been suggested to overcome the problematic implementation of the "additionality" requirement. Some have advocated for stronger guidance from the EB. The EB responded to this call in its last review of the *Tool for the demonstration and assessment of additionality*, which now includes an annex concerning *Guidance on the Assessment of Investment Analysis*. Yet, given that the shortcomings of the additionality test are structural and inhere in the very types of incentives that are in place, stronger changes seem necessary. It has been claimed that the additionality test itself is misleading, and that it could be substituted by different methods, such as the comparison of project emissions with historic trend projections and the use of sectoral benchmarks.

4. *Comments*

The merits of the CDM – which, as mentioned above, contributes steadily to the funding of climate-related projects and has served to increase the participation of developing countries in the Kyoto Protocol – are many. Nevertheless, there are some flaws in its functioning.

On the one hand, the problem of conflict of interests of DOEs needs to be addressed. On the other hand, the methodologies used in order to evaluate the emission reductions stemming from projects display serious flaws. The additionality test needs to be replaced with different tools, such as historic trend projections and sectoral benchmarks.

The flexible distinguishing features of the CDM – the involvement of private entities, the different methodologies used – are important strengths of the mechanism and key to its success; at the same time, however, they can also diminish its effectiveness. They need to remain flexible, but also to be better tailored and subject to certain reforms, both from a procedural (especially the activity of the DOEs) and a substantive perspective (the methodology used to

measure additionality).

5. *Further Reading*

a. W. BETZENBICHLER, "The Role of the Verifier: Validation and Verification in "Cap & Trade" and "Baseline & Credit" Systems", *Intereconomics* (2004), 123 et seq.;
b. F. LECOCQ, P. AMBROSI, "The Clean Development Mechanism: History, Status and Prospects", 1(1) *Review of Environmental Economics and Policy* 134 (2007);
c. C. FIGUERES, C. STRECK, "The Evolution of the CDM in a Post-2012 Climate Agreement", 18 *The Journal of Environmental Development* 227 (2009);
d. J. GREEN, "Delegation and Accountability in the Clean Development Mechanism", 4 *J. Int.l L. & Int.'l Rel.* 49 (2008);
e. B. MÜLLER, "Additionality in the Clean Development Mechanism: Why and What?", March 2009, Oxford Institute for Energy Studies EV 44, (http://www.oxfordclimatepolicy.org/publications/mueller.shtml);
f. E. PAULSSON, "A review of the CDM literature: from fine-tuning to critical scrutiny?", 9 (1) *International Environmental Agreements: Politics, Law and Economics* 63 (2009);
g. C. STRECK AND J. LIN, "Making Markets Work: A Review of CDM Performance and the Need for Reform", 19 *EJIL* 409 (2008);
h. J. WERKSMAN, "The Clean Development Mechanism: Unwrapping the 'Kyoto Surprise'", 7(2) *Review of European Community & International Environmental Law* 147 (1998);
i. L. SCHNEIDER, *Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvements*, Berlin, Oko-Institut (2007);
j. C. SUTTER, J.C. PARREÑO, "Does the current Clean Development Mechanism (CDM) deliver its sustainable development claims? An analysis of officially registered CDM projects", 84 *Climate Change* 75 (2007);
k. M. WARA, "Measuring the Clean Development Mechanism's Performance and Potential", 55 *UCLA L. Rev.* 1759 (2007-2008).

I.E.3 Lobbying and Technology Exports in Emissions Trading: *Enel – China*

Florencia D. Lebensohn

1. *Background*

The ultimate goal of the United Nations Framework Convention on Climate Change (UNFCCC) is to stabilize greenhouse gas (GHG) concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. In order to meet that goal, the overall global annual mean surface temperature increase should not exceed 2°C above pre-industrial levels as endorsed by the Cancun Climate Change Conference in 2010 and the Copenhagen Accord.

According to the UNFCCC, developed countries shall provide financial resources, including the transfer of technology needed by the developing country Parties to meet the agreed full incremental costs of implementing measures taken to fulfil the climate goals (articles 4.3 and 4.4).

The Kyoto Protocol to the UNFCCC sets binding targets for 37 industrialized countries and the European community for reducing GHG emissions to an average of five per cent lower than 1990 levels over the period 2008-2012. The most important difference between the UNFCCC and the Kyoto Protocol is that, while the former merely encouraged industrialized countries to stabilize GHG emissions, the latter set binding commitments for named Parties. These targets were set out in the form of levels of allowed emissions ("assigned amounts") over the period 2008-2012.

Under the Treaty, countries must meet their targets primarily through national measures. However, there are a number of additional mechanisms that are available to them in pursuit of that goal: emissions trading, "joint implementation" of projects based on the territory of other Parties, and the Clean Development Mechanism (CDM) (see § I.E.2 "Rigidity and Flexibility in the Clean Development Mechanisms", by M. De Bellis).

The emissions trading system allows the market to determine the place in which reductions in emissions will be most efficiently achieved, which should, in turn, lower the global cost of compliance. In this sense, they serve as a powerful

tool for internalizing the cost of environmental damage justified by the principle of cost-efficiency.

Emissions' trading, as set out in Article 17 of the Kyoto Protocol, allows countries that have emission units to spare to sell this excess to countries that are over their targets. In this way, emission reductions or removals have come to constitute a new commodity that can be traded. The various forms of this commodity are as follows:

- A removal unit (RMU) on the basis of land use, land-use change.
- An emission reduction unit (ERU) created by a joint implementation project.
- A certified emission reduction (CER) originated from a CDM.

In 2005, the European Union (EU) established binding limits on all large concentrated sources of emissions in Member States and set up the EU Emissions Trading Scheme (EU ETS). In its second phase (2008-2012), limits have tightened and an increasing number of companies must diminish their emissions or pay for equivalent reductions carried out outside the EU ("offsetting"). The amount of offsetting permissible is limited and set out to Member States in their National Allocation Plans.

As the EU ETS is linked to the international emissions trading scheme, established under the Kyoto Protocol, EU legislation allows participants to use most categories of joint implementation/CDM credits from mechanisms established under the Kyoto Protocol towards fulfilling their obligations under the EU ETS. One objective of the linking Directive is to boost the types of cheap options within the EU ETS, which can turn into a diminution in the total compliance costs with the Kyoto Protocol.

According to publicly available data, in 2010, European companies used 1371 million offsets, 117 million CERs and 20 million ERUs to comply with their commitments. 77% (90.4m) of all CERs came from industrial gas - trifluoromethane (HFC) and nitrous oxide (N2O) adipic- credits. The biggest offsetter is the Italian power company Enel, which accounts for 12.3% of all offset credits granted in 2008. The majority of credits came from chemical factories (84% in total from 'HFC' and 'N20' destruction projects).

2. *Materials: Norms and Relevant Documents*

- United Nations Framework Convention on Climate Change (1992) (http://unfccc.int/resource/docs/convkp/conveng.pdf);
- Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998) (http://unfccc.int/resource/docs/convkp/kpeng.pdf);
- 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 Protoco's project mechanisms (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0101:EN:NOT);
- *International Offsets and the EU: Tracking compliance offsets in the EU Emissions Trading Scheme*, Sandbag, February 2010 (http://www.sandbag.org.uk/site_media/pdfs/reports/InternationalOffsetsAndTheEU.pdf);
- CDM Watch, *UN Under Pressure to Halt Gaming and Abuse of CDM* (http://www.cdm-watch.org/wordpress/wp-content/uploads/2010/06/hfc-23_press-release_gaming-and-abuse-of-cdm1.pdf);
- Commission Regulation (EU) No 550/2011 of 7 June 2011 on determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, certain restrictions applicable to the use of international credits from projects involving industrial gases (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R0550:EN:NOT);
- CDM Watch, *Climate campaigners hail European ban on industrial gas offsets as an historic victory for environmental integrity*, 21 January 2011 (http://www.cdm-watch.org/?p=1565);
- W. MICHAEL, V. DAVID, *A Realistic Policy on International Carbon Offsets*, Working Paper #74, April 2008, Program on Energy and Sustainable Development, Freeman Spogli Institute for International Studies, Stanford University (http://iis-db.stanford.edu/pubs/22157/WP74_final_final.pdf);
- CDM-Watch, *Environmental Groups Call for Extension of Industrial Gas Offsets Ban*, Brussels, 15 May 2011

(http://www.cdm-watch.org/?p=1935);
- CDM-Watch, *EU action required as UN Panel keeps flawed rules of carbon offsetting scheme in place*, 18 July 2011 (http://www.cdm-watch.org/?p=2187);
- CDM-Watch, *UNFCCC Approves Controversial Coal and Hydro Projects in India*, 5 October 2011 (http://www.cdm-watch.org/?p=2641);
- CDM-Watch, *New Study Finds CDM Coal Projects Undermine Climate Goals while Receiving Billions in Climate Finance*, 3 November 2011 (http://www.cdm-watch.org/?p=2775);
- *Industrial Gas Big Spenders: HFC and N20 adipic credit usage in 2010*, Sandbag (http://www.sandbag.org.uk/site_media/pdfs/reports/Sandbag_2011-05_HFC-N20_2010.pdf);
- CDM-Watch, *HFC-23 Offsets in the Context of the EU Emissions Trading Scheme, Environmental Investigation Agency*, 14 July 2010 (http://www.cdm-watch.org/wordpress/wp-content/uploads/2010/07/HFC-23_Policy-Briefing1.pdf);
- CDO Executive Board 64, Report Annex 3, Draft Procedure for Addressing Significant Deficiencies in Past Validation, Verification or Certification Reports (http://cdm.unfccc.int/filestorage/1/P/0/1P0U9F42RL3G6HNXKYCIZWODTJQ8V5/eb64_repan03.pdf?t=OFF8bThnZzRkfDBCUVkv2oNO7iTwsLyLLmfN);
- UNFCCC, Subsidiary Body for Implementation, Thirty-fourth session, Bonn, 6–16 June 2011, *Views on procedures, mechanisms and institutional arrangements for appeals against the decisions of the Executive Board of the clean development mechanism* (http://unfccc.int/resource/docs/2011/sbi/eng/misc02.pdf);
- Council of the European Union, Preparation for the 16th Conference of the Parties to the UN Framework Convention on Climate Change, Cancun, 29 November to 10 December 2010, Council Conclusions, (http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/117096.pdf).

3. *Analysis*

There has been much criticism of the quality of CER credits. These include the following: *(i)* most of the credits used are the cheapest and most easily available

ones created from chemical factories in the developing world (HFC and N20 destruction projects in China and India) (the destruction of HFC-23 costs just €0.17 per tonne of CO2 equivalent. However, when this destruction is sold as CERs on the EU ETS market it can cost €12–70 times more than what it costs to destroy the gas.); *(ii)* many projects are 'non-additional', meaning that they would have been implemented without the help of European States ("additionality" refers to "reductions in emissions that are additional to any that would occur in the absence of the certified project activity", Article 1, Kyoto Protocol); *(iii)* with the use of CER credits, the EU is aiming at the minimum level of compliance rather than increased standards of environmental protection; *(iv)* instead of using the CDM system to prevent HFC gases entering the atmosphere, regulation should be adopted; *(v)* more standardized procedures for the proper assessment of the sustainable development impacts of projects should be put in place; *(vi)* some chemical companies may have altered levels of emissions to increase UN credits (augmenting the production of HCFC-22 and hence of destroyable HFC-23 in order to get more CERs); *(vii)* the definition of qualifying projects should also make reference to the country of origin and *(viii)* EU actions do not complement efforts undertaken domestically, and is failing to meet expectations that it will position itself as a leader in the transformation to a low-carbon economy.

As a result of these criticisms, and in spite of alleged lobbying by corporate interests (including Enel), the EU issued Commission Regulation No. 550/2011. According to this norm, from 1 January 2013, the use of international credits from projects involving the destruction of HFC-23 and N2O from adipic acid production for the purposes of complying with the EU emissions limits will be prohibited. The adoption of this measure was driven by the following considerations: *(i)* the majority of gas projects take place in advanced developing countries which are capable of financing the cheap reductions themselves; *(ii)* restrictions on industrial gas credits should contribute to a more balanced geographical distribution of the benefits arising from the use of the Kyoto mechanisms; *(iii)* the high rates of return which the destruction of HFC-23 generates stimulate the production of HCFC-22, which in turn undermines the 2007 Montreal Adjustment on Production and Consumption of HCFCs; *(iv)* restrictions in the use of these international credits will reduce distortions of economic incentives and competition, and contribute to the avoidance of GHG emission leakage and *(v)* international credits relating to industrial gas projects do not contribute to technology transfer or the transformation of energy systems in developing countries.

This EU regulation was heavily criticized on the following grounds: *(i)* it is silent on issues of methodology in the certification of credits; *(ii)* members states

were influenced by the lobby of certain powerful investors, allegedly including Enel, who succeeded in delaying the entry into force of the ban until 2013 (which will permit the use of 52 million additional credits); and *(iii)* the ban of these offset credits in the EU ETS while permitting them to credit for other climate targets in the EU (the ban does not include national limits to EU members in areas such as agriculture and transport) can generate a double standard. If this happens, states can continue to use these credits to meet certain national targets despite the fact that private enterprises are banned from using them.

4. *Issues*

The case of the HFC-23, with its perverse incentives and potentially devastating consequences for the environment, directs our attention to two issues: *(i)* the increasing role of private companies in the crafting of international environmental law and *(ii)* the quality of the CER credits and of the legitimacy of CDM certification processes.

(i) The increasing role of private companies -and their power to delay the implementation of restrictive measures in order to profit from their planned activities- is generating a shift of power from the public sphere to the private one. Representatives of industrial and corporate interests are acquiring an increasing role in the setting of environmental norms. The extent to which this influence should be tolerated, the appropriate balance between the legitimate pursuit of profit and the detrimental effect of these activities on the environment are issues that remain to be addressed.

(ii) The issues surrounding the quality of offset credits are complex ones. The goals of the Kyoto mechanisms are to create a cost-effective form of compliance for capped countries while encouraging investment flows, the transfer of technology and the promotion of sustainable development in the region of the project. Currently, if a project developer aims to be accredited under the CDM, he/she must follow the rules set by the UNFCCC: meet mandatory standards, show proof of additionality and be certified by a third party. However, the process of assessing whether projects meet all these criteria is far from crystal clear. The criticism over the quality of offset credits encouraged the WWF to establish a separate accreditation mechanism, the 'Gold Standard', which applies stricter criteria for assessing projects than the UN and only accredits certain types of project (e.g. renewables). What is the legitimacy of these independent

verifications? Is the competitive market of verification systems diminishing the quality of the effective controls? Are they truly independent verifications? What are the interests that underpin them?

Finally, the principle of participation is also beginning to emerge in this sector. What kind of consultation is provided by the CDM framework? Is the stakeholder consultation sufficient? Is there a proper process of stakeholder consultation beyond the period of validation, once the project is being implemented?

In conclusion, the issues relating to HFC-23, in which Enel-China are the major players, are an excellent example of the problems confronting the CDM mechanism, in particular concerning the influence of lobby groups and the flaws in assessing both the environmental impact and CDM compliance of relevant projects. Global administrative law standards of review, publicity, public consultation, transparency should be reaffirmed and implemented in order to avoid a scenario in which, despite its good intentions, the current environmental law framework ends up facilitating environmental degradation rather than preventing it.

5. *Further Reading*

a. C. FIGUERES, C. STRECK, "The Evolution of the CDM in a Post-2012 Climate Agreement", 18 (3) *The Journal of Environment Development* 227 (2009) (http://jed.sagepub.com/content/18/3/227.short);
b. C. STRECK, J. LIN, *Making Markets Work: A Review of CDM Performance and the Need for Reform*, 19 (2) *EJIL* 409 (2008) (http://www.ejil.org/pdfs/19/2/190.pdf);
c. M. VON UNGER, C. STRECK, "An Appellate Body for the Clean Development Mechanism: A Due Process Requirement", 3 *Carbon & Climate L. Rev.* 31 (2009) (http://www.ask-eu.de/Artikel/15100/An-Appellate-Body-for-the-Clean-Development-Mechanism-A-Due-Process-Requirement.htm);
d. Project 0549: Project for HFC23 Decomposition at Zhejiang Dongyang Chemical Co., Ltd., China (parties involved, Enel Trade S.p.a. and China), (http://cdm.unfccc.int/Projects/DB/JQA1154593239.79);

I.E.4 The Californian "Clean Cars Law": Global Warming and Domestic Distribution of Competences

Bruno Carotti

1. *Background*

In 2002, California adopted Clean Cars Law-CCL (AB 1493), designed to meet greenhouse gas (GHG) emission reduction targets and focusing in particular on four such gases – carbon dioxide, hydro fluorocarbons, methane, and nitrous oxide (for the international arrangements in this area, see § I.E.2 "Rigidity and Flexibility in the Clean Development Mechanisms", by M. De Bellis).

On this legislative basis, California established the low emissions vehicle (LEV) program, which aimed to improve the technical equipment of passenger cars and light trucks. The program does not require vehicles' substitution by the owners. On the contrary, it seeks to introduce new tools and technologies, directed at stopping the emissions (such as cleaner fuels). Specific standards are set for new vehicles, providing a constant flagging of gas discharge.

The program is viewed as a success by the California Air Resources Board (CARB), which estimates that it will result in an 18% of the overall emissions in 2020, rising to 27% in 2030. In evaluating the importance of the program, it is worth recalling that California represents the eighth largest economy in the world.

The Californian Law was introduced within the framework of the Federal Clean Air Act (42 U.S.C. 7401 *et seq.*), first enacted in 1955 and with major revisions in 1970, 1977, and 1990. The last review, in particular, provided for tighter pollution standards for emissions from automobiles and trucks. The Act allows States to adopt standards aimed at improving air quality, on the basis of the benchmarks established by US Environmental Protection Agency (EPA).

While the definition by States of standards equivalent to federal ones is generally permitted, California is the only State with the powers necessary to establish stricter limits, which it does on the basis of Division 26 of the California Health and Safety Code. This possibility has been granted by the Federal Clean Air Act as a consequence of the fact that California (the only State to do so) had already adopted specific rules on pollution, when the Federal Act entered into

force. In any event, California must first request a waiver from the Federal Government in order to enact stricter standards.

When California makes use of this possibility, other States are entitled to follow suit, and implement the Californian, rather than the federal, standards. The Clean Cars Law of 2002 thus opened the doors to a new wave of stricter regulation: Arizona, Connecticut, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington all soon followed the Californian example (as did Delaware in 2010).

After the introduction of the LEV Program, in September 2004 the CARB passed a new standard, requiring automakers to reduce emissions by 30% before 2016. At this point, a number of companies brought legal action in an attempt to overturn the Californian legislation.

Various judges rejected the plaintiffs' arguments, however, and found that the standard represented a legitimate use of power by State institutions. Between September and November 2007, two US District Courts, for the Eastern District of California and for the District of Vermont, rejected the arguments leveled against the new norms. California could promulgate stricter standards where a waiver had been sought and received under the Clean Air Act, and other States were entitled to then follow suit.

It is also worth noting that, at around the same time, the US Supreme Court handed down its important judgment in Massachusetts v. Environmental Protection Agency (2007), in which it recognized that gas emissions (and, in particular, carbon dioxide) represents a danger in terms of air pollution, and that the EPA has the power to regulate C02 emissions. By holding that these emissions could be regulated by the EPA under the Clean Air Act, the Supreme Court opened up the possibility that California could apply for a waiver, and thereby introduce its own standards in that regard (if the matter had been found to fall within the remit of a different federal body, and hence a different Act, California's waiver possibility would have been redundant), thus in effect paving the way for the application of the Clear Cars Law and subsequent regulation.

As noted above, however, this ultimately depended on California being granted a waiver by federal authorities; without this, the stricter standards could not be implemented lawfully. California first sought such a waiver in 2005, placing its program on hold in the meantime. On 6 March 2008, the EPA denied the waiver. California challenged this position before the Washington District Court.

Following the Presidential elections in November 2008, a new collaborative method was introduced by the Obama administration, which sought to establish a dialogue between the parties involved – a dialogue that would, it was hoped, achieve a mediated solution in this delicate area. A form of

concrete cooperation was sought between different institutional levels (the EPA and States), encompassing both private and public subjects.

On 26 January 2009, a Presidential Memorandum asked the EPA to reconsider its previous rejection of California's request. On 30 June 2009, the EPA approved the waiver that permitted the introduction of stricter standards for exhaust emissions. The waiver was then confirmed by the Columbia District Court of Appeal, which, in a judgment of April 2011, rejected the lawsuit presented by the Chamber of Commerce and Auto Dealers and affirmed that California could implement the law.

In July 2011, the President of the United States announced another agreement intended to "finalize national greenhouse gas and fuel economy standards for model years 2017-2025. The target standard will be 163 g/mi GHG and 54.5 mpg fuel economy". Two "separate but coordinated sets of standards for model years 2017 through 2025" will ensure more stringent requirements. The new regulations are to be developed under the procedures of the EPA and the National Highway Traffic Safety Administration (NHTSA), on behalf of Department of Traffic, which will work closely with the State of California in order to establish "harmonized light-duty fuel economy and GHG emission standards for vehicles built in model years 2012-2016".

The Californian Program can now focus on other goals, namely the reduction of the smog, the introduction of new fuel technologies and the promotion of the cleanest cars (zero emission vehicles).

2. *Materials*

a. California Assembly Bill no. 1493, July 1st, 2002 (http://www.arb.ca.gov/cc/ccms/documents/ab1493.pdf);
b. Clean Air Act, U.S. Code, Title 42, Chapter 85 (http://www.gpo.gov/fdsys/pkg/USCODE-2008-title42/pdf/USCODE-2008-title42-chap85.pdf);
c. United States District Court for the District of Vermont, September 12th, 2007 (http://www.cleancarscampaign.org/web-content/legal/docs/vermontdecision.pdf);
d. United States Court of Appeals for the District Court of California, December 11th, 2007 (http://www.calcleancars.org/archives/legal/11_Dec_07_Order.pdf);

e. EPA, Office of the Administrator, Letter to California's Governor, December 19th, 2007 (http://www.epa.gov/otaq/climate/20071219-slj.pdf);
f. EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, March 6th, 2008 (http://www.epa.gov/fedrgstr/EPA-AIR/2008/March/Day-06/a4350.pdf);
g. EPA, California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption, June 30th, 2009 (http://edocket.access.gpo.gov/2009/pdf/E9-15943.pdf);
h. Nichols' Letter to EPA, November 10th, 2010 (http://www.arb.ca.gov/msprog/clean_cars/arb_to_epa_letter.pdf);
i. United States Court of Appeals for the District of Columbia Circuit No. 09-1237, *Chamber of Commerce of the United States of America and National Automobile Dealers Association, Petitioners v. Environmental Protection Agency, Respondent Commonwealth of Massachusetts, et al.*, Intervenors, Argued January 18, 2011 – Decided April 29, 2011 (http://www.cadc.uscourts.gov/internet/opinions.nsf/BA9699870A63607C852578810051B160/$file/09-1237-1305573.pdf);
j. EPA Regulatory Announcement, EPA and NHTSA, in Coordination with California, Announce Plans to Propose Greenhouse Gas and Fuel Economy Standards for Passenger Cars and Light Trucks, July 2011 (http://www.epa.gov/otaq/climate/420f11027.pdf);
k. EPA Regulatory Announcement, EPA and NHTSA to Propose Greenhouse Gas and Fuel Efficiency Standards for Heavy-Duty Trucks; Begin Process for Further Light-Duty Standards, EPA-420-F-10-038, May 2010 (http://www.epa.gov/otaq/climate/regulations/420f10038.pdf);
l. EPA Regulatory Announcement, EPA and NHTSA Adopt First-Ever Program to Reduce Greenhouse Gas Emissions and Improve Fuel Efficiency of Medium and Heavy Duty Vehicles, August 9th, 2011 (http://www.epa.gov/otaq/climate/documents/420f11031.pdf);
m. Regulations and Standards, EPA webpage (constantly updated) (http://www.epa.gov/otaq/climate/regulations.htm#prez);
n. California Clean Cars Campaign (http://www.calcleancars.org);

o. President Obama Announcement, Agreement with Automakers, July 29th, 2011, New Fuel Economy Standards, Full Report (http://www.whitehouse.gov/sites/default/files/fuel_economy_report.pdf).

3. *Analysis*

The basic regulatory question here can be broken down into three core aspects: the legislative framework, the judicial decisions and the EPA determinations.

The EPA rejected the waiver on the basis of restrictions introduced in Section 209 of the CAA. In particular, that provision states that no waiver shall be granted if the Administrator finds that: "a) the determination of the State is arbitrary and capricious; b) such State does not need such State standards to meet compelling and extraordinary conditions; c) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title" (i.e. Section 202 of CAA, which relates to emissions standards for new motor vehicles or engines).

The EPA argued that section 209(b) was not respected, because no exceptional conditions existed that would allow the State to adopt different standards. Federal standards were "enough protective of the public health" and the issue did not merit a separate regime: the regulatory power would have been better left in the hands of central government.

In the words of the EPA, Section 209 of the CAA was intended "to address pollution problems that are *local* or *regional*". The Section was not intended "to allow California to promulgate state standards for emissions from new motor vehicles designed to address *global climate change* problems" (emphasis added). "[T]he effects of climate change in California are [not] compelling and extraordinary compared to the effects in the rest of the country": the State thus, in the EPA's view, lacked the power to adopt new standards under the national legislative framework.

This was a particularly surprising position for the Agency to adopt, coming as it did after a number of relevant judicial decisions that had taken the opposite view. Despite recognizing the importance of global warming, the Agency had already opted for a particular interpretation of the Clean Air Act, affirming that if Congress had decided to delegate to the EPA the authority to regulate the emissions of motor vehicles, it would have done so explicitly (in particular in the 1990 reform). The relevance of climate change, a matter of which Congress was well aware, meant that the subject required, in the Agency's view, an explicit act of delegation. On the contrary, no regulatory power on the gases could be found

in the literal meaning of the Act, which referred to "pollutants" with no reference to global warming.

The Supreme Court rejected this interpretation. In the *Massachusetts* case, the Court backed the plaintiffs' argument, which argued that the EPA had "abdicated its responsibility under the Clean Air Act to regulate the emissions". The Court stated, in general terms, the existence of the EPA's regulatory competence in the field. It affirmed that this regulatory power fell properly within the scope of the CAA: recognizing the polluting effect of vehicle emissions, it found that greenhouse gases did indeed "fit well within the Clean Air Act's definition of 'air pollutant' ". The Supreme Court thus clearly paved the way for the EPA to intervene.

The Court found also there was no conflict between the EPA's authority (under the CAA) to regulate greenhouse gases and the NHTSA's authority (under the ECPA) to set mileage standards (a potential conflict which the EPA had argued meant it had no competence to act). The former, the Court held, is entrusted with the protection of public health and welfare; the latter, with the definition of fuel economy standards. The relative competences overlap but do not conflict. Consequently, "local" standards were declared not necessarily pre-empted by federal fuel economy law; the possibility for a Californian waiver under the CAA remained valid.

The judgments of the District Courts of California and Vermont therefore confirmed the possibility for California (and, subsequently, of other States) to set more stringent criteria than those in place at the federal level. They rejected the opposing claims, holding that, in this case and due to the specificities of Section 209 of the CAA, the general "pre-emption doctrine" did not apply.

An economic argument was also advanced. In particular, it was found that the upfront additional cost per vehicle of compliance with the Californian standards – estimated at around $ 2,000 – would ultimately save money, due to the reduction in running costs implied by the new arrangements. This meant that the CCL also produced economic benefits, allowing it to be characterized as a pro-competitive incentive, which makes commercial and ultimately fosters efficiency (one of the goals of the CAA reform is indeed the promotion of innovative approaches, such as performance-based standards). The EPA's denial of the waiver appeared to be deeply at odds with these decisions. An internal conflict between the different levels of government within the US thus remained unresolved.

As noted above, the situation changed with the election of the Obama administration. The new President intervened, and ordered the EPA to reconsider its decision. This time, the Federal Government strongly supported

the Californian initiative, seeking a new agreement between institutions and private actors. A few months later, the EPA granted the waiver.

In its final Decision, the EPA "returned" to an interpretation of the intentions of Congress, recognizing that, in 1967 and 1977, "Congress established that there would be only two programs for control of emissions from new motor vehicles – EPA emission standards adopted under the Clean Air Act and California emission standards adopted under its state law".

This "new interpretation", based on the legislative history, found that the Californian Program met all the three conditions established under Section 209 of the CAA. Firstly, "the opponents of the waiver have not met their burden to demonstrate that California's determination was arbitrary and capricious" – Sect. 202(1)(b)(A). Secondly, "Congress also intentionally provided California the broadest possible discretion in adopting the kind of standards in its motor vehicle program"; it "did not use this criterion to limit California's discretion to a certain category of air pollution problems, to the exclusion of others" – Sect. 202(1)(b)(B). Thirdly, "California may act a 'laboratory for innovation' in the regulation of motor vehicles" and "section 209 [has been intended] to allow such innovation"; the State requesting the waiver, along with its supporters, had provided "a great deal of evidence regarding the dangers posed by GHGs". These gases, when released in elevated concentration into the atmosphere, "are reasonably anticipated to endanger public health and welfare [and] are contributing to this air pollution under section 202(a) of the Clean Air Act". The measure was thus considered consistent with the provisions of Federal Law – Sect. 202(1)(b)(C). The waiver was thus granted and finally allowed for the implementation of Clean Cars Law.

4. *Issues: Global Interests and National Competences in the Light of Multipolar Governance*

The differences between the original EPA decision and the rulings of the relevant courts give rise to three main issues.

The first relates to the problem of uniformity and differentiation between the different levels of government. In a letter addressed to the Governor Schwarzenegger of 19 December 2007, the President of the EPA affirmed that "just as the problem extends far beyond the borders of California, so too must be the solution". The Alliance of Automobile Manufacturers stated that "[w]e need a consistent national policy for fuel economy, and this nationwide policy cannot be written by a single state or group of states – only by the federal government". The California Law's early opponents seemed, therefore, to express a preference

for a single, centralized regime, in order to avoid the potentially negative consequences of excessive regulatory fragmentation.

The courts affirmed precisely the contrary. A non-unitary framework was held to be possible: State legislation can be allowed to establish different mechanisms, because these might generate more effective outcomes. Such an incremental method – based on the parallel presence of federal and state law and the progressive enhancement of the adopted rules – was indeed evoked by the Supreme Court, as a sound regulatory approach capable of achieving better results in an uncertain, difficult and challenging area such as global warming.

This second viewpoint was finally adopted by the EPA in reconsidering its interpretation of the CAA in June 2009: a "lack of either kind of action by EPA is not by itself evidence that GHG standards are in fact inconsistent with section 202(a). The fact that EPA has not yet made either determination, in the context of its own rulemaking, is by itself not a basis to deny a waiver the absence of EPA standards does not by itself preclude a waiver or prevent its ability to review California's standards". Central – and uniform – regulation is not, in this context, a precondition for the adoption of local rules by California.

Proximity to people involved, acknowledgment of different possible solutions, convergence on common goals, are all elements to be considered in deciding the level that would provide the most efficient regulation for environmental protection. In this sense, does the competitive method between jurisdictions foster efficiency? Or might such competition ultimately turn into what is effectively a cooperative model – as the fact that many other States followed California suggests?

Another interesting element is presented by the dichotomy between administrative and legislative power. Vermont District Court explicitly recognized that "legislative and executive branches are better suited to make policy decisions and technological choices". It added, intriguingly, that "[m]any of the technical, political and even moral issues raised by this case are not, and should not be, resolved here, but may remain the subject of debate and policy-making in Congress, in state legislatures, and in federal and state agencies".

Courts do not consider themselves the appropriate *locus* for the resolution of such conflicts. Nonetheless, even if the definition of general principles appears to be better left to legislatures, Court rulings equally offer concrete solutions, and the evidence that the innovative Californian Program was assuring a higher level of protection.

This aspect is closely related to another issue concerning federal intervention. The involvement of Congress was also advanced, by the opponents of the Californian program, as necessary to ensure a unitary national foreign policy. This argument, however, was summarily rejected, the California Court of

Appeals holding that its proponents had "failed to make a prima facie showing that it is the foreign policy of the United States to hold state-based efforts to reduce greenhouse gas emissions in abeyance in order to leverage agreements with foreign countries. Plaintiffs have also failed to demonstrate that implementation of California's AB 1493 Regulations will conflict in any way with United States foreign policy".

This question leads us towards a central issue: the interactions between domestic regulation and global problems, when worldwide interests, such as the protection of environment, are at stake. This is properly a matter of delineating the borderline between global issues and legitimate authority for the adoption of rules intended to address them.

As affirmed in Californian Law, "air pollution knows no political boundaries" (CAL. Health and Safety Code, § 39001). As the California Environmental Protection Agency have pointed out, the Program's goal is to "protect public health, the economy and the environment through policies that address air pollution and *climate change*". Previously, in 1978, Congress had already enacted the National Climate Program Act, intended to "assist the Nation *and the world* to understand and respond to natural and man-induced climate processes and their implications" (emphasis added).

Within the framework of the national legislation, it is undoubtedly considered a problem of global relevance; and this aspect was also highlighted also by the judges called upon to rule on the issue. The Supreme Court referred explicitly to the international significance of the question, quoting the reports produced by the UN's Intergovernmental Panel on Climate Change. This judgment explicitly stated, *for the first time*, that global warming represents a concrete danger and has potentially catastrophic effects upon the environment. "The harms associated with climate change are serious and well recognized".

The Supreme Court found, consequently, that the powers of the EPA must include measures to address the kinds of pollution that can cause global warming. The importance of the global effects of national legislation is highlighted by the Court in rejecting the argument that the national intervention would not *by itself* reverse global warming: the fact that the effects of the remedies might be delayed is irrelevant, because of "the enormity of the potential consequences". "Nor it is dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere".

Later, the EPA affirmed that the "United States has the opportunity to *lead the world* in the development of a new generation of clean cars and trucks through innovative technologies and manufacturing".

The national regulation was thus undoubtedly considered in the light of it potential to improve general atmospheric conditions and to produce beneficial effects for the entire world. It was held, in other words, that national regulation cannot be invalidated as irrelevant or insufficient simply because it is, by itself, unable to resolve global problems.

The clash between EPA and the Californian administration also seems to open the way to a different kind of consideration: that the division of competences between domestic authorities can have a global impact. Sharing or dividing competences, under determinate circumstances, also displays an appreciation of the limits of the centralized decision, which can act as a brake on the development of more innovative ideas. Local administrations can take into consideration not merely national interests, but are often able to embrace a broader perspective.

Would, however, a multipolar and supranational form of governance be better in this regard? Would it be more efficient? Given that the environment can undoubtedly be considered a common good, does it therefore require uniform treatment? Many international instruments already exist within the international legal order that seek to guarantee environmental protection; might it, however, be sufficient to establish common, general principles at that level, leaving the way clear for national and local actors to adopt a range of more specific options?

Is it even possibility to strike a balance between these different forces, the defense of local competences and the achievement of more general results? Given the global nature of the interests at stake, might the decisions of national administrations on such matters be supranationally controlled? Finally, how does the presence of a global interest influence domestic decision-making?

5. *Further Reading*

a. H. DOREMUS, W.M. HANEMANN, "Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming", 50 *Arizona Law Review* 799 (2008);
b. M.B. GERRARD (ed.), *Global Climate Change and U.S. Law*, Chicago (2007);
c. S.C. MOSER, L. DILLING, *Creating a Climate for Change: Communicating Climate Change and Facilitating Social Change*, Cambridge (2007);
d. J.B. RUHL, J. SALZMAN, "Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away", 98 *California Law Review* 59 (2010);

e. S.L. SMITH, S.B. SAULS, E.L. LANNET (with updates by attorneys at Arnold & Porter LLP), under the direction of M.B. GERRARD, *Clean Air Act*, in *Environmental Law Practice Guide* (2011);
f. D. SPERLING, D. GORDON, *Two Billion Cars: Driving Toward Sustainability*, Oxford (2009);
g. J.B. WIENER, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 *University Pa. Law Review* 1961 (2006-2007).

I.E.5 Horizontality as a Global Strategy for Accountability: The OECD Reviewing the EU CAP

Bruno Carotti and *Georgios Dimitropoulos*

1. *Background*

The global legal order is highly fragmented. Global regimes operate in several fields, and these can be further subdivided into more specialized ones still. The legal orders of States are embedded within functional regimes, which operate in relative autonomy to each other, a characteristic of the post-Westphalian era. Globalization ensures the functional inclusion of the states within the global legal space.

Different global governance actors operate alongside nation-States. The UN system provides many important instances of this. Regional examples can be found in the European Union (see Chapter VIII "Europe in the Global Space"), the African Union, the North American Free Trade Agreement (NAFTA) (see § I.A.1 "The Concept of the State in Globalization: The Case of the Environmental Cooperation Commission of the North American Free Trade Agreement (NAFTA)", by M.-S. Kuo), the Andean Community and the Association of Southeast Asian Nations (ASEAN) (see § I.B.7 "The ASEAN Charter: The Legalization of ASEAN?", by M. Ewing-Chow and L. Bernard; and § I.D.3 "ASEAN International Investment Agreements: The Incorporation of Global Regulatory Governance", by M. Ewing-Chow and G.R. Fischer).

One global organization that has begun to wield great influence in the global legal order is the Organization for Economic Co-operation and Development (OECD). The OECD is a classical intergovernmental organization with the mission of promoting the economic and social well-being of people around the world. It is one of the most important international standard-setters in many fields, such as taxation or the safety of chemicals; it operates as a forum for governmental interaction and, most importantly, undertakes specific analyses, drafts reports and conducts reviews on issues such as education and agriculture. It comprises 34 member States that produce two-thirds of the world's goods and services, and for this reason it is often described as a "rich man's club".

International organizations sometimes acquire elements of "statehood". A hybrid nature can be indeed recognized in the coexistence of national and supranational components inside these structures. States give birth to international organizations; nonetheless, the latter often acquire a specific role, turning themselves into autonomous bodies *vis-à-vis* the nation-States that created them. The interests protected by IOs can – indeed, often do – clash with those of States. When this occurs, specific instruments are required in order to strike a balance between the different goals.

Of increasing importance, then, is the burgeoning range of reciprocal checks and balances operating between States and global actors. While traditional forms of control function vertically, imposed "from above" by Member States on IOs (or, indeed, vice versa), the development of global legal regimes reveals the evolution of new techniques, indicating that global institutions "talk to each other"'. Although the relationship among the fragmented institutional actors used to be one of *de facto* or legal cooperation, in recent years new forms of "unfriendly" coexistence have emerged. One of the first cases of coexistence of the second type is provided by the OECD's review of EU agricultural policy.

2. *Materials and Sources*

- ECJ, *Judgment of the Court, 6 April 1962, Meroni & Co., S.p.A., and Others v High Authority of the European Goal and Steel Community*, Joined Cases 21 to 26/61 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61961CJ0021:EN:PDF);
- OECD, *Analysis of the 2003 CAP Reform*, Paris (2004) (http://www.oecd.org/dataoecd/62/42/32039793.pdf);
- OECD, *Agricultural Policies in OECD Countries: Monitoring and Evaluation*, Paris (2010);
- OECD, *OECD-FAO Agricultural Outlook 2010-2019*, Paris (2010);
- OECD, *Agricultural Policies in OECD Countries and Emerging Economies*, Paris (2011);
- OECD, *Disaggregated Impacts of CAP Reforms*, Paris (2011);
- OECD, *Evaluation of Agricultural Policy Reforms in the European Union*, Paris (2011) (http://www.oecd-ilibrary.org/agriculture-and-food/evaluation-of-agricultural-policy-reforms-in-the-european-union_9789264112124-en);

- OECD, *Evaluation of Agricultural Policy Reforms in the United States*, Paris (2011).

3. *Analysis*

The Common Agricultural Policy (CAP) is the central common policy adopted by the EU under the Treaty of Rome (see § VI.A.6 "The Common Agricultural Policy: EU vs. WTO?" by F. Lebensohn). The OECD first published an analysis of the 2003 CAP Reform, which sought merely to describe its features. In 2011, the OECD published a second report documenting the reforms and changes of the CAP over the period from 1986-2010. The later report goes one step further than mere description: from an initial "Analysis of the 2003 CAP Reform", the OECD has thus progressed to an "Evaluation of Agricultural Policy Reforms in the European Union", in which it emphasizes deficiencies and proposes measures to be adopted. While evaluations are published in specific reports for every country, in this case the assessment deals directly with policy formulation at the regional level. In doing so, the OECD has recognized that the relevant national policies in this field are predetermined by those of the EU.

The report evaluates the application by the EU of the principles for agricultural reform agreed by OECD ministers (reform principles and operational characteristics, as agreed to by the organization in 1998 and reinforced in 2010). It offers an overview of the developments in the European agricultural sector. After analysing in detail the history of agricultural policy reforms in the EU (from its inception until the present time), it assesses the impact of these reforms on the economic and environmental performance of the agricultural sector. Finally, the report makes an overall evaluation and suggests a future direction for the CAP.

More specifically, the report sets out some structural deficiencies of the European policy. The OECD notes that in some aspects the policies are inefficient, costly and combined with low or decreased productivity. While the market-orientated attitude of recent years has improved competitiveness, as it concentrates production in the most efficient farms and regions, some measures, like the link between single payments and land, slows structural adjustment as it allows inefficient farmers to stay in business. The OECD proposes an increasingly market-oriented approach for the EU, through the reduction of trade barriers including the abolition of export subsidies. Further liberalization would, on the other hand, create the need to develop instruments that empower farmers to deal with business risks. It even makes suggestions as to whether these reforms should be dealt with at the national or European level.

The OECD further proposes enhancing the policy coherence of the CAP with other relevant policies, such as those related to land or labor, social issues or environmental protection. It states that the impacts of reforms on structural change are generally small, mainly because payment entitlements remain linked to land and structural factors such as farmers' age are the main determinants. On several occasions, farm productivity has increased, whereas the share of agriculture in the economy has continued to decrease. Moreover, while some progress has been made in improving the environmental performance of agriculture, the OECD states that there is still space for improvement in the environmental efficiency of the CAP. Still, it notes, a great need of further information is required in order to evaluate fully the impact of CAP measures on the environment. The financial and economic crises have imposed budgetary constraints; enhancing transparency in relation to budget allocation and efficiency of the policies is now more necessary than ever. The overall objectives should be made clearer and statistical information needs to be improved, thus increasing transparency of information.

Altogether, the report measures the agricultural policy against the standards and indicators set by the OECD, evaluates to which extent the CAP has followed the principles for policy reform established by agricultural Ministers of the OECD countries, and draws conclusions on the reform efforts.

4. *Issues: Horizontal Accountability in the Global Legal Order*

The 2011 Evaluation Report of the OECD finds some structural and economic deficiencies in the CAP, even though it recognizes that its evolution in recent years has, on the whole, been positive. The report is related to a core function of the EU, i.e. the management of the most important of the common policies.

The Evaluation Report is a clear sign of the emergence of a different strategy in the relationships between global actors and introduces a new form of review in the global legal order. In the face of deficient results of EU policies, the OECD has taken up an oversight function, expanding its policy of reporting on countries to the regional institutions. The OECD has thus begun to deal with the EU as if it were a state. This is driven by the hugely important impact that EU legislation has upon member states' legal orders and economic activities: the OECD is therefore seeking to fill a gap by expanding its remit in this regard. The activities of domestic administrative authorities are increasingly being reviewed by global organizations (and global courts). Additionally, actions of international organizations are subject to review by national courts. Global actors, including supranational institutions, are starting to evolve similar review strategies. They

have begun to perceive their own role as, in part at least, exercising an oversight function in relation to each other.

It is exactly in this framework that a specific form of interaction between IOs has been raised. Hard law mechanisms aimed at connecting international organizations are already known. Vertical relations are mainly created in order to permit a double methodology of control, spreading from the IOs towards the States and vice-versa. In some cases, it is possible to see a direct influence between organizations: hard legal commitments can be envisaged in the judicial review of European decisions conducted by the WTO Dispute Settlement Body (see, for instance, § VI.A.7 "European Union's Retaliatory Measures: Community Interest and Wto" by G. Bolaffi; § III.D.2 "Global Procedural and Substantial Limits for National Administrations: The *EC-Biotech* Case" by D. Bevilacqua). In other cases, it is the composition and the scope of the structure that is questioned: for instance, the *Codex Alimentarius Commission* is entrusted with the protection of health and trade, but the influence of the WTO actually produces a subtle prevalence of the latter – thus revealing a functional conditionality (see § II.A.5, "Competing Interests: Food Safety Standards and The Codex Alimentarius Commission" by D. Bevilacqua).

The present case appears different for three reasons. Firstly, it is not a specific decision that is under scrutiny, but an entire policy; the overall administrative activity of one global actor is thus examined by another. Secondly, new forms of institutional arrangements based on soft law emerge: "international actors choose softer forms of legalized governance when those forms offer superior institutional solutions" (Abbott-Snidal, 2000). It is thus possible to envisage a "reputational effect" connected to the publication and publicity of the report and its evaluation of the EU's performance, which is not produced by the means of hard international law, but developed through specific measures of policy-definition and evaluation. Finally, the report appears, in more general terms, to be placing some limits on the "independence" of the EU in the global legal space. The review is made under the specific criteria established by the OECD: the review can be qualified as external, as it is not derived from the mechanisms of control established under the EU Treaty, but from another regulatory context.

The issue of the compatibility of such an intervention with the independence of the EU is worthy of consideration. The legitimacy of the OECD in this context seems to be rooted in a twofold claim. On the one hand, the presence of the same nation-States in both organizations creates a substantial overlap in membership, since most of the members of the EU are also members of the OECD. On the other hand, the possibility for the OECD to check EU activity is permitted by the methodology adopted for the analysis. This one is

indeed conducted on a market-compatibility basis, which represents the common ground between OECD and EU; the overview is thus permitted by the identical nature of the interests fostered by the two organizations.

The report, consequently, intends to interrogate the action of the EU on the basis of the specific market-based conditions set by the OECD. Can a form of control, grounded on efficiency and the common acceptance of market-oriented goals, be regarded as legitimate? Does the global legal space encourage forms of control driven solely by economic considerations? The particularity of the European integration process might pose a problem in this regard.

This is, in our view, a new form of "peer review" by a global administrative organization of the activities of another. It is no great surprise that it is the OECD that has introduced this new form of peer review, as it is also the "leader" in the field of peer review of national governments (for a different example, relating to FATF, see § IV.2 "Holding National Administrations Accountable through Peer Reviews: the FATF Case" by G. Dimitropoulos). Its Report on the CAP presents us with a hybrid form of review that lies between hierarchical and peer review. In light of the fact that GAL has several dimensions and that it is not hierarchical, but mainly heterarchical, encompassing networked, multilevel and hierarchical relations among different global actors, it is very plausible that such a hybrid form could emerge.

It is also characterized by a more "aggressive" attitude that could be defined as "unfriendly". This attitude can be explained by the fact that many of the member states of the EU are also member states of the OECD. A similar stance can be also observed in other fields of global governance. The Parliamentary Assembly of the Council of Europe has heavily criticized the World Health Organization for its actions during the H1N1 crisis (see § I.E.9 "International Organizations and Horizontal Review: The World Health Organization, the Parliamentary Council of Europe, and the H1N1 Pandemic" by A. Deshman). On the other hand, the European Court of Justice declined to directly review Security Council resolutions in the Kadi case (see § III.B.1 "The War on Terror and the Rule of Law: *Kadi II*", by M. Savino). Nonetheless, there are signs that, despite the initial neutrality in the reciprocal relationships (between fragmented global, regional and state actors), global players have begun to change their strategies. In our case, the OECD has reviewed the policies of a very important global actor, the EU, treating it, in effect, as if it were a member.

This new strategy can be described as "horizontal monitoring". The OECD *does not have any mandate for such actions*. The actions of global organizations are in many cases not subject to any kind of review. Global courts are very rare and in, even where they do exist, they often have heavily restricted mandates. Global organizations have thus begun to develop new methods of control and

review. As there are no courts to assess the actions of global organizations, the evolving strategy is to mutually evaluate the actions of each other. Verticality is partially ceding its place to horizontality. This practice is a new and fertile ground for GAL, and can bring about a fundamental change in terms of accountability in the global legal order. The review of the CAP by the OECD is thus legitimate, as in this new strategy of horizontality is contained a huge and largely untapped potential for increasing accountability.

Horizontality suggests that EU has to account for its actions or inactions (also) towards its peers. This new form of peer accountability among global bodies goes beyond the already–existing vertical relation between States and IOs (and beyond the public authority-citizen relationship). Horizontality as a model and strategy in this regard can also be applied as a means of improving the accountability of national administrations, as it enhances mutual responsibility and their relations with global administrative organizations. A similar model of peer accountability also operates within the EU, as prescribed by the Meroni doctrine of the European Court of Justice. It is expressed in terms of an "institutional equilibrium" of the primary organs of the EU. US federal law applies a similar logic of horizontal accountability with the concept of "checks and balances". In the global setting there are no defined centers of authority and there is no separation of powers. As a result, the idea of the power holders holding each other mutually to account can be best expressed in terms of horizontal accountability. The strategy of horizontality enhances the interdependence of the global players and creates a global administrative system of mutual responsibility.

Horizontal relations of this type have the potential to enhance overall legitimacy, and the OECD action considered here points us in the right direction. This model of horizontal or peer accountability can play an important complementary role in ensuring accountability within the global legal order. In order, however, for this approach to fulfill its potential as a global strategy for increasing accountability and legitimacy, the review processes would benefit from some procedural fortification. At the same time, this form of intervention must be cautiously evaluated, as external oversight of this type could have the effect of influencing the goals of the entity overseen. If the roles of the actors involved are not clearly defined by applicable norms, or decided by common practice in their mutual relationship, subtle forms of conditioning may eventually be discerned. Given that this form of oversight is not yet genuinely institutional (in that, in the case under consideration here at least, there was no formal mandate for the action taken), each instance of horizontal monitoring must be carefully analysed and evaluated, in order to reveal clearly the motives that lie behind it.

5. *Further Reading*

a. K.W. ABBOTT, D. SNIDAL, "Hard and Soft Law in International Governance", 54 *International Organizations* 421 (2000);
b. J.E. ALVAREZ, "International Organizations: Then and Now", 100 *American Journal of International Law* 324 (2006).
c. A. DESHMAN, "Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture", 22 *European Journal of International Law* (2011);
d. C.C. JOYNER, *International Law in the 21st Century: Rules for Global Governance*, Oxford (2005), p. 85;
e. B. KINGSBURY, L. CASINI, "Global Administrative Law Dimensions of International Organizations Law", 6 *International Organizations Law Review* 319 (2009);
f. C. MEYER-BOLTE, *Agrarrechtliche Cross Compliance als Steuerungsinstrument im Europäischen Verwaltungsverbund*, Baden-Baden (2007);
g. G. O'DONELL, "Delegative Democracy", 5 *Journal of Democracy* 55 (1994);
h. G. O'DONELL, "Horizontal Accountability in New Democracies", in A. SCHEDLER, L. DIAMOND, M. PLATNER (eds.), *The self-restraining State. Power and Accountability in New Democracies*, London (1999) p. 29 et seq.;
i. J. SALZMAN, "Decentralized Administrative Law in the Organization for Economic Cooperation and Development", 68 *Law and Contemporary Problems* 189 (2005);
j. A. SCHEDLER, L. DIAMOND, M. PLATNER (eds.), *The Self-Restraining State. Power and Accountability in New Democracies*, Boulder, London (1999).

I.E.6 Melting Ice and Exclusive Economic Zones

Nicola Ferri

1. *Background*

Oceans are currently home to much human activity. As a result of developments in science and technology during the 20th century, extensive shipping and fishing – including in ocean areas previously too remote to be accessed – have become possible; more recent activities, such as oil and gas extraction and underwater tourism, are burgeoning.

The general legal framework for all of these is the UN Convention on the Law of the Sea, which was adopted back in 1982 (see § III.B.4 "The International Tribunal for the Law of the Sea (ITLOS): The *Juno Trader* Case", by D. Agus and M. Conticelli; and § V.8 "Settling Global Disputes: The *Southern Bluefin Tuna* Case", by B. Carotti and M. Conticelli). According to this convention, the jurisdiction of coastal States over the water column and its resources can be extended up to 200 nautical miles through the establishment of Exclusive Economic Zones. In terms of the seabed and its resources, on the other hand, coastal States have an inherent right of exploitation – ranging up to 200 nautical miles – which does not depend on any occupation or express proclamation of sovereignty over the continental shelf. There is also the possibility for some States of extending the limits of their continental shelf beyond 200 nautical miles by lodging a claim with the UN Secretariat.

Be that as it may, once an ocean space, either the water column or the continental shelf or both, is under the jurisdiction of a State, that State can – generally speaking – govern all human activities taking place therein. Despite the developments in science and technology that occurred throughout the 20th century, human activities in the Arctic have been significantly hindered by the presence of sea ice, although lately this has been changing due to the impact of climate change: even if there remains a degree of uncertainty regarding the causes of rising temperatures in the Arctic, and the consequent melting of the ice there, open waters are now a brand new feature of the region. There is little doubt that the unprecedented conditions of the Arctic will facilitate the conduct of all those human activities which have been traditionally carried out in the oceans but that

have remained mostly unknown to this region thus far. From this point of view, the Arctic can be seen as providing major commercial opportunities. However, the increasing exposure of the Arctic to the combined effects of melting ice and human activities should be regarded, first and foremost, as a global challenge.

At its 65th session, held in 2010, the UN General Assembly for the first time adopted a Resolution – namely Resolution 65/94 – on the topic of global governance. This resolution highlights the central role that the UN plays in dealing with global challenges. Although no reference to any specific global challenge is provided in the text, the melting of the ice in the Arctic can properly be regarded as a global challenge. As a matter of fact, the international community will have to take action in order to protect Arctic ecosystems and biodiversity while strengthening global governance in response to the adaptation of the Arctic to the ongoing environmental changes. Consequently, all institutions – both international and regional – with the competence to regulate a given human activity expected to occur with progressively greater frequency in the Arctic in the foreseeable future (e.g. shipping, fishing, etc.) will of necessity have to coordinate among themselves at some point. In addition to the interests of States in the global governance of the Arctic, there are also those of other stakeholders, non-governmental organizations and local communities (and indigenous peoples in particular) that will have to be taken into account. Given that a certain degree of cooperation in the Arctic already exists, most notably in the realm of science, there is significant scope to improve levels of coordination among the present host of institutions implicated in the region, as well as to ensure, possibly within the framework of the UN General Assembly, the exercise of global governance in a democratic manner.

2. *Materials and Sources*

- UN Panel Discussion on "The Arctic - A Barometer for Global Climate Change" (23 June 2008) (http://treaties.un.org/pages/TreatyEvents.aspx?pathtreaty=Treaty/PD/Page1_en.xml);
- 65th UN General Assembly adopted resolutions (http://www.un.org/en/ga/65/resolutions.shtml);
- The Arctic Council (http://www.arctic-council.org);
- The Arctic Governance Project (http://www.arcticgovernance.org/);
- European Commission Arctic overview (http://ec.europa.eu/maritimeaffairs/arctic_overview_en.html).

3. *Analysis*

There is no treaty regime specifically addressing the Arctic. Existing arrangements that also apply to the Arctic encompass both universal frameworks, such as the abovementioned UN Convention on the Law of the Sea and the UN Framework Convention on Climate Change, and regional agreements, such as that establishing the Arctic Council, whose membership is limited to the eight Arctic nations at present (Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, Russia, Sweden and the United States).

A third set of arrangements encompasses norms developed within the remit of international organizations, and includes, for example, guidelines adopted by the International Maritime Organization and decisions adopted by the Conference of the Parties of the Convention on Biological Diversity. The existence of these arrangements suggests that the exercise of global governance may be particularly suited to deal with the issues facing the Arctic, although the legal and institutional status quo is apparently inadequate to address the changing Arctic environment. This seems to be especially the case of those solutions envisaged under existing arrangements applicable to Arctic governance, most notably the zoning of the region both via the establishment of Exclusive Economic Zones and the possible extension of the external limits of the continental shelf by the Arctic nations. The latter move in particular, one that is available to those Arctic nations that have ratified the UN Convention on the Law of the Sea, would give access to the offshore resources of the seabed under the Arctic Ocean.

However, there are currently several maritime borders where Arctic nations have not agreed upon the delimitation of their Exclusive Economic Zones. Also, submissions to the UN Secretariat extend the external limits of the continental shelf may take several years before a claim is settled. And even conceding that problems relating to Exclusive Economic Zones and continental shelves in the Arctic would be sorted out at some point in the future, it is still worth questioning whether or not the zoning of the region would be consistent with the recent developments that have occurred at the UN General Assembly. In particular, in order to better respond to global challenges, the General Assembly has underlined the need for participatory mechanisms to improve consultation and cooperation between all relevant actors of the international community. Arguably, the zoning of the Arctic would leave little room for any such mechanism.

With regard to the specificities of the Arctic case, the best way to address this global challenge is in all probability that of adopting a systematic and all-

encompassing approach that can move beyond the fragmentation both of the legal and institutional framework and of any geographic understanding of policy-setting for the region. This seems evident, given that the melting of the ice can have a significant impact on vulnerable ecosystems, the livelihoods of indigenous communities and the very existence of many coastal areas all over the world. Owing to this state of affairs, and bearing in mind that the UN General Assembly is expected to further consider global governance in the near future, the Arctic could provide a useful testing-ground: the simultaneous implication of several factors (e.g. environmental, economic, political, etc.), as well as the interests of several categories of actors (e.g. States, regional economic integration organizations, intergovernmental organizations, non-governmental organizations, private stakeholders, local communities, etc.), means that the Artic could ultimately function as a crucible for shaping our responses to the challenges of global governance more generally.

Although States are destined to remain key players in the future, as they have been in the past, it is imperative to recognize that others can also play important roles in the exercise of global governance. In the case of the Arctic, while acknowledging the relevance of States, finding a role for non-State actors will most likely assist the international community in identifying the priorities that need to be addressed and in developing policies adequate to the task.

4. *Issues: The Exercise of Global Governance in the Arctic*

At present, the Arctic seems to embody the idea of a global administrative space characterized by "a congeries of different actors" rather than by separate levels of regulation. As a result, it could prove capable of bringing about a new understanding of international law; and, in particular, one that departs from the traditional idea of sovereignty.

As the need for global governance in the Arctic has already been recognized, whether or not it will be possible to adequately address the changes that are occurring in the region as a result of the melting of the ice will depend on the way in which this governance is exercised. If indeed the Arctic should be entirely ice free by the end of 2013, a likely scenario if the ice continues to melt at its current rate (faster than all models have predicted), it will be necessary to create some kind of locus that can foster and facilitate relations of cooperation and coordination among those institutions, processes and actors involved in addressing risks and opportunities arising out of the melting of the ice.

At that point, a global administrative space – in which States find themselves situated alongside various international and regional organizations,

nongovernmental organizations, local communities and private stakeholders – would have to be made functional. In order for this to be possible, however, it will be necessary for the international community to rethink its approach to the Arctic; the idea that the challenges presented by the region can be adequately addressed through the zoning provided for by the UN Convention Law of the Sea does not seem plausible. Perhaps the UN General Assembly will seek to galvanize the international community as a whole and itself address in detail the topic of global governance of the Arctic.

Will the international community accept the fact that the Arctic should fall under the sole competence of Arctic nations or, considering the global implications that the melting of the ice is expected to have on the planet, will mechanisms of global governance instead be used to supplement the existing legal and institutional framework? Can the UN General Assembly, in its ongoing consideration of the exercise of global governance, ultimately prove capable of making that global administrative space which appears to characterize the changing Arctic landscape functional? Should that be the case, will it be possible to ensure the legitimate and representative exercise of global governance of the Arctic that does not neglect the interests of old and new actors, including those emerging from the private sector and civil society, that might see in the melting of the ice either a risk or an opportunity?

5. *Further Reading*

a. B. KINGSBURY, "The Concept of "Law" in Global Administrative Law", 20 *The European Journal of International Law* 23 (2009);
b. O. SCHRAM STOKKE, G. HØNNELAND (eds.), *International Cooperation and Arctic Governance: Regime Effectiveness and Northern Region Building*, London (2007);
c. M. WANG, J.E. OVERLAND, "A Sea Ice Free Summer Arctic within 30 years?", 36 *Geophysical Research Letters* 1 (2009);
d. T.G. WEISS, R. THAKUR, "Global Governance and the UN: An Unfinished Journey", Bloomington (2010);
e. O. YOUNG, *Creating Regimes: Arctic Accords and International Governance*, Cornell University Press (1998).

I.E.7 Accountability in Transnational Governance: The Case of Forestry

Gianluca Sgueo

1. *Background*

In the last 20 years, not only have the forest certification programmes that set global standards for proper forest management spread and increased their relevance worldwide, but they have also become increasingly transparent and participatory. One famous case related to this topic involved the Rainforest Action Network (RAN) – a non-profit organization headquartered in San Francisco, with office staff in Asia, plus thousands of volunteer scientists, teachers, parents, students and citizens around the world – and Home Depot Corporation Inc., the world's largest home-improvement retailer. The RAN's many activities include challenging the spread of corporate power, with campaigns that prioritize the long-term health of forest communities and ecosystems.

The Home Depot campaign sought to persuade the company to "renounce sourcing of wood products from old-growth virgin forests filled with ancient, never-harvested stands of very diverse trees" (as reported by the press), and in doing so embrace forest certification standards. The campaign lasted approximately two years. RAN's tactics mixed guerrilla market activism with genuine grassroots activism. It staged public demonstrations, the majority of which sought to leverage public opinion and associate the company's activities with environmental destruction. On one occasion, a giant banner was hung in front of the company's headquarters with the words: "Home Depot, Stop Selling Old Growth Wood". On another occasion, schoolchildren around the world were urged to join a massive letter-writing campaign, bombarding the company with their pleas. Occasionally, RAN collaborated with major institutional stakeholders. For example, it fought Home Depot expansion plans at local city council meetings both in the United States and abroad (Chile).

Home Depot eventually announced its commitment to stop selling wood from endangered forests and agreed to promote forest certification. At around the same period, 27 U.S. corporations – including IBM, Dell, Kinko's, and Nike – announced that they would stop selling or using old growth wood.

2. *Materials and Sources*

- COMMONDREAMS NEWS, "Home Depot Announces Commitment to Stop Selling Old Growth Wood; Announcement Validates Two-Year Grassroots Environmental Campaign" (http://www.commondreams.org/pressreleases/august99/082699c.htm);
- S. BASS (ed.), *Certification's Impacts on Forests, Stakeholders and Supply Chains*, Report of the International Institute for Environment and Development, May 2001;
- HOME DEPOT CORPORATION, Wood Purchasing Policy (http://www.insidehighered.com/news/2011/11/18/sociology-association-encourages-members-help-improve-wikipedia);
- E. MEIDINGER, "The Administrative Law of Global Private-Public Regulation: The Case of Forestry", XVII *The European Journal of International Law* 47-87 (2006);
- E. MEIDINGER, "Forest Certification as Environmental Law Making by Global Civil Society", in E. MEIDINGER, C. ELLIOTT, G. OESTEN (eds.), *Social and Political Dimensions of Forest Certification*, Eifelweg (2003).

3. *Analysis*

Moving on to an analysis of the case outlined above, three points seem worthy of consideration. To begin with, the case exemplifies the influence that non-state actors and social movements can wield in shaping public governance and in affecting the rules and policies of multinational corporations. Moreover, in recent years the involvement of non-state actors in public governance has been expanding. According to Errol Meidinger, following the success of the Home Depot's advocacy campaign, RAN carried out a number of similar activities against a range of major corporations, the majority of which resulted in success. For instance, RAN turned its sights on Wall Street, recognizing that behind every environmentally-destructive logging, mining, or drilling project were financial institutions underwriting them and providing the necessary capital. In 2000, RAN set out to convince Citi (then Citigroup) to adopt new environmental policies. In

2003, the producer of timber and forest products, Boise Cascade, agreed to stop selling wood from endangered forests. Later, RAN began campaigning against global institutions, being one of the first US nonprofit organizations to actively campaign against the World Bank, the International Monetary Fund (IMF) and the International Finance Corporation (IFC).

Yet, the success of RAN's campaigns is not simply the success of a single player. It is rather the illustration of a complex network in which NGOS, consumer groups and citizens get together to lobby against corporations or other public institutions. This is the second point worthy of mention: networks or alliances of non-state actors can be described as private-public hybrids, loosely coordinated, and committed to common principles, rules, procedures and programmes. In the Home Depot case, for instance, RAN headed a large network of actors. These included the Forest Action Network, Rainforest Relief, the Student Environmental Action Coalition, Free the Planet, the Sierra Student Coalition, the Action Resource Center, the American Lands Alliance, the Sierra Club, Greenpeace, the Natural Resources Defense Council, Earth Culture, and many others.

Clearly, these kind of alliances are becoming central to the dialogue between supranational regulators and/or multinationals and civil society. It might even be supposed that, in a near future, such networks will increase further their presence in the supranational arena. It is not that, should this happen, NGOs or citizens' groups operating autonomously will disappear; rather, it is likely that they will concentrate on campaigning solely at the national level, where lower levels of resources and effort are required in order to build and conduct advocacy campaigns.

A third, and final, consideration relates to the principles of global governance promoted by these networks of non-profit organizations, especially in the field of forest certification. Through the absorption of principles of administrative law in their policies, multinationals commit themselves to transparency, access to information, and participation. This process, in turn, facilitates the adoption of shared methods of governance across legal systems, and eventually at the global level.

4. *Issues: The Promises of Forest Certification*

Assuming that, as outlined above, the adoption of forest certification programmes by international operators contributes to the formation of a global system of governance that lies on democratic values, a number of questions need

to be answered. How effective is certification in terms of developing common principles of administrative governance?

In this regard, it should be recalled that forest certification programmes are voluntary. The enforcement mechanisms are limited to revoking the certification or the membership in the related association. However, the "social" control element can be powerful. In such agreements companies do not engage with a single partner, but become part of a broad network. Thus, failing to demonstrate compliance with a certification programme may have no legal consequences, but still generate serious counter-effects in terms of business activity.

A second problematic aspect relates to accountability. To whom/what are the companies and institutions that decide to engage to a certification programme accountable? As noted by Errol Meidinger, in the forest certification system there is no single accountability structure. Instead, there are a number of mutually reinforcing accountability structures, such as those afforded by certification programmes and their members. The contribution of forest certification programs to global accountability is therefore a promise rather than a certainty. Depending on the number of companies that join the programs, and the strengthening of "social" enforcement of the latter, forest certification could actually help in developing accountability on the global stage.

5. *Further Reading*

a. S. BERNSTEIN, B. CASHORE, "Is Forest Certification a Legitimate Alternative to a Global Forest Convention?", in J.J KIRTON, M.J. TREBILCOCK (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, London (2004);

b. B. CASHORE, G. AULD, D. NEWSOM, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority*, New Haven (2004);

c. D. HUMPHRIES, *Forest Politics: The Evolution of International Cooperation*, London, New York (1996);

d. A. KOLK, *Forests in International Environmental Politics: International Organisations, NGOs and the Brazilian Amazon*, Utrecht (1996);

e. J. SASSER, "Gaining Leverage: NGO Influence on Certification Institutions in the Forest Product Sector", in L. TEETER, B. CASHORE, D. ZHANG (eds.), *Forest Policy for Private Forestry*, New Haven (2002).

I.E.8 Decision-Making Procedures in Fisheries Governance: The Evolving Role of the General Fisheries Commission for the Mediterranean (GFCM)

Nicola Ferri

1. *Background*

In light of the fact that the traditional "subjective" approach to the exploitation of fisheries – unilateral and State-centered – has significantly contributed to the depletion of these living marine resources, an "objective" approach has progressively emerged throughout the 20th century. Premised on the assumption that fisheries are shared resources, this approach calls upon all States to cooperate in order to achieve their sustainable exploitation.

This "objective" approach to the exploitation of fisheries began to emerge in the early 20th century, with the creation of the first regional organizations mandated by group of States to oversee matters pertaining to fish stocks. Initially, these organizations were mainly charged with carrying out scientific research on selected fish stocks so that States could gain better knowledge, based on biological data, of the impacts of their activities on exploited fisheries. Over time, the duties of these organizations have been broadened to the extent that some of them have begun to perform management functions as well. As a matter of fact, States, while enhancing the role of these organizations, have built a regulatory superstructure upon the scientific base that they provide. In so doing, States have inevitably sought to play down their own role in those marine areas (i.e. the high seas) that lie beyond all national jurisdictions. Traditional norms of international law, including the freedom of fishing and the rule of *pacta tertiis*, have thus been eroded due to the growing need for cooperative approaches. Nowadays, the revision of the mandates of several pre-existing regional organizations has meant that Regional Fisheries Management Organizations (RFMOs) are widely understood to be in charge of regulating the rational exploitation of fisheries. Each of the existing 20 RFMOs is generally responsible for an area of competence or a given species. States are at times members of more than one RFMO and are thus bound to abide by more than one set of measures, depending on where they fish. Following the entry into force of the 1995 United

Nations Fish Stocks Agreement (UNFSA), States Parties to this agreement have been bound by measures adopted by all existing RFMOs, regardless of membership, consistent with article 8 of the UNFSA. At the risk of oversimplification, it thus seems that States Parties to the UNFSA retain autonomous decision-making power in relation to fisheries only for those marine areas that remain under national jurisdiction at present. When fishing in an area under the governance of a given RFMO, on the other hand, States Parties to the UNFSA must do so in conformity with the measures in place. These measures will have been agreed upon by the members of the RFMO concerned through the decision-making processes envisaged in the constitutive agreements of the organization. When a State Party to the UNFSA does not abide by these regulations, instances of what is termed "Illegal, Unreported or Unregulated (IUU) Fishing" occur. At the same time, not being a Party to the UNFSA will not necessarily provide a justification for States fishing in disregard of measures adopted by RFMOs: since the 1992 United Nations Conference on Environment and Development RFMOs have begun to focus on ways of securing compliance by non-members with measures aimed at the conservation and the management of fisheries (e.g. mesh size limits, no-take zones, fishing gear, etc.), including through the adoption of regulations related to enforcement (e.g. inspections, import and export prohibitions, etc.). Recently, in light of the alarming depletion of fish stocks – also due to the growing incidence of IUU fishing – a process aimed at reviewing the performances of RFMOs has been launched through the United Nations in an attempt to increase the effectiveness of these organizations. As a result, further constraints on States, including non-members of RFMOs that are not Parties to the UNFSA, may well be forthcoming. The General Fisheries Commission for the Mediterranean (GFCM) provides us with a concrete illustration of this situation.

2. *Materials and Sources*

- 1982 United Nations Convention on the Law of the Sea (http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm);
- 1995 United Nations Fish Stocks Agreement (http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm);
- GFCM portal (www.gfcm.org);
- GFCM performance review

(http://www.gfcm.org/gfcm/topic/16090/en);
- Recommended minimum criteria for reviewing the performances of RFMOs (http://www.un.org/Depts/los/convention_agreements/fishstocksmeetings/icsp6report.pdf);
- OECD principles of good governance (http://www.oecd.org/document/32/0,3746,en_2649_33735_1814560_1_1_1_1,00.html);
- Model RFMO (http://www.oecd.org/document/32/0,3746,en_39315735_39313060_39397536_1_1_1_1,00.html);
- United Nations Atlas of Oceans (http://www.oceansatlas.org).

3. *Analysis*

The GFCM was set up in 1949 through an agreement concluded on the basis of article XIV of the FAO Constitution. The main objective of the GFCM is "to promote the development, conservation, rational management and best use of living marine resources, as well as the sustainable development of aquaculture in the Mediterranean Sea, the Black Sea and connecting waters". Initially, the GFCM performed solely scientific functions, as the commission merely advised members on matters pertaining to fisheries in its area of competence. In subsequent amendments of the 1949 agreement, in 1963, 1976 and 1997 respectively, the possibility for the GFCM to also adopt measures for the regulation of the relevant activities – thus relieving its members of decision-making duties and responsibilities – was envisaged. Such measures are agreed upon if a two-thirds majority of members present and voting is reached, and become mandatory for any members that have not exercised the right to object though an opt-out procedure (any member may within 120 days from the date of the notification of a measure object to it; and, should it do so, it is under no obligation to give effect to the measure concerned). Most regulations adopted by the GFCM thus far aim at conservation and management whereas only a few enforcement measures have been taken to elicit compliance. This has weakened conservation efforts by the GFCM because if members, let alone non-members, need fear no repercussion for misbehaviour then they are less likely to abide by any measure that restricts their fishing catch. In this connection, it is worth bearing in mind that fishermen can influence issues relating to catch quotas by lobbying the relevant administrative bodies at the national level. This is not at all

surprising as the fishermen are the ultimate addressees of measures adopted by RFMOs. As a result, and as a last resort, seeking to regulate national markets might prove the most effective solution for RFMOs to tackle IUU fishing and enforce cooperation vis-à-vis rogue States. The GFCM has not, however, yet taken this route in its attempts to discourage IUU fishing.

It is worth noting in this regard the current overlaps in the mandates of the GFCM and the International Commission for the Conservation of Atlantic Tuna (ICCAT). In accordance with the 1966 agreement establishing the ICCAT, it is charged with maintaining the population of tuna and tuna-like species found in the Atlantic Ocean at levels permitting the maximum sustainable catch for food. In order to ensure the better management of tuna stocks that straddle the Mediterranean Sea and the Atlantic Ocean, an institutional liaison has been established between the GFCM and the ICCAT via the creation of a joint working group on large pelagic species and through the transposition by the GFCM, into its body of law, of relevant measures adopted by the ICCAT. ICCAT measures transposed into the GFCM body of law do not, however, include those that prohibit imports from States, including non-members, which could have the effect of conservation efforts by the ICCAT (ICCAT members are barred from importing tuna caught in contravention of ICCAT regulations – an approach adopted by many RFMOs since the 1990s). Still, it is possible that prohibited tuna be caught in the area governed by the GFCM. In this regard, it is worth noting that Georgia (which borders the Black Sea), although a non-member, is the subject of a commercial ban by the ICCAT. Irrespective of the fact that Georgia it is not a member of the GFCM either, there is little doubt that it is geographically linked to this RFMO rather than to the ICCAT. However, in the event Georgia decides to become a member of the GFCM in light of the competence of the GFCM over the Black Sea, and without simultaneously joining the ICCAT, there would be a *décalage* between the RFMO competent to sanction it for IUU fishing, and the organization that has already recommended a commercial ban against it.

This state of affairs could be prevented by bridging in the meantime the gap between the ICCAT and the GFCM in their respective regulatory superstructures, which have evolved at a different pace (with the ICCAT moving much faster in this regard). It suffices to note here that the ICCAT, unlike the GFCM, can rely, *inter alia*, on an internationally recognized body of law relating to enforcement that has turned it into a leading RFMO in the fight against IUU fishing. With specific regard to measures banning imports of tuna from non-members, it should be underlined that ICCAT has acknowledged that they can pose problems in terms of accountability and fairness at one point. Consequently, it has developed built-in procedures to afford an opportunity for due process to

those non-members that may find themselves targeted by such measures. A further amendment of the constitutive agreement of the GFCM along these lines could not only enable it to perform similarly efficient enforcement functions, but also provide States Parties with an opportunity to apply good governance principles within the framework of the GFCM. As was clarified in 2006 at the first international meeting on the establishment of the South Pacific Regional Fisheries Management Organization, in the context of RFMOs "governance relates to the rules and practices governing the negotiation and the implementation of its objectives and principles through the exercise of authority, management and control within the organisation. It encompasses the structures and processes for making decisions, as well as the relationship between the organisation and its members".

4. *Issues: Principles of Good Governance*

At the last annual meeting of the GFCM, held in 2011, the results of its performance review were presented. It found that there exists significant scope to improve the functioning of the GFCM, particularly in relation to enforcement mechanisms. Members have thus decided to launch a task force charged with identifying relevant modifications that could be made to the constitutive agreement of the GFCM in the near future. Created when the depletion of fisheries was less acute than it is nowadays, the GFCM is therefore apparently set to evolve further apparently in the search for improvements in governance. In this regard, members are expected to take measures increase the efficiency of the GFCM, as well as its accountability vis-à-vis non-members in relevant decision-making processes. Moreover, to improve transparency, rules for the participation of observers from NGOs and civil society should also be elaborated (at present, no such possibilities exist). Given that the OECD principles for good governance – namely accountability, transparency, efficiency and effectiveness, responsiveness, forward vision and rule of law – were already deemed of sufficient import to be reflected in the agreements of newly created RFMOs, the GFCM should not to overlook their significance in modernizing its own functions. In light of existing interactions with the ICCAT, the GFCM – in revising its constitutive agreement – could perhaps benefit from the development of further cooperative mechanisms with its partner RFMO. After all, the ICCAT has been acting in accordance with the OECD principles of good governance.

As the problem of IUU fishing will not disappear anytime soon, can a "good governance" approach help the GFCM, and other RFMOs, build upon the objective approach to the exploitation of fisheries that characterizes modern

international law? In particular, will it prove possible to strengthen enforcement mechanisms by targeting non-members that persist fishing in violation of existing measures? And, if so, will this be accompanied by the provision of due process protections within RFMOs to account for the interests of non-members targeted by commercial bans?

5. *Further Reading*

a. S. CASSESE, "Shrimps, Turtles and Procedure: Global Standards for National Administrations", NYU IILJ Working Paper No. 2004/4 (2004);
b. L. JUDA, *International Law and Ocean Use Management – The Evolution of Ocean Governance*, London, New York (1996);
c. L. JUDA, "Rio Plus Ten: The Evolution of International Marine Fisheries Governance", 33 *Ocean Development & International Law* 109 (2002);
d. M. LEHARDY, "La liberté de la pêche en haute mer et l'accord sur les stocks de poissons: principe en faillite ou en voie d'effectivitié?", 23 *Annuaire de Droit Maritime et Océanique* 251 (2005);
e. M. LODGE, "Managing International Fisheries: Improving Fisheries Governance by Strengthening Regional Fisheries Management Organizations", Chatman House briefing paper (2007) (http://www.chathamhouse.org/publications/papers/view/108441);
f. T. SCOVAZZI, "The Evolution of International Law of the Sea: New Issues, New Challenges", 286 *Recueil des cours de l'Académie de droit international de la Haye* 39 (2000);
g. A. VON BOGDANDY, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship", 5 *Max Planck Yearbook of United Nations Law* 609 (2001);

I.E.9 International Organizations and Horizontal Review: The World Health Organization, the Parliamentary Council of Europe, and the H1N1 Pandemic*

Abigail C. Deshman

1. *Background*

The two key international organizations involved in this case study are the World Health Organization (WHO) and the Council of Europe's Parliamentary Assembly. The World Health Organization was established in 1948 and serves as the United Nations' specialized health agency. There are three main governing organs within the WHO: the World Health Assembly (WHA), the Executive Board, and the Secretariat. The WHA is the highest decision-making body. Each WHO Member State has one vote and may send a delegation of health experts who should "preferably [represent] the national health administration of the Member." The WHA elects 34 member states to sit on the Executive Board. The individuals sent by states to sit on the Board are supposed to serve in their individual capacity as health experts rather than as state representatives. The Secretariat is composed of the Director-General and WHO staff. The WHO also has a number of partnerships and *ad hoc* working bodies that supplement its formal operational structures. The organization, for example, makes extensive use of Expert Advisory committees – groups of external experts appointed by the Director-General who are available for specialized consultation. In addition, over the last decade the WHO has made a conscious organizational effort to focus on "open and constructive relations with the private sector," joining several global public-private partnerships and actively soliciting private sector cooperation, funding and personnel (see also § I.B.10 "SARS, the 'Swine Flu' Crisis and Emergency Procedures in the WHO", by J.B. Heath).

The Council of Europe is an international organization that was founded in 1949 with a mandate to promote democracy and protect human rights and the

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rule of law within Europe. It currently has 47 member countries, constituting almost the entire European continent. The Council's Parliamentary Assembly is the legislative branch of the organization and has a structure that is specifically tailored to its legislative, as opposed to executive, focus. Each Member State must send delegates who are sitting Members of Parliament in their home countries and "the balance of political parties within each national delegation must ensure a fair representation of the political parties or groups in their national parliaments". The number of representatives is apportioned according to population and, unlike many international organizations where state representatives are appointed directly by the executive branch, a variety of appointment methods is used to select Parliamentary Assembly representatives. In the United Kingdom, for example, the country's 16 members and 16 alternates must be approved by both legislative houses.

2. *Materials and Links*

- World Health Organization Constitution, (http://www.who.int/governance/eb/who_constitution_en.pdf);
- Council of Europe, "Assembly structure", (http://assembly.coe.int/Main.asp?link=/AboutUs/APCE_structures.htm) ;
- WHO, *International Health Regulations*, WHA 58.3, Fifty-Eighth World Health Assembly (2005) (http://www.who.int/csr/ihr/IHRWHA58_3-en.pdf);
- WHO, *Situation updates – Pandemic (H1N1) 2009* (http://www.who.int/csr/disease/swineflu/updates/en/index.html);
- Parliamentary Assembly of the Council of Europe, *The handling of the H1N1 pandemic: more transparency needed*, Report, Social Health and Family Affairs Committee, 7 (March 23, 2010) (http://assembly.coe.int/CommitteeDocs/2010/20100329_MemorandumPandemie_E.pdf);
- Deborah Cohen & Philip Carter, *WHO and the pandemic flu "conspiracies"* 340 BMJ 2912 (2010) (http://www.bmj.com/content/340/bmj.c2912.full);
- Parliamentary Assembly, Council of Europe, *Resolution 1729 (2010)*, 26th sitting (June 24, 2010) (http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1749.htm);

- Parliamentary Assembly, Council of Europe, *Recommendation 1929 (2010)*, 26th sitting (June 24, 2010), (http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1929.htm);
- WHO, *Pandemic (H1N1) 2009 briefing note 21: The international response to the influenza pandemic: WHO responds to the critics*, (June 10, 2010) (http://www.who.int/csr/disease/swineflu/notes/briefing_20100610/en/index.html);
- WHO, *How will the global response to the pandemic H1N1 be reviewed?*, (April 12, 2010) (http://www.who.int/csr/disease/swineflu/frequently_asked_questions/review_committee/en/index.html);
- WHO, *Report of the Review Committee on the Functioning of the International Health Regulations (2005) in relation to Pandemic (H1N1) 2009*, A64/10 (5 May 2011) (http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_10-en.pdf);
- WHA, *Implementation of the International Health Regulations (2005)*, 64th Session, A64/VR/9 (20 May 2011) (http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_R1-en.pdf).

3. *Analysis*

In order to combat the international spread of disease, one of the core mandates of the World Health Organization, the WHA has adopted the International Health Regulations, an international agreement that is binding on all WHO members. The Regulations coordinate national and international public health monitoring, reporting and response. At the national level, individual member states are required to develop and implement national surveillance and response capacities to track and manage health risks. Each country must designate a National IHR Focal Point to help implement the IHR at the national level, advise national policy-makers of WHO recommendations and serve as a continuous official communication channel. There are also mandatory reporting requirements, the most significant of which is states' duty to notify the WHO within 24 hours of any events which may constitute a "public health emergency of international concern" (PHEIC).

At the international level the WHO has a general duty to monitor global health risks and provide expert assistance. Additional regulatory powers are triggered by an international health emergency. To declare an official PHEIC, the WHO Director-General must consult with the Emergency Committee – a specially convened Expert Advisory Committee – and the affected state party. In

consultation with the Emergency Committee the Director-General may issue recommendations including guidelines on medical treatment and border control measures. National health authorities, however, retain ultimate discretion regarding their country's pandemic response.

The first deployment of the IHR occurred in the spring of 2009. In early April, both Mexico and the United States notified the WHO of H1N1 outbreaks. The Director-General convened an Emergency Committee, and on April 25, 2009 publicly announced that the H1N1 outbreak constituted a PHEIC. On June 11, 2009, WHO announced that the H1N1 outbreak had reached phase 6 on the WHO's pandemic scale, a determination that officially signaled the existence of a global pandemic.

From the outset the WHO took on a leadership role in the public health response. The organization disseminated a large amount of information through frequent press briefings and actively facilitated and enhanced on-the-ground monitoring and response capabilities. They dispatched teams of experts to support national health authorities, coordinated global prophylactic and vaccination treatments and maintained a "close dialogue with influenza vaccine manufacturers" throughout. The organization also elaborated specific recommendations for national health ministries and the general public, including guidelines regarding the recommended use of specific antivirals, vaccine availability, and vaccination priorities and strategies.

There has been a significant amount of public criticism directed towards the WHO as a result of its role in managing the pandemic. For several years the scientific community had been raising concerns regarding the WHO's transparency, accountability, and independence from commercial health entities such as pharmaceutical companies. These underlying concerns were brought to the fore during the H1N1 pandemic. Despite the large national and international response mobilized to protect populations against H1N1, the actual health impacts of the virus proved to be relatively minimal. The public expenditure to combat H1N1, however, greatly outstripped budgets allocated to the seasonal flu in many countries. Moreover, although the WHO's recommendations were not binding on Member States, several European countries had dormant purchase contracts with pharmaceutical companies that were drafted to come into effect if and when the WHO declared a pandemic. The WHO decision to declare a global pandemic, therefore, had significant and direct consequences for many states and arguably constituted a windfall for pharmaceutical companies. The contrast between the money spent and the severity of the pandemic led many to question the WHO's governance structure, transparency and the adequacy of its conflict of interest provisions.

The Parliamentary Assembly of the Council of Europe emerged early on as the primary institutional critic of the WHO. In January 2010 a Parliamentary Assembly Rapporteur began a high profile public inquiry into the WHO's H1N1 response which culminated in a highly critical report that was released later that year. The report cited a lack of transparency surrounding the WHO's decision to maintain the pandemic at a level 6 alert despite evidence that the pathogen was relatively non-lethal. It also examined an apparently unreported, undocumented change in the WHO's pandemic definition just prior to the phase 6 declaration which made a pathogen's virulence irrelevant. Finally, the report expressed significant concern regarding possible undue commercial influence, the sufficiency of existing conflict of interest provisions, and WHO's refusal to release the names or the declared conflicts of interest for Emergency Committee members. The WHO Director-General had stated that Emergency Committee anonymity was maintained to protect the experts from political or commercial pressure. The Rapporteur, however, was unsatisfied with this explanation, responding that he was "very concerned by this attitude and remains convinced that it is entirely justified to require full transparency with regard to the profiles of experts whose recommendations have far-reaching consequences for the public health sector".

After considering the report the Parliamentary Assembly adopted a strongly-worded resolution citing "grave shortcomings […] regarding the transparency of decision-making processes relating to the pandemic which have generated concerns about the possible influence of the pharmaceutical industry". he resolution "calls on public health authorities at international, European and national level – and notably the WHO – to address in a transparent manner the criticisms and disquiet raised in the course of the H1N1 pandemic". The Assembly's conclusions were buttressed by a June 2010 British Medical Journal investigation revealing that experts involved in championing and developing the first WHO pandemic preparedness guideline belonged to an industry-funded scientific group. In addition, experts who had drafted the WHO's most recent policy guidelines on the use of vaccines and antivirals during influenza pandemics had financial and research ties with pharmaceutical companies. These relationships were not published with the guidelines, a violation of the WHO's conflict of interest directives. The WHO subsequently agreed that "[t]he publication of summaries of relevant interests following meetings is inconsistent and needs to be made routine" and that "safeguards surrounding engagement with industry need to be tightened".

Under considerable public pressure and media attention drawn in large part by the ongoing Parliamentary Assembly inquiry, the WHO announced its own independent review of the H1N1 response. The findings, released in May 2011,

reinforce the Assembly's conclusions on the issues of transparency, accountability and conflicts of interest. The Review Committee noted that the WHO's "[r]eluctance to acknowledge its part in allowing misunderstanding of the intended definition [of a pandemic] fuelled suspicion of the Organization". It also criticized the decision to keep the identities of the Emergency Committee members confidential, stating that "this practice was not well-suited to a Committee whose service would extend over many months." Finally, the review found there was a "[l]ack of a sufficiently robust, systematic and open set of procedures for disclosing, recognizing and managing conflicts of interest among expert advisers." The Committee recommended increasing transparency in the appointment process of experts, including prior disclosure of identities and conflicts of interest, an opportunity for public comment, probationary appointments, and clear standards regarding what conflicts of interest would disqualify candidates. The Report was submitted to the World Health Authority, which requested the Director-General to report on the implementation of the Committee's recommendations in 2012.

4. *Issues: Inter-Institutional GAL Criticism and the Emergence of Horizontal Review*

This case study, which tracks the emergence of GAL-related criticism between two international organizations, raises some interesting questions regarding the evolutionary mechanisms of GAL development. First, we should note that, although the existing body of GAL literature has identified many diverse forms of GAL review and evolution, most do not involve one international organization criticizing another. We frequently see international organizations being criticized by internal review mechanisms and national courts and tribunals. International organizations, however, seem less likely to review each other. International and regional courts, for example, have refused to exert jurisdiction over various international organizations, and both the International Court of Justice and the European Court of Justice have declined to directly review Security Council resolutions (for a different perpective, see § III.B.1 "The War on Terror and the Rule of Law: *Kadi II*", by M. Savino; on relationships between international courts, see also § VIII.17 "The Relationship between the ECHR and EU Law, the Presumption of Equivalent Protection Revisited and the End of Mutual Trust in the EU Asylum System: The *M.S.S.* Case", by D. Gallo). Moreover, most identified examples of GAL-related review involve the decisions of courts and other adjudicative bodies – not interaction between two political organizations.

Against this background, the review exercise undertaken by the Parliamentary Assembly appears to be the exception rather than the norm. This gives rise to three key questions. First, why is there a paucity of horizontal review (on this specific theme, see § I.E.5 "Horizontality as a Global Strategy for Accountability: the OECD Reviewing the EU CAP", by G. Dimitropoulos and B. Carotti) between international organizations? Second, what structural features of this particular controversy prompted or allowed horizontal review between international organizations to emerge? And third, why would the substantive positions of the Parliamentary Assembly and the WHO differ so greatly with respect to desirable standards of transparency, accountability, and the possibility of corporate capture of WHO mechanisms?

Fundamentally, an examination of where and why GAL emerges must take into account internal and external institutional dynamics, politics and power. Criticizing an international institution can be politically costly – particularly if the target institution is being directed by powerful member states. An international institution without explicit jurisdiction over other global organizations may be reluctant to criticize its peers. There are also inherent structural obstacles to horizontal IO review. States are, in theory, the ultimate decision-makers within most international organizations. If enough states are concerned about the procedural fairness, accountability, or responsiveness of a given international organization, these concerns seem likely to be addressed within that organization. If, on the other hand, power-wielding states are of the opinion that the existing procedures are adequate, it is unlikely that another international organization controlled by those same powerful states will publicly voice criticism.

Recognizing these political and structural obstacles to horizontal review can also help identify instances where one might expect to see criticism for GAL norms emerging. If international institutions are not controlled by the same powerful states they will be more likely to differ with respect to preferred outcomes. Diversity in institutional composition could theoretically come from several different sources – divergent membership bases, differential distribution of power between members within an organization, or even diverse interests being pursued by the same member state in the two institutional settings. In this case study, therefore, it may be important that the Parliamentary Assembly's representatives are sitting European parliamentarians, while the WHO's representatives are drawn from states' executive branches. This split between the legislative and executive branches of the government may have allowed a critique that was playing out within many governments at the national level to replicate itself in the international arena.

The question of why government representatives in the Council of Europe would show more concern about WHO accountability than their WHO

counterparts is also important – particularly if we are interested in understanding which organizations are concerned about GAL norms, and why. Again, politics and power dynamics may play an important role. For example, an organization that is to some extent captured by powerful actors may not be interested in robust transparency, accountability and conflict of interest provisions. Other organizations that represent more diverse constituencies, on the other hand, may demand implementation of these norms as a way of working towards a more equitable power distribution. Although large international organizations such as the World Bank and the International Monetary Fund are often criticized for a lack of accountability (see § III.A.7 "Corruption in Global Administrative Bodies: The Integrity Vice Presidency at the World Bank", by S. Fresa; § III.C.1 "Transparency Reform in the World Bank and Beyond", by M. Donaldson), in reality they are tightly controlled organizations that are directly accountable to their powerful Member States. Seen in this light, much discussion of GAL norms may focus not on whether an organization is accountable and transparent, but to whom it owes these duties.

Finally, there may also be substantive reasons that can help explain why institutions may have differing visions regarding which GAL norms should be implemented in any given organization. Does it make a difference, for example, if you know that states' traditional interest in regulating the international spread of disease related more to negative impacts that diverse quarantine practices had on global trade routes, rather than a shared concern for public health? The continued relevance of international trade is reflected in the International Health Regulations' statement of purpose, which includes avoiding "unnecessary interference with international traffic and trade." It is likely that delegates to the Council of Europe did not have international trade in mind when they criticized the WHO's processes and procedures. For the delegates that sat on the WHO's governing bodies, however, the impact any quarantine measures might have had on international trade was likely a central concern. Could this divergence of opinion regarding the ultimate purpose of the World Health Organization have impacted the evolution, or lack thereof, of GAL norms?

5. *Further Reading*

a. E. BENVENISTI, "Public Choice and Global Administrative Law*:* Who's Afraid of Executive Discretion*?*", 68 *L. and Contemp. Probs.* 319 (2005);

b. A.C. DESHMAN, "Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture", 22 *EJIL* 1089 (2011);
c. R.W. GRANT and R.O. KEOHANE, "Accountability and Abuses of Power in World Politics", 99 *American Political Science Review* 29 (2005);
d. J. KLABBERS, "The Bustani Case before the ILOAT: Constitutionalism in Disguise?", 53 *Int'l & Comp. L. Q.* 455 (2004).

I.E.10 The TBT Agreement: Implications for Domestic Regulation

Joanna Langille

1. *Background*

From 1947 to 1994, international trade was regulated by the General Agreement on Tariffs and Trade (GATT). The GATT was initially signed by twenty-three countries when multilateral negotiations failed on a proposed International Trade Organization (ITO). Unlike the proposed ITO, the GATT was not an international organization. It was an international treaty which provided simple and basic rules governing trade in goods, designed to limit discrimination in trade policy and facilitate global trade. These rules obliged States party to the GATT to treat like products from other GATT Members the same way under their tariff regime (the "Most Favoured Nation" obligation). They also required GATT members to treat imported products the same as like domestic products (the "National Treatment" obligation). These rules, and others meant to prevent discrimination, were relatively simple and were aimed primarily at reducing discriminatory barriers to trade such as tariffs and internal taxation regimes.

Thorough a series of rounds of multilateral negotiations, the GATT gradually expanded in scope. During the forty-seven years in which it was the primary agreement on international trade, the GATT grew in membership, covered an increasingly large percentage of global trade, and expanded beyond rules on tariffs.

The Uruguay Round of multilateral trade negotiations lasted from 1986-1994, and produced the World Trade Organization (WTO), a formal international organization, with a permanent headquarters and staff, to replace the informal GATT regime (however, the GATT treaty itself remains in effect).

The Uruguay Round also produced a series of agreements which greatly expanded the scope of the rules governing multilateral trade. These agreements included the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), so services and intellectual property are now governed by multilateral agreements, beyond the GATT's coverage of trade in goods. The Uruguay Round also resulted in the Agreement on Technical Barriers to Trade (TBT Agreement).

The TBT Agreement marked a distinct change in the rules governing global trade. The GATT regime focused on facilitating trade by combating discriminatory practices and protectionism in the tariff regime. These measures focused largely (although not exclusively) on decisions taken "at the border," when countries regulate imports. The TBT Agreement represents a shift from this approach; it contains provisions unrelated to discrimination, seeking to go "beyond the border" to promote regulatory efficiency in order to facilitate trade. It applies to technical regulations and standards imposed by governments which set out specific requirements or characteristics of products.

The various provisions of the TBT Agreement have significant implications for global administrative law. This contribution will analyze several relevant provisions and the ways in which they affect domestic regulation.

2. *Materials*

- Agreement on Technical Barriers to Trade (http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm);
- WTO Portal on the TBT Agreement (http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm);
- History of the Uruguay Round (http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm);
- European Communities — *Trade Description of Sardines* case (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm);
- European Communities — *Measures Prohibiting the Importation and Marketing of Seal Products* case (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm);
- European Communities — *Asbestos* case, available at (http://www.wto.org/english/tratop_e/envir_e/edis09_e.htm).

3. *Analysis*

The TBT Agreement contains provisions that have the potential to dramatically affect domestic regulation. This section will discuss selected provisions of the TBT Agreement and the ways in which they affect domestic regulatory processes.

The first important provision of the TBT is Article 2.2, which states that "Members shall ensure that technical regulations are not prepared, adopted or

applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products".

This goes beyond the traditional international trade law goal of minimizing discrimination in seeking to actively facilitate international trade by requiring that WTO Member States not create "unnecessary obstacles to international trade" when developing their technical regulations. The Article places several requirements on domestic regulators. They must first identify a "legitimate" objective for their technical regulation. While several examples of what constitutes a legitimate objective (such as human health) are set out in the provision, the list is not exclusive, and remains ill-defined. For example, the *European Communities — Seal Products* case currently being considered by the WTO dispute settlement process may address the issue of whether protecting animal welfare is a legitimate objective under the TBT Agreement.

After defining a legitimate objective, the domestic regulator must ensure that the technical regulation adopted is not "more trade-restrictive than necessary" to meet the legitimate objective. This means that the regulation must be calibrated to meet the appropriate level of risk, as defined by the legitimate objective. Article 2.2 specifies that when domestic regulators assess such risk levels, "relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end-uses of products."

The various requirements of Article 2.2 therefore constrain domestic administration, by requiring that regulators select a legitimate objective for regulation, that they ensure that any technical regulation meets the level of risk established by the objective, and that they use scientific evidence and other sources to assess the risks.

A second important provision of the TBT is Article 2.4, which requires domestic regulators to base their technical regulations on international standards, where applicable. In the *European Communities — Sardines* case, the WTO Appellate Body found that the "based on" requirement necessitates some degree of *substantive* correspondence between the international standard and the domestic standard; the AB rejected a *procedural* approach, whereby the domestic regulator would be required to consider the international standard during the

process of standard setting but would not be required to match the international standard in substance. This Article places a significant constraint on domestic administrative law; it requires WTO Member States to justify substantive departures from international standards. This also gives significant power to international standard setting processes (such as the Codex Alimentarius and the International Organization for Standardization), because they become the relevant benchmark for domestic administrative law.

A third important and related article of the TBT is Article 2.5, which provides that, if a technical regulation is prepared in accordance with the relevant international standards discussed in 2.4, "it shall be rebuttably presumed not to create an unnecessary obstacle to international trade." This Article creates an additional incentive for domestic regulators to base their technical regulations on international standards, and further increases the importance of international standard setting administrative processes.

Fourth, Article 2.7 requires that WTO Member States "give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations." This so-called equivalence requirement means that Member States must accept the regulatory policies of other states which accomplish effectively the same goal as their own regulatory regime. The equivalence requirement is designed to facilitate trade; Members must accept the technical regulations of others and permit their products to be sold domestically if they meet the same level of risk assessment. This creates obligations on WTO Members to review the regulatory processes of others and to refrain from limiting the importation or sale of their products as long as they adhere to technical standards that meet the objectives (e.g. safety) of the reviewing State's own regulations.

Fifth, Article 2.8 changes the substantive character of domestic regulation, by specifying that regulations be set out "in terms of performance rather than design or descriptive characteristics." This Article is meant to make the equivalence principle of Article 2.7 workable. Members must create technical regulations which specific the *desired outcome*, instead of a particular substance or character which is correlated with a desired outcome. This obliges domestic regulators to formulate their regulations in terms of a performance standard, rather than a characteristic of a product.

This analysis has summarized only a select few of the provisions of the TBT Agreement. There are many more aspects of the Agreement that are beginning to shape domestic regulatory processes and outcomes, as technical barriers to trade become more thoroughly litigated at the WTO. But even an analysis of these few articles demonstrates that the TBT Agreement has the

power to affect domestic regulation in significant ways. The following section draws some conclusions from this analysis.

4. *Issues: Shaping the Processes and Substantive Outcomes of Domestic Regulation*

The provisions of the TBT Agreement outlined above have significant implications for global administrative law. They shape domestic regulatory and administrative law in at least three important ways.

First, the TBT Agreement affects domestic *substantive* regulatory outcomes. Article 2.2 requires domestic regulators to select a legitimate outcome for regulation, and to tailor their technical regulations to that legitimate outcome in a way that doesn't create unnecessary obstacles to trade. This imposes a specific substantive requirement on the quality of domestic regulation. Further, Article 2.8 means that domestic regulators must frame their regulations in terms of outcomes rather than technical characteristics, to facilitate trade. This, too, imposes a substantive requirement on domestic regulators. The TBT Agreement, therefore, strikes to the heart of the domestic regulator's mandate: the substance of the technical regulations that they produce.

Second, the TBT Agreement also has an effect on the *process* of domestic regulation. For example, Article 2.2 specifies that scientific information and other types of risk assessment must be used when analyzing how to effectively meet the legitimate objective of the regulation.

Third, the TBT Agreement promotes domestic compliance with *international agreements*. Articles 2.4 and 2.5, as discussed above, encourage states to base their domestic regulatory standards on international standards, where applicable. This has the effect of encouraging global conformity and convergence in regulation, based on the relevant international standards. This also empowers global administrative processes, as they become the relevant benchmark for domestic regulation.

These are only some of the ways in which the TBT Agreement has the potential to shape domestic regulation. It is a clear example of the way that international law can affect the domestic regulatory process, another facet of global administrative law.

5. *Further Reading*

a. S. CASSESE, "Global Standards for National Administrative Procedure", 68 *Law & Contemp. Probs.* 109 (2005);
b. R. HOWSE, "A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and 'International Standards'", in C. JOERGES, E. PETERSMANNN (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006) p. 383 et seq.;
c. G. MAYEDA, "Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries", 7 *J. Int'l Eco. L.* 737 (2004);
d. M. MING DU, "Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization", 6 *Chinese J. Int'l L.* 269 (2007);
e. R. MUNOZ, "The TBT Agreement: A Perfect Tool to Monitor Regulatory Activities Worldwide", 4 *Cambridge Y.B. Eur. Legal Stud.* 273 (2002);
f. N.L.W. WILSON, "Clarifying the Alphabet Soup of the TBT and the SPS in the WTO", 8 *Drake J. Agric. L.* 703 (2003);
g. H. ZUNIGA SCHROEDER, "Definition of the Concept International Standard in the TBT Agreement", 43 *J. World Trade* 1223 (2009).

I.E.11 Compliance and the Post-Retaliatory Phase in the WTO: *US/Canada – Continued Suspensions*

Giulio Bolaffi

1. *Background*

In 1998, the WTO Appellate Body issued its report in the *Hormones* case, regarding the European Community (EC) ban on the import of meat and meat products treated with hormones (see § III.A.3 "*WTO Hormones*: Impartiality and Local Interests" by G. Bolaffi). The decision of the global body, however, did not settle the longstanding dispute between the two sides of the Atlantic. The European Communities, in fact, took immediate steps to bring its legislation into conformity with WTO law; and it ordered seventeen new scientific studies in order to perform a valid risk assessment, compatible with the WTO ruling, but decided not to lift the ban. As the contested European measure was not withdrawn, the United States (US) and Canada responded by commencing the procedures necessary under WTO law to impose sanctions, with the aim of obtaining compensation for the losses incurred and placing pressure on their European counterpart to withdraw its measure. On July 26, 1999, the US and Canada obtained from the Dispute Settlement Body (DSB), after arbitration under Article 22.6 of the Dispute Settlement Understanding (DSU), the authorization to retaliate against European food products up to a value of US $250 million through the imposition of 100 per cent additional duties.

The new scientific studies were used by the Scientific Committee on Veterinary Measures (SCVPH), the European body designated to perform a new risk assessment in conformity with the WTO requirements, to issue three different reports (1999, 2000 and 2002) on the effects and problems linked to the use of hormones in livestock production. On September 22, 2003, in light of the new scientific findings, the EC adopted Directive, 2003/74/EC, which maintained the permanent prohibition on meat and meat products from animals treated with *Oestradiol-17ß*, and which provisionally continued the ban on the other five hormones until "more complete scientific information" could be collected with regard to the risks of those hormones.

On October 2003, the EC notified the DSB of the new Directive and the scientific studies, arguing that it had complied with the recommendations and rulings of the DSB from the *Hormones* Case, and requesting the withdrawal of the sanctions. The US and Canada, however, considered that the new EC measure could not be considered a measure taken to comply, and therefore decided not to withdraw their additional duties on the European products.

The issue that arose for the first time in the WTO was to determine who was to bear the burden of initiating new legal proceedings to determine whether the new European legislation was in conformity with the previous WTO recommendations. Under Article 21.5 of the DSU, a disagreement over whether measures taken to comply with DSB recommendations are WTO-consistent should be resolved by referral wherever possible to the original panel. The US and Canada, however, declined to refer the matter to the original Panel, as they considered that Directive 2003/74/EC, by maintaining the original ban, could not be considered a measures taken to comply, while the EC assumed that it could not seek a DSU Article 21.5 proceeding as it was the original respondent in the case. To resolve the standoff, the EC decided to initiate a new proceeding challenging the sanctions imposed on its products.

The Panel and the Appellate Body were confronted with scores of procedural issues raised in the post-suspension stage of the dispute to determine if Member States had properly complied with its WTO obligations, but in order to do so they had to deal again with the issue of striking a balance between measures taken to protect human and animal health on one hand and free trade on the other, in the light of uncertain scientific information.

2. *Materials*

- *European Communities - Measures Concerning Meat and Meat Products (Hormones)* - Original Complaint by the United States - Recourse to Arbitration by the European Communities - Decision by the Arbitrators, WT/DS26/ARB, 12/07/1999 (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm);
- *European Communities - Measures Concerning Meat and Meat Products (Hormones)* - Original Complaint by Canada - Recourse to Arbitration by the European Communities - Decision by the Arbitrators, WT/DS48/ARB, 12/07/1999 (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm);
- *United States - Continued Suspension of Obligations in the EC - Hormones Dispute* - Report of the Panel, WT/DS320/R, 31/03/2008 (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm);

- *United States - Continued Suspension of Obligations in the EC - Hormones Dispute* - AB-2008-5 - Report of the Appellate Body, WT/DS320/AB/R 16/10/2008 (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm);
- Canada - Continued Suspension of Obligations in the *EC - Hormones* Dispute - Report of the Panel, WT/DS321/R, 31/03/2008 (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds321_e.htm);
- *Canada - Continued Suspension of Obligations in the EC - Hormones* Dispute - AB-2008-6 - Report of the Appellate Body, WT/DS321/AB/R, 16/10/2008 (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds321_e.htm);

3. *Analysis*

Before the Panel, established on February 17, 2005, the EC argued that, by adopting Directive 2003/74/EC, it had removed its WTO inconsistent measure and that the US and Canada had violated the provisions of the DSU by maintaining the retaliatory measures against its products without having recourse to the DSB.

The Panel first assessed the procedural issue related to Article 23.2(a) of the DSU, which established that a Member shall "not make a determination to the effect that a violation has occurred […] except through recourse to dispute settlement". The Panel recognized that the new EC Directive was not the same measure that was found to be in breach in the previous *Hormones decision* and had never been the subject of WTO litigation. Moreover, the Panel relied on two statements made by the US and Canada at the DSB that the new Directive was WTO-illegal to conclude that they had made a unilateral determination without having recourse to the relevant dispute settlement mechanisms. The Panel, therefore, concluded that, by continuing to suspend concessions after the notification of Directive 2003/74/EC, the defending parties had breached Articles 23.1 and 23.2(a) of the DSU.

The Panel then focused on the question of whether EC Directive 2003/74/EC could be considered a measure taken to comply under Article 22.8 of the DSU. It found that, in relation to the permanent ban on *Oestradiol-17ß*, the European Communities had not performed a valid risk assessment because it had "failed to evaluate relevant health risks specifically in terms of those originating from residues in meat as a result of hormone treatment for the purpose of growth promotion" (US Panel Report, 7.513). In relation to the provisional ban on the other five hormones at issue, the Panel affirmed that the European

Communities had failed to meet the condition of "insufficient scientific evidence under Article 5.7 of the SPS Agreement since it had not demonstrated any "critical mass" of new evidence, which would have justified the EC's provisional ban" (US Panel Report, 7.648). The Panel, on the basis of these findings, concluded that Directive 2003/74/EC had not complied with the previous WTO ruling and that the ban was still inconsistent with Articles 5.1, 5.2, 5.7 and Annex A(4) of the SPS Agreement. The Panel, did recommend that the defending parties should bring their continued sanctions into conformity with their obligations under the DSU, but it did not require that they be lifted as the European Union had not complied with the previous ruling.

The three parties appealed the decision. The Appellate Body made its final report public on October, 16, 2008. The first issued addressed was a common request by the parties to open the oral hearings to the public, in order to enhance the transparency of the global judicial process. The Appellate Body, in a preliminary ruling of July 2008, allowed the public to participate in this manner, holding that this did not affect the fairness and integrity of the adjudicative process. Therefore, for the first time since the establishment of the WTO, an Appellate Body oral hearing was made public; 80 individuals registered to follow the proceeding on close circuit monitors.

The Appellate Body then turned to the procedural issue of who should shoulder the burden of initiating a proceeding in a post-retaliatory phase of a dispute. It considered that, under DSU article 22.8, any putative removal of an inconsistent measure should be substantial, that the suspension of concessions can continue until this condition is met and that any disagreement has to be resolved through a multilateral proceeding during which the suspension of concessions can remain in place. The principle affirmed by the Appellate Body is that if sanctions had to end whenever implementing measures were notified, this would significantly weaken the effectiveness of the WTO dispute settlement mechanism (Appellate Body Report, para. 308). The parties, however, share the responsibility of ensuring that suspensions are temporary, as they constitute an "abnormal state of affairs". Therefore, a retaliatory measure has to be immediately lifted if the implementing measure is found to be in compliance with WTO rules.

The Appellate Body then clarified that the appropriate procedural venue to assess whether an inconsistent measure has been removed is through having recourse to a proceeding under Article 21.5 of the DSU; and that both the implementing and the suspending parties can have recourse to this. In the Appellate Body's view, in a post retaliatory proceeding, the implementing Member need only to identify its implementing measure and claim that it has complied, while the original complainant, if it believes that the new measure

creates new violations or fails to rectify old ones, can promptly file its own Panel request referencing those provisions, so that both requests can be referred to the original panel. The Appellate Body then concluded that the US and Canada had not violated Article 23 of DSU by maintaining the suspension of concessions, as they had engaged actively in the dispute settlement proceedings.

The Appellate Body's report then moved on to the issue of whether EC Directive 2003/74/EC could be considered a measure taken to comply under Article 22.8 of the DSU.

As a preliminary matter, the Appellate Body discarded the expert advice received by the Panel because it considered that the process of appointment of the experts had been such as to cast doubt on their independence, thus violating the EC's due process rights. In the Appellate Body's view, the selection of experts has to respect the principles of fairness and impartiality, which is an "essential feature of a rules-based system of adjudication", as they can have "a significant bearing on a panel's consideration of the evidence and its review of a domestic measure, especially in cases like this one involving highly complex scientific issues" (Appellate Body Report, 436). For this reason, it concluded that the previous affiliation of two of the experts consulted compromised their appointment and thereby the adjudicative independence and impartiality of the Panel.

The analysis then turned to determine if the permanent ban of *Oestradiol-17ß* was based on a valid risk assessment under Article 5.1 of the SPS Agreement. In the Appellate Body's view, the Panel erred in adopting a narrow interpretation of risk assessment that "failed to take into account that risk assessment and risk management partly overlap in the SPS Agreement" (Appellate Body Report, para. 537). On this basis, the Appellate Body concluded that the Panel had erred because it had not considered the possibility of misuse or abuse of good veterinary practices as a contributing factor in the EC's risk assessment to justify the its ban on *Oestradiol-17ß* (Appellate Body Report para. 545). The Appellate Body also criticized the Panel's standard of review of the EC risk assessment under Article 5.1, because it had not limited itself to determining whether the risk assessment was supported by scientific evidence, but instead had engaged in an evaluation of the correct scientific conclusions. The Appellate Body noted that a WTO member is entitled to rely on divergent or minority views in justifying trade-restrictive measures, as long as those views come from a "respected and qualified source", and concluded that the Panel thus erred in itself seeking to weigh up the majority scientific view on the risks posed by the use of hormones.

The Appellate Body also took issue with the Panel on the question of the possible application of provisional measures under Article 5.7 of the SPS Agreement where new scientific evidence had rendered the state of scientific

knowledge insufficient to perform a risk assessment. The Appellate Body strongly disagreed with the Panel's standard that to fulfil the condition established in Article 5.7 a "critical mass" of new evidence calling into question previously "sufficient" scientific evidence would be necessary. The Appellate body considered that this view was too inflexible as it required a paradigm shift in science, and affirmed that it is sufficient that "new scientific evidence is capable of casting doubts as to whether the previously existing body of scientific evidence still permits of a sufficiently objective assessment of risk" (Appellate Body Report, para. 703). For this reason it reversed the Panel's conclusion that the EC had not demonstrated that relevant scientific evidence was insufficient in relation to any of the five hormones on which it had applied a provisional ban.

The Appellate Body's conclusion reversed the Panel's findings that Directive 2003/74/EC was not based on a valid risk assessment; however, it also considered that the information before it was not sufficient to complete its analysis and to rule on the issue of actual lawfulness of the Directive under WTO law. On that basis, it recommended that the parties initiate a new proceeding to determine whether the European Directive was in conformity with the WTO rules and regulations.

4. *Issues*

This dispute raises three relevant issues. First, what are the appropriate procedures that a State has to follow in order to respect its obligations after a decision of a global adjudicative body? In the *US/Canada-Continued Suspensions* dispute, the Appellate Body introduced a proceduralized set of steps that Member States have to follow in the post-retaliatory phase, and declared its own ultimate authority to verify whether a Member State has complied with its WTO obligations. The competence of global adjudicative bodies therefore is not necessarily limited to verifying the existence of a violation of an international agreement, but it can also incorporate the power to conduct an objective assessment of the implementation phase in order to ensure that previous rulings are being respected. This raises several questions: can national courts be involved in the process of reviewing a State's measures taken in order to comply with a global regime? Who can trigger the post-implementation review process? Should a State's implementing measure become the object of different proceedings, what would the consequences of conflicting decisions by the two (or more) adjudicative bodies be?

Second, this case touched upon the sensitive issue of how to enhance transparency and participation at the global level. One of the recurring criticisms

of global public and private bodies to date is that their decision-making processes lack transparency, openness and accountability, calling their legitimacy into question. The Appellate Body, following decisions reached by previous Panels, decided to open its oral hearings to the public, despite the fact that no textual provisions in the WTO Agreement had provided for this possibility. This ruling was objected to by some Member States, but since then it has become a substantial feature of the WTO adjudicative process. What are the other instruments through which it is possible to enhance public participation in and the accountability of global bodies? Should public participation and transparency become general principles of law, enforceable at the global level?

Third, the relationship between law and science still remains very controversial (on the issue, see also § VIII.13 "Balancing of Interests, Scientific Cognitions Knowledge and Health: The *Gowan* Case", by S. Penasa). Member States wishing to protect the life and health of their citizens from risks deriving from food consumption are not free to determine the level of protection they deem appropriate, but must instead conform to conform to global standards (see § III.A.3 "*WTO Hormones*: Impartiality and Local Interests" by G. Bolaffi). The jurisprudence of the Appellate Body in the present dispute has introduced a higher degree of flexibility and deference towards national regulatory measures, in particular in cases in which there are new threats to food safety and public health and a lack of scientific evidence. In such situations, however, should global standards always be discarded? And what are the appropriate procedures for reviewing the international sanitary guidelines set by other international bodies?

This leads to a final problem that emerged in the present case. Under the SPS Agreement, WTO adjudicative bodies rely on expert advice to decide on the legality of national risk measures. In the *US/Canada-Continued Suspensions* dispute, the Appellate Body discarded expert advice used by the Panel, questioning its objectivity on the basis of due process concerns. This gives rise to the following questions: what should the role of scientific experts in the final decisions of these global bodies be? What due process rights must be respected in order to guarantee that expert assessments of fact are impartial and objective?

5. *Further Reading*

a. S. CHARNOVITZ, "The Enforcement of WTO Judgments", 34 *Yale Journal of International Law* 558 (2009);
b. S. CHO, "United States – Continued Suspension of Obligations in the EC – Hormones (International Decisions)" (2009)

(http://ssrn.com/abstract=1736188);

c. J.W. DAVEY, "Compliance Problems in WTO Dispute Settlement", 42 *Cornell International Law Journal* 119 (2009);

d. C. FOSTERM, "Precaution, Scientific Development and Scientific Uncertainty under the WTO Agreement on Sanitary and Phytosanitary Measures", 18 (1) *Review of European Community & International Environmental Law* 50 (2009);

e. C.E. HANRAHAN, R. JOHNSON, "The US-EU Beef Hormone Dispute", CRS Report for Congress, Congressional Research Service, 2010;

f. B. HOEKMAN, J. TRACHTMAN, "Continued suspense: *EC–Hormones* and WTO disciplines on discrimination and domestic regulation Appellate Body Reports: *Canada/United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R,WT/DS321/AB/R, adopted 14 November 2008", 9 *World Trade Review*, 151 (2010);

g. M. IOANNIDIS, "A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law", 12 (5) *German Law Journal* 1175 (2011);

h. S. SHADIKHODJAEV, *Retaliation in the WTO Dispute Settlement System*, Kluwer Law International, Alphen aan den Rijn (2009);

i. R.B. STEWART, M. RATTON SANCHEZ BADIN, "The World Trade Organization and Global Administrative Law", in C. JOERGES, E.U. PETERSMANN (eds.), *Constitutionalism, Multilevel Trade Governance And Social Regulation*, NYU School of Law, Public Law Research Paper No. 09-71 (http://ssrn.com/abstract=1518606);

j. I. VAN DAMME, "Treaty Interpretation by the Appellate Body", Oxford (2009).

I.E.12 Multipolar Conflict: The Chinese Textile Affair

Antonella Albanesi

1. *Background*

On January 1, 2005, the textiles and clothing sector was brought under the general regime of the General Agreement on Tariffs and Trade (GATT). This lifted the quotas that, for almost forty years, had limited the exports from many developing countries.

The liberalization of trade in textiles has been gradual. The textiles sector had been regulated through bilateral agreements and subjected to special regimes since the 1970s.

Temporary agreements allowed GATT Member States to impose import quotas in order to protect their own industries. Within the GATT regime, the *Short Term Cotton Arrangement* (1960-1961) was the first agreement to regulate the textiles and clothing sector; the subsequent *Long Term Cotton Arrangement* (1962-1973) included some 30 countries. In 1974, the European Community, United States, Canada, Austria, Norway and Finland signed the Multifiber Agreement (MFA), which imposed quotas for textile imports from some developing countries. The MFA was in force until December 31, 1994, and grew to include 44 countries (including even China). The MFA set up a special regime that was ultimately incompatible with the GATT, because it violated the most favoured nation principle, discriminated against developing nations and did not guarantee transparency.

Following the establishment of the World Trade Organization (WTO) in 1995, the Agreement on Textiles and Clothing (ATC) was completed. The main purpose of the ATC was to remove import quotas by December 31, 2004; it was to be implemented in four steps, each one partially removing the quotas.

During the negotiations for the accession of China to the WTO (signed in 2001), a specific Textiles-Specific Safeguard Clause (TSSC) was concluded. This clause can be found in paragraph 242 of the *Report of the Working Party on the Accession of China*, which is an integral part of the Chinese WTO adhesion protocol. This transitional clause allowed Member States, under certain circumstances, to introduce specific safeguard measures in the form of quantitative restrictions on Chinese textiles exports until December 31, 2008,

forming an exception to the general incorporation of the textiles sector into the GATT regime on January 1, 2005.

The TSSC is exceptional for two reasons: firstly, because safeguard measures in general, and quantitative restrictions in particular, are usually proscribed in free trade areas; and secondly, because the clause has no connection with other safeguard provisions or procedures in the WTO regime.

Community law acknowledges the TSSC through Council Regulation (EC) n. 138/2003, implementing article 10a of Council Regulation (EC) n. 3030/93. The Regulation provides for adhesion to the protocol, and clarifies that the Commission, before commencing formal consultations with China to reduce trade restrictions, must submit, in accordance with standard committee procedures a draft of the proposed measures to the textile committee (itself established in Art. 17 of Regulation (EC) n. 3030/93).

According to the European rules, safeguard clauses can be applied where textile products imported into the Community have come from China, and are governed by the ATC. The imported textile products must also trigger a market disruption that jeopardizes the balance of trade in these products. In evaluating whether the balance of trade in textile products has been jeopardized, the Commission considers two factors. The first is the speed at which imports have increased: a slight modification cannot be sufficient to justify the application of the safeguard clause. The increase has to be rapid enough and clear enough as to modify the trade system. The second factor is the price trend of imports: a relevant decrease in the cost of imported goods relative to that charged by other suppliers can be considered as a threat to market balance.

On December 13, 2004, a few days before the ATC deadline and the subsequent transition to the general GATT regime, the European Union enacted Council Regulation (EC) n. 2200/2004, setting up an ex-ante surveillance system for 35 categories of textile products already affected by liberalization. This system provided for the institution of an early warning system for monitoring Chinese imports: when certain "alert levels" were reached, the Commission, on its own initiative, could commence an investigation in order to invoke the TSSC.

On April 6, 2005, the Commission adopted specific guidelines to inform the interested parties of the criteria and procedures to follow in order to invoke the TSSC. These "soft" legal norms allow for private participation in the decision to adopt safeguard measures. Various forms of private participation are provided for in this process, which unfolds in three steps – initiation, preliminary investigation and decision. The private party directly affected by a market disruption can request the Commission to commence proceedings in the first place. Private parties can also make a comment within a specific time limit during the preliminary investigation, through an appropriate notice and comment

procedure.

On May 27, 2005, the European Commission requested and obtained the opening of consultations with China, arguing that some categories of Chinese textile imports jeopardized market balance. The consultations were completed on June 10, 2005: the European Commission and the Chinese Ministry of Commerce signed a Memorandum of Understanding on exports of 10 categories of products. The quantitative limits fixed upon the imports in the Memorandum were not, however, sufficient to avoid market disruption for a number of different categories. As a result, Chinese imports were detained in European Community ports.

To resolve this problem, the European Commission and the Chinese Ministry of Commerce began new negotiations and, on September 5, 2005, they decided to increase the quotas and introduce more flexibility for the categories of textiles and clothing which exceeded the quotas fixed in the memorandum. Moreover, Community quantitative limits on Chinese imports were increased by 1% in January 2007, to allow for the release of the textiles and clothing products detained in European ports.

2. *Materials*

- Agreement between the EU and China on Chinese Textiles, Beijing, 5 September 2005 (http://europa.eu.int/comm/trade/issues/sectoral/industry/textile/china_safeguards.htm);
- Memorandum of Understanding (MOU) Between the European Commission and the Ministry of Commerce of the People's Republic of China on the Export of Certain Chinese Textile and Clothing Products to the European Union, 12 June 2005 (http://europa.eu.int/comm/trade/issues/sectoral/industry/textile/mou_tex_china_en.htm);
- European Commission, *Statement of Reasons and Justification for the Request for Formal Consultations with China Concerning a Textiles-specific Safeguard Clause*, 9 June 2005 (http://europa.eu.int/comm/trade/issues/sectoral/industry/textile/china_safeguards.htm);
- European Commission, *Guidelines for the Use of Safeguards on Chinese Textiles Exports to the Eu*, Brussels, 6 April 2005 (http://europa.eu.int/comm/trade/issues/sectoral/industry/textile/memo060405_en.htm);

- Agreement on Textiles and Clothing (ATC) (http://www.wto.org/english/tratop_e/texti_e/texti_e.htm);
- Accession of China to WTO, Textiles-Specific Safeguard Clause (TSSC) (http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm);
- Commission Regulation (EC) No 1478/2005, of 12 September 2005 amending Annexes, V, VII and VIII to Council Regulation (EEC) 3030/93 on Common Rules for Imports of Certain Textile products from Third Countries, OJ L 236, of 13 September 2005, pp. 3 et seq. (http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:236:0003:0011:EN:PDF);
- Commission Regulation (EC) No 1084/2005, of 8 July 2005 amending Annexes, II, III and V to Council Regulation (EEC) 3030/93 on Common Rules for Imports of Certain Textile products from Third Countries, OJ L 177, 09 July 2005, pp. 19 et seq. (http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:177:0019:0026:EN:PDF);
- Council Regulation (EEC) No 3030/93, of 12 October 1993 on Common Rules for Imports of Certain Textile products from Third Countries, OJ L 275, 08 November 1993, pp. 1 et seq. (http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993R3030:EN:HTML);
- Council Regulation (EC) No 54/2007, of 22 January 2007, amending Council Regulation (EEC) 3030/93, on Common Rules for Imports of Certain Textile products from Third Countries, OJ L 18, 25 January 2007, pp. 23 et seq. (http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:018:0001:0005:EN:PDF);
- Commission Implementing Regulation (EU) No 1321/2011, of 16 December 2011, amending Annex I to Council Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries, OJ L 335, 17 December 2011, p. 17 et seq. (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0017:0041:EN:PDF).

3. *Analysis and Issues: Global Limits on National Administrations*

This case sheds light on how global administrative law can bind national administrations. The Chinese WTO adhesion protocol gives national authorities

the power to determine the conditions under which safeguard measures can be taken. However, the evaluation of each Member State (or, in this case, of the European Union) is limited by both substantive criteria (such as the need for market disruption) and procedural ones (such as the duty to consult the Member State authority affected by the proposed measures, and the duty, based upon the principle of transparency, to provide appropriate reasons for the need to take safeguard measures).

This case highlights some other important issues.

The first concerns the effects of the TSSC within a system aiming to secure progressive trade liberalization. Within the European textiles market, there are three different types of interests involved: first, there are countries with large manufacturing industries (Portugal, France, Italy, Spain) that have a strong interest in limiting Chinese imports; second: there are nations with a well-developed service industry (Great Britain, Germany, Holland), which would prefer to offer favourable terms to Chinese textile importers; and third, there are manufacturers, importers and retailers that suffer significant economic losses from restrictions on Chinese products. Does the adoption of protective measures allow for the well-balanced development of international trade? What are the best means for limiting the market disruption triggered by an influx of cheap products from Asia?

The second issue pertains to private participation in the administrative procedure. At the global level, the TSSC provides that only interested States can participate in the procedure for the adoption of safeguards measures. The international agreement does not provide for a right for private actors (such as, for example, Chinese textiles producers, European importers, etc.) to participate in the decisions of national administrative authorities concerning whether to implement safeguard measures. The remedy to this problem, in this context at least, comes from national and European law: the European Union, through the use of soft law guidelines, has introduced a notice and comment mechanism that allows the participation of private parties – and also of third countries, like China – whose interests will be affected by a proposed safeguard measure. Therefore, the European Commission guidelines allow for parallel consultations between private parties and the Chinese government. What if, however, other legal systems do not allow private parties a similar opportunity to participate? If the EU system has introduced such measures from the "bottom-up", is there a risk of normative asymmetry between different national legal orders? Is there a remedy for this asymmetry, perhaps through imposing private participation in a "top-down" fashion?

This leads to a third problem: that of private jurisdictional protection. The introduction of a safeguard measure is an administrative act that limits the

economic freedom of private parties, who may be importers in the country applying the restriction, or private Chinese exporters. In the latter case, private Chinese exporters are bound by a set of limits decided in a country other than their own. While a private party can always bring a claim against domestic administrative decisions before national courts, there is no parallel right to do so against those of foreign administrative bodies. Is this a sign of the incompleteness and immaturity of global administrative law?

4. *Further Reading*

a. H. BAYLEY, J. BOOZMAN, "An Emerging China and the Transatlantic Economy", Report, Nato Parliamentary Assembly, Formerly North Atlantic Assembly, International Secretariat, 19 October 2005 (www.nato-pa.int/Default.asp?SHORTCUT=794);
b. E. IANCHOVICHINA, W. MARTIN, "Trade Liberalization in China's Accession to the World Trade Organization", Working Paper, Development Research Group, World Bank, June (2001);
c. H. KYVIK NORDAS, "The Global Textile and Clothing Industry post the Agreement on Textiles and Clothing", WTO – Discussion Paper, n. 5 2004 (http://www.wto.org/english/res_e/booksp_e/discussion_papers5_e.pdf) ;
d. S. MACDONALD, T. VOLLRATH, "The Forces Shaping World Cotton Consumption after the Multifiber Arrangement, Economic Research Services/USDA", 15 April 2005 (http://www.ers.usda.gov/Publications/cws/apr05/cws05c01).

I.E.13 Shared Powers: Global and National Proceedings under the International Patent Cooperation Treaty

Manuela Veronelli and *Lorenzo Carbonara*

1. *Background*

The Patent Cooperation Treaty (PCT) is an international treaty administered by the World Intellectual Property Organization (WIPO). The PCT was signed in Washington in 1970, amended in 1979, and modified in 1984 and 2001. Since its entry into force in 1978, the PCT has "served as an alternative to the Paris Convention for the Protection of Industrial Property (1883) for acquiring patent rights in different countries" (see § I.B.9 "The World Intellectual Property Organization (WIPO)", by C. Carmosino).

The Treaty, which now has 144 contracting States, establishes the rules that companies must follow when filing an international patent application. Much of the technology and the most notable inventions that surround us today have passed through the PCT system (e.g. Blackberry, Google, to name but two).

As the WIPO's Yearly Review in 2009 noted, The PCT allows applicants "to seek patent protection for an invention simultaneously in a large number of countries (PCT contracting States) by filing a single 'PCT international application'". The PCT application procedure (which is, at least partially, carried out at international level), however, does not result in the issuance of "international patents", because "the decision on whether to grant patent rights remains at the discretion of the national or regional patent offices".

The PCT and its implementing regulations outline in detail the procedure for filing an international patent application. Other implementing rules are found in the administrative instructions issued by the Director General of WIPO (Art. 58(4) of the PCT and Rule 89 of the mplementing regulations) and in the annual WIPO guidelines for filing applications under the PCT. The Treaty also provides that the International Bureau and national or regional administrations should enter into agreements to define the "minimum common rules" for the implementation of each procedure (Articles 16 (3)(b)(c); 17.1, 34.1 of the PCT).

The international rules set up a networked, polycentric organizational structure, involving an International Bureau based in Geneva (Art. 55 of the

PCT) – which receives the applications filed by residents of PCT countries – and the patent offices of the PCT Member States. However, residents of PCT countries that are also parties to regional agreements – such as the European Patent Convention – may also file an international application with the patent offices established by these regional agreements (e.g. the European Patents Office in Italy).

The PCT procedure also involves other international bodies: the Assembly (Art. 53 of the PCT), made up of representatives of the contracting States, which is charged with "giving directions to the International Bureau concerning the preparation for revision conferences" dealing with all matters concerning the implementation of the Treaty and "performing such tasks as are specifically assigned to it under other provisions of the Treaty"; an Executive Committee (Art. 54 of the PCT) that works together with the Assembly; and a Committee for Technical Cooperation (Art. 56 of the PCT). Finally, the PCT Treaty provides that all controversies relating to the enforcement of the implementing regulations and the Treaty itself, if not settled by means of international negotiations, may be submitted to the International Court of Justice by any of the States concerned (Art. 59 of the PCT).

2. *Materials and Sources*

- Patent Cooperation Treaty (as in force from April 1, 2002) (http://www.wipo.int/export/sites/www/pct/en/texts/pdf/pct.pdf);
- Regulations under the Patent Cooperation Treaty (as in force from July 1, 2011) (http://www.wipo.int/export/sites/www/pct/en/texts/pdf/pct_regs.pdf) ;
- Administrative Instructions under the Patent Cooperation Treaty (as in force from July 1, 2011) (http://www.wipo.int/export/sites/www/pct/en/texts/pdf/ai.pdf);
- PCT Applicant's Guide - Introduction to the International Phase (22 March 2012) (http://www.wipo.int/pct/guide/en/gdvol1/pdf/gdvol1.pdf);
- PCT Applicant's Guide - Introduction to the National Phase (14 January 2010) (http://www.wipo.int/pct/guide/en/gdvol2/pdf/gdvol2.pdf);
- WIPO - Working Group on Reform of the Patent Cooperation Treaty, *Sessions Reports* (http://www.wipo.int/meetings/en/topic.jsp?group_id=133);

- PCT Receiving Office Guidelines (as in force from August 1, 2011) (http://www.wipo.int/export/sites/www/pct/en/texts/pdf/ro.pdf);
- PCT International Search and Preliminary Examination Guidelines (1 November 2011) (http://www.wipo.int/export/sites/www/pct/en/texts/pdf/ispe.pdf);
- PCT Glossary (http://www.wipo.int/pct/en/texts/glossary.html);
- WIPO, The International Patent system. Yearly Review 2010 (http://www.wipo.int/export/sites/www/pct/en/activity/pct_2010.pdf);
- European Patent Organisation - European Patent Convention, 14th edition, 2010 (http://documents.epo.org/projects/babylon/eponet.nsf/0/7bacb229e032863dc12577ec004ada98/$FILE/EPC_14th_edition.pdf);
- Guidelines for Examination in the European Patent Office (April 2010) (http://documents.epo.org/projects/babylon/eponet.nsf/0/7ffc755ad943703dc12576f00054cacc/$FILE/guidelines_2010_complete_en.pdf).

3. *Analysis*

The PCT procedure is a composite or mixed administrative procedure that takes place partly at a global level and partly at a national level.

A patent application may be filed, at the applicant's option, with the International Bureau of WIPO in Geneva or with the national patent office of the contracting State of which the applicant is a national or resident. Generally, "the applicant tends to file a patent application at the national patent office in the first instance, followed by a PCT international application within 12 months from the priority date" (the filing date of the application). In case of competing applications, that which was filed first with a national office in a State party to the Paris Convention for the Protection of Industrial Property is entitled to claim priority (the "right of priority"). The procedure concludes in the "designated States" set forth in the original application, i.e., in those States in which the company has originally requested that the patent be registered.

The PCT is a successful example of practical cooperation in a global regime. Its 144 Member States work with each other and with the WIPO Secretariat to make the system work. The International Bureau and the national or regional offices cooperate in a close relationship: in fact, according to the Treaty and the implementing regulations, national offices are required to "assist" the International Bureau and the other administrative authorities involved at the international level (the International Searching Authorities (ISAs) and the

International Preliminary Examining Authorities (IPEAs)) in carrying out their tasks under the Treaty (Art. 55(5) of the PCT). The administrative bodies in charge of the procedure at the international level are required to publish the application and communicate it, along with the necessary supporting documents (including any statements submitted by applicants during the international search or the preliminary examination), to the designated national patent offices (Art. 20 of the PCT and Rules 41, 44 and 47 of the implementing regulations). In other words, the international phase of the procedure deals with the examination of the claims; the national phase takes the actual decision on whether to award a patent. In fact, "an 'international patent', as such, does not exist and… the granting of patents remains under the control of national or regional patent offices in what is called the 'national phase'" (WIPO Yearly Review (2010) p. 5).

The international phase of the procedure usually lasts for a period of 18 months and is divided into three stages: the first is mandatory, the second and the third are optional.

The first stage consists of an "international search" by an ISA, aimed at identifying "the prior art relevant to the patentability of the invention", resulting in an "international search report" and a preliminary and nonbinding "written opinion" on the questions of whether the claimed invention appears to be novel, involves an inventive step and is industrially applicable (Art. 15 of the PCT and Rules 33 and 34 of the implementing regulations).

The second stage is optional and was introduced in 2009: the applicant may "request, in addition to the main international search, one or more 'supplementary international searches' [SIS] each to be carried out by an international authority other than the ISA that carries out the main international search" (Rule 45-*bis* of the implementing regulations). "The SIS primarily focuses on the patent documentation in the language in which the Supplementary International Search Authority (SISA) specializes" (WIPO Yearly Review (2009) p. 60). This service is intended to complement the initial search by making additional language-based searches, thus providing "a more complete overview of the prior art in the international phase".

The third stage also is optional, and is commenced only upon request of the applicant, after receiving an unfavorable written opinion from the ISA concerned. An "international preliminary examination", i.e., "a second evaluation of the invention's patentability", is carried out by an International Preliminary Examining Authority (IPEA), "usually on an amended version of the application", to determine whether the invention is novel, involves an "inventive step" and is industrially applicable, having regard to the existing prior art (Art. 33 of the PCT and Rules 64 and 65 of the implementing regulations). Once the preliminary examination has been carried out, an International Preliminary

Report on Patentability (IPRP) is sent to the applicant, "who is then better placed to make an informed decision on whether to enter the PCT national phase" (Art. 35 of the PCT – see the WIPO Yearly Review (2010) p. 47).

During the international preliminary examination the authority "may, at any time, communicate informally, over the telephone, in writing, or through personal interviews, with the applicant" (Rule 66 of the implementing regulations). The exchange with the applicant can become intensified if the administrative authority in charge of preparing the search report or performing the international preliminary examination raises certain doubts (resulting in a written opinion) regarding the application for patent registration (Rule 66(2) of the implementing regulations). The authority then notifies the applicant accordingly in writing, and the latter has the right to submit a written reply before a deadline indicated by the authority (which must be "reasonable under the circumstances": in any case, not less than one month). In such cases, applicant companies can be required to pay an additional fee in order to submit comments or amendments (Arts. 17(3) and 34(3)(a) of the PCT and Rules 40 and 68 of the implementing regulations) to the competent office. The fee in question is reimbursed only if the applicant's reply proves to be supported by adequate documentary evidence.

When the international phase of the procedure has concluded and the International Bureau has issued its opinion, the applicant has 30 months from the priority date to enter the PCT national phase in the countries or regions in which protection is sought. As the WIPO's Yearly Review for 2010 notes (p. 30) "[o]n average, for every PCT application filed, applicants using the PCT system entered the national phase in 2.7 patent offices in 2009".

During the national phase, each patent office "can take into account the IPRP when considering the patentability of the underlying invention" (p. 47); nonetheless, each national office is "responsible for examining the application in accordance with its national patent laws and deciding whether to grant patent protection. The time required for the examination and grant of a patent varies among patent offices" (p. 6).

4. *Issues: Multilevel Governance and its Effects*

As the WIPO website notes, the Patent Cooperation Treaty has "revolutionized the way patent protection is sought in countries around the world": in April 2011, the PCT international patent application filing system clocked up two million applications worldwide. "The international application system simplifies the process of multi-national patent filings by reducing the requirement to file

multiple patent applications for multi-national patent rights". As a matter of fact, applicants and patent offices of PCT contracting States benefit from a single, uniform and global application system. In 2010, the International Bureau continued to develop a PCT terminology database across all 10 PCT publication languages, and in 2011 a new pilot system ("ePCT") for electronic filing and processing of PCT applications was launched.

The system is therefore widely spread at a global level. Nonetheless, a number of issues arise in relation to the PCT procedure.

First, the system is only partially governed at a global level: "the decision on whether to confer patent rights remains in the hands of the national and/or regional patent offices, and the patent rights are limited to the jurisdiction of the patent granting authority". Could the PCT legal framework gain effectiveness by instituting centralized examination and the grant of a truly "international patent" based on the PCT procedure? Is it possible, in this field, to achieve a fully integrated system in which Member States delegate duties to a global body? In any case, given that the PCT does not in practice necessarily lead to an expedited grant of a patent in the national phase, how might better integration between the international and national phases be achieved? In what terms could greater reliance and acceptance of PCT search and examination results by national offices be achieved?

Second, as the preliminary examination takes place at the global level, the PCT procedure and rules give rise to certain issues concerning the right to a hearing (or participation) and the justiciability of relevant claims. How is the right of the company involved to participate in the global examination stage conceived? Which entities should be informed: only those directly concerned, or competing companies as well? Should there be a more inclusive stage in which the representatives of collective or diffuse societal interests may intervene as well? What is the scope of the consultation obligation and how does it affect administrative actions? Might the requirement to pay a fee in order to file a comment discourage companies from participating and thus impair their participation rights?

What is the underlying principle of the consultation obligation upon administrative authorities in general? What purpose do participation rights serve in an international context? Does global participation take on a different and new "value" compared to the traditional, domestic paradigm?

Lastly, how can the question of a right to appeal be resolved? If a comment is disregarded by one of the relevant administrative authorities, the applicant company cannot appeal to any international tribunal. Only contracting States may appeal to the International Court of Justice, if they cannot settle a controversy by means of international negotiations. However, it should be kept in mind that

final decisions are taken at the national level. Is it possible, therefore, for a national court to evaluate the legitimacy of the final decision (itself often based upon the opinions of the international authorities) in the light of international regulations? Would the introduction of an appeal or complaint mechanism increase legitimacy and users' reliance on the system?

5. *Further Reading*

a. F.M. ABBOTT, T. COTTIER, F. GURRY, *International Intellectual Property in an Integrated World Economy*, 2nd ed., Wolters Kluwer, (2011), p. 254 et seq.;
b. G.B. DINWOODIE, W.O. HENNESSEY, S. PERLMUTTER, *International and Comparative Patent Law*, LexisNexis (2002), p. 303 et seq.;
c. P. DRAHOS, *The Global Governance of Knowledge*, Cambridge University Press, (2010), p. 181 et seq.;
d. J.F. DUFFY, "Harmony and Diversity in Global Patent Law", 17 *Berkeley Technology Law Journal* 685 (2002) (http://www.btlj.org/data/articles/17_02_02.pdf);
e. G. DUTFIELD, U. SUTHERSANEN, *Global Intellectual Property Law*, Edward Elgar (2008);
f. J. ERSTLING, "The Patent Cooperation Treaty: At the Center of the International Patent System", 32 *William Mitchell Law Review* 1583 (2006) (http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1015&context=facsch);
g. J. LESSARD, *Annotated guide to the Patent Cooperation Treaty (PCT) and associated regulations*, Upfront (2008);
h. T. MARKETA, *Global Patents: Limits of Transnational Enforcement*, Oxford University Press (2012);
i. J. NELSON, *International Patent Treaties*, Oceana (2007), p. 65 et seq.;
j. G. ROCCO, *Come depositare brevetti e marchi. Procedure, modelli, registrazioni, convenzioni internazionali, posizione OMC*, II ed., Milano (2005), p. 123 et seq.;
k. A.D. SABATELLI, J.C. RASSER, "Impediments to Global Patent Law Harmonization", 22 *N. Ky. L. Rev.* 579 (1995);
l. J. STACK, *International Patent Law: Cooperation, Harmonization and an Institutional Analysis of WIPO and the WTO*, Edward Elgar (2011), p. 65 et seq.;
m. T. TAKENAKA, *Patent Law and Theory: A Handbook of Contemporary Research*, Edward Elgar (2008), p. 161 et seq.;
n. WIPO, *World Intellectual Property Indicators*, 2011, p. 33 et seq. (http://www.wipo.int/ipstats/en/wipi/index.html).

I.E.14 Mutual Recognition: The Free Movement of Professionals

Benedetto Cimino

1. *Background*

The free movement of professionals can be strongly affected by the existence of differing national standards relating to the level of education, experience or certification legally required in order to provide certain services.

These national rules constitute regulatory barriers that are not formally discriminatory: as such, they cannot be addressed through recourse to the classic liberalization techniques (such as the national treatment requirement or the abolition of market access restrictions). There are, however, two feasible approaches for tackling the *de facto* protectionist effects of different standards: the harmonization of the relevant regulations, or mutual recognition. Harmonization is very difficult to achieve in practice: there is strong opposition in every State to modifying the educational system and the regime of professional qualifications. Until now, the mutual recognition approach has achieved better results, sometimes in combination with a basic coordination of substantive requirements. For a better understanding of these mechanisms, it is useful to compare two supranational legal systems: the EU and the WTO.

The EU law on professionals has undergone a continuous evolution since the 1970s. The initial tendency was to adopt sectoral directives for different regulated professions, in which the recognition of qualifications and diplomas depended on the prior, basic harmonization of the national educational systems. However, difficulties emerged due to the complex requirements of harmonization, the problem of reaching consensus between governments and the number of regulations necessary. Consequently, the EC institutions adopted a new approach, based on a general framework for mutual recognition. This area is now governed by Directive n. 2005/36/EC, which consolidates, modernizes and simplifies fifteen Directives approved between 1977 and 1999. This new instrument aims to create a more uniform, transparent and flexible legal regime. It also introduces a number of important innovations in terms of procedural and organizational simplification.

The global WTO regime followed a very different approach. The free movement of services, and professional services in particular, was long neglected

in multilateral negotiations until 1994, when its increasing relevance to trade made it an issue in the Uruguay round. States retain more autonomy in this than in other areas of WTO law, making the relevant regulation less uniform.

The main provisions for mutual recognition are set forth in Articles VII and VI.6 of the General Agreement on Trade in Services (GATS). Member States can conclude agreements for the mutual recognition of "education or experience obtained, requirements met, or licenses or certificates granted". These agreements can, in theory at least, produce "external" discriminatory effects in *prima facie* violation of GATS Article II (the Most Favoured Nation clause); they are, however, considered lawful and indeed encouraged, provided that they are open to the accession of other parties.

Article VI.6 requires Member States to adopt "adequate procedures" for verifying the competence of professionals from any other member, in order to assess the equivalence of the relevant foreign and national standards. This norm performs two functions. First of all, by leaving recognition under national control, it protects higher health and quality standards and acts against any national "race to the bottom". Secondly, by introducing supranational control over the reasonableness of national decisions in this context, it protects economic operators from unjustified discrimination.

2. *Materials*

- European Court of Justice, *Colegio de Ingenieros de Caminos, Canales y Puertos*, C-330/03, Judgment of 19 January 2006, *Rec.* 2006, p. I-801;
- European Parliament and Council, Directive No. 2005/36/EC of the 7 September 2005,*Recognition of Professional Qualifications*, as amended by Council, Directive No. 2006/100/EC of 20 November 2006 (http://eurlex.europa.eu/LexUriServ/site/en/consleg/2005/L/02005L0036-20070101-en.pdf);
- Commission of the European Communities, *Report to the European Parliament and the Council on the State of Application of the General System for the Recognition of Higher Education Diplomas Made in Accordance with Article 13 of Directive 89/48/EEC,* COM (1996) 46, 15 February 1996 (http://aei.pitt.edu/3995/01/000088_1.pdf);
- *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*, S/L/38 (28 May 1997) (http://www.wto.org/english/news_e/pres97_e/pr73_e.htm);
- *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 (17 Dec. 1998)

(http://www.wto.org/english/tratop_e/serv_e/accountancy_e/accountancy_e.htm);

- *Disciplines on Domestic Regulation pursuant to GATS Article VI:4*. Informal Note by the Chairman, Room Document, 18 April 2007 (http://www.tradeobservatory.org/library.cfm?refID=98264).

3. *Analysis*

The EU mutual recognition regime for professionals is illustrated well by the case of *Colegio de Ingenieros de Caminos, Canales y Puertos*, decided by the European Court of Justice in 2006. Mr. Imo, an Italian hydraulic engineer, sought to practice his profession in Spain; however, his particular specialization was not a recognized field there. Nonetheless, the Ministry of Economic Development held Imo's diploma to be equivalent to that of a Spanish civil engineer. The national association of Spanish engineers appealed this decision. The *Tribunal Supremo*, noting the substantial differences between the Italian and the Spanish specializations, made a preliminary reference to the European Court of Justice.

According to the ECJ, the mutual recognition of titles and diplomas under EU law is founded on "mutual trust" between Member States. Education and training need not be strictly similar. Such mutual recognition is triggered every time a diploma bestows the right to take up a regulated profession.

Differences in the organization or content of education and training are not sufficient to justify a refusal to recognize a professional qualification. At most, where those differences are substantial, they may justify the host Member State in requiring that the applicant satisfy one or more compensatory measures, as set forth in the directives (e.g. further examinations or experience).

These measures, however, are lawful only when they are applied in a non-discriminatory way, justified by overriding reasons that are based on the general interest, that are suitable and necessary for securing the attainment of their objective, and that are not unduly restrictive.

In the case of Mr. Imo, any such compensatory measures would have been heavily burdensome, which meant that alternative solutions had to be found. The Spanish authorities were ordered to consider partial recognition of his qualifications and allow the provision of engineering services at least in the field of hydraulics, even though Spanish law did not provide for such an alternative.

In the WTO context, case law is still lacking in this area. Recognition of professional qualifications, however, is under the careful consideration of the Council for Trade in Services (CTS) and its main subsidiary body: the Working

Party on Domestic Regulation (WPDR) (known, until 1999, as the Working Party on Professional Services (WPPS)).

To take the example of the accountancy sector, it is clear that the efforts of the WPDR have been oriented in two directions: the preparation of a set of Guidelines for future bilateral or multilateral negotiations on mutual recognition agreements; and the approval of binding disciplines to regulate national procedures for unilateral recognition.

Regarding the first issue, the Guidelines suggest the adoption of a standard format for such agreements, in order to strengthen the effectiveness and the predictability of the parties' obligations; moreover, they include recommendations for the conduct of successful negotiations, and to respect duties of cooperation towards the other States.

In terms of the binding disciplines, to date specific regulations have only been approved for the accountancy sector. In this field, the so-called Accountancy Disciplines require Members States to take qualifications acquired in another State into account, on the basis of equivalency of education, experience and/or examination requirements. Moreover, they provide for procedural protections for the interested parties: for example, establishing time limits for the evaluation procedure, or, in the case of a refusal of recognition, imposing a duty to identify which additional qualifications, if any, should be attained. Currently, further negotiations are underway to strengthen these disciplines and to extend them to all sectors. According to current proposals, national agencies would be asked to make predictable decisions on objective grounds; allow service providers to fulfill additional requirements in their home country or in a third country; and give positive consideration to professional experience and membership in professional associations as a substitute for or complement to academic qualifications.

4. *Issues: Multiple Regimes and Extraterritorial Application of National Administrative Decisions*

The above considerations illustrate nicely the peculiarity of this area. First of all, at the supranational level, there is no one law on mutual recognition, but rather several overlapping regimes. Recognition may be pursuant to, or entirely distinct from, previous harmonization agreements. It may be based on bilateral agreements or national decisions reviewed by supranational authorities. It may operate in a highly institutionalized framework, including administrative and judicial review; it may also be based on a traditional international treaty, in a weak regulatory regime, lacking effective means of enforcement. It may be automatic

or subject to complex substantive conditions and costly administrative procedures. It may operate at the inter-state level or be based on more informal agreements between private organizations, professional associations and sub-national bodies. What are the effects of this complex overlapping of norms? Should we expect to see the emergence of antinomies, unjustifiable discrimination, and uncertainty and trade distortions? How do the national, regional and global regimes interact with each other?

What institutional, social and economic conditions are necessary to create a mutual recognition regime? The effective functioning of recognition is based on mutual trust between administrative authorities, economic operators and consumers, rather than on substantive legal homogeneity. What technical solutions should be adopted to facilitate the creation of a cooperative context and to minimize controversy and unpredictability? Would it be useful to increase administrative cooperation, the circulation of best practices and crosschecks?

A third interesting issue is that regulation proceeds by trial and error. This seems evident in the three generations of directives on professional titles in the European context, as well as in WTO efforts to provide more methods of recognition, testing solutions in certain sectors before generalizing the disciplines.

Given this *modus procedendi*, analysis of the negotiating history and subsequent amendments of recognition agreements is a useful tool for understanding both the limits of the existing regulation, and the probable future developments. What area should negotiators focus on? Is there evidence of an increasing interest in procedural and organizational reform? If so, what is driving this?

The last issue is perhaps the most important. Mutual recognition and the principle of equivalence directly imply, in effect, the extraterritorial application of national administrative decisions. The sanitary system approved by the German *Bundestag*, the law course as defined by the *Senato Accademico* of the University of Rome, or the professional license granted by *Colegio de ingenieros* in Spain – all automatically affect the legal systems of other European States and, under certain conditions, other members of the GATS. How do these affect the national right to regulate? What checks and balances are necessary? What tools are available to ensure responsibility, control and accountability?

5. *Further Reading*

a. J.E. DE COCKBORNE, *Professional Services in the European Union*, in OECD, *Liberalisation of Trade in Professional Services*, Paris (1995);
b. J. DIVIS, "The International Labour Market: Professional Recognition of

Qualifications", Centre for International Recognition and Certification (CIRC), The Netherlands Enic/Naric in The Hague, November 2004 (http://www.aic.lv/rigaseminar/documents/Haaksman.pdf);

c. S. ENEMARK, "Mutual Recognition of Professional Qualifications, FIG Task Force on Mutual Recognition of Professional Qualifications February" (2002) (http://www.fig.net/admin/ga/2002/mutual_rep.pdf);

d. V. HATZOPOULOS, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services*, Athènes – Bruxelles (1999);

e. K. NICOLAIDIS, "Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals", in F. KOSTORIS PADOA SCHIOPPA (ed.), *The Principle of Mutual Recognition in the European Integration Process*, Basingstoke (2004);

f. K. NICOLAIDIS, G. SCHAFFER, "Transnational Mutual Recognition Regimes: Governance without Global Government", 68 *Law and Contemporary Problems* 263 (2005) (http://www.iilj.org/GAL/documents/10120509_NicolaidisShaffer.pdf);

g. K. NICOLAIDIS, J. TRACHTMAN, "Liberalization, Regulation and Recognition for Services Trade", in S.M. STEPHENSON (ed.), *Services Trade in the Western Hemisphere: Liberalization, Integration and Reform*, Washington, DC (2000);

h. K. NICOLAIDIS, J. TRACHTMAN, "From Policed Regulation to Managed Recognition in GATS, in P. Sauvé and R. Stern", (eds.), *GATS 2000: New Directions in Services Trade Liberalization*, Washington, DC (2000);

i. J. NIELSON, "Trade Agreements and Recognition", in OECD, *Quality and Recognition in Higher Education* (2004) (http://www.oecd.org/dataoecd/39/7/33729996.pdf);

j. H. SCHNEIDER, "The Recognition of Diplomas in the European Community" (http://www.fdewb.unimaas.nl/eurecom/PDF/Paperschneider.PDF).

I.E.15 The Role of Advisory Bodies in the World Heritage Convention

Eleonora Cavalieri

1. *Background*

The first reference to the Seven Wonders of the World dates from the 2nd century B.C., when, in 140 B.C., the Greek poet Antipater of Sidon used the term to describe seven sculptural and architectural monuments located in the Mediterranean and in Middle Eastern Regions. Since then, the basic idea that cultural and natural heritage is not merely an asset of individual nations, but belongs to humanity as a whole, has gradually gained traction. It was, however, only in the second aftermath of the Second World War that the protection of this universal value became a matter of pressing concern for the international community.

In 1954, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was concluded in order to protect the "cultural heritage of all mankind" from the risk of damage. This objective was formally sanctioned by the Member States of UNESCO in 1972, with the adoption of The World Heritage Convention.

The Convention aims at identifying, protecting, conserving, presenting and transmitting to future generations cultural and natural heritage of outstanding universal value (Art. 4). Even though these are first and foremost duties of the State in which the cultural and natural heritage is situated, the Convention recognizes the collective interest of the international community in cooperating in the protection of this heritage, providing financial, scientific and technical assistance to States Parties. To this end, the Convention established the World Heritage Committee and the World Heritage Fund.

The World Heritage Committee is composed of 21 members elected for a period of four years by Member States during the General Conference of UNESCO. It is assisted by a Secretariat with administrative powers, the World Heritage Centre.

Three Advisory Bodies, international organizations with technical expertise, cooperate closely with the Committee: the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), the

International Council of Monuments and Sites (ICOMOS) and the World Conservation Union (formerly the International Union for Conservation of Nature and Natural Resources (IUCN)). Under the World Heritage Convention, these are to cooperate with the Committee in the implementation of its programs and projects (Art. 13, par. 7), and preparing the documentation and the agenda for its meetings (Art. 14, par. 2). To cover the costs connected to their involvement in the work of the World Heritage Convention, the three Advisory Bodies receive a grant from the World Heritage Fund. Lastly, upon request of the Member States, other intergovernmental or non-governmental organizations may attend the meetings of the Committee in an advisory capacity (Art. 8).

The procedures for the implementation of the Convention (including the criteria set out for determining the "outstanding universal value" of a particular piece of heritage) are established in the Operational Guidelines, which are periodically updated. The system is based on a listing procedure: State Parties are invited to develop so-called "Tentative Lists", inventories of properties of significant interest that are considered suitable for inscription on the World Heritage List.

In order to ensure that the World Heritage List remains "representative, balanced and credible", the number of nominations that can be submitted by each State Party has, since the "Cairns Decision" (adopted by the 24th session of the World Heritage Committee in 2000) been limited. Similarly, the overall number of nominations that the Committee will review annually is set at 45. However, "no formal limit is imposed on the total number of properties to be inscribed on the World Heritage List" (see Operational Guidelines, sec. II.B).

The World Heritage Committee, drawing on the views of its Advisory Bodies, decides which properties among those submitted by Member States fit the criteria of "outstanding universal value" and thus merit inclusion on the List.

The listed properties automatically become subjected to a range of scientific, technical, administrative and financial measures under the Convention regime, with their conservation the subject of monitoring and periodic reporting requirements (see Operational Guidelines, sec. IV and V).

When a property is threatened by serious and specific risks, necessitating major intervention to secure its conservation, the World Heritage Committee may decide to include it on the List of Word Heritage in Danger (see § IV.8 "Global Bodies Reviewing National Decision: The *Yellowstone* Case" by B. Cimino). Often, the Committee relies on NGO submissions in danger listing decisions (see Affolder, 358). The Committee may also delete a property from the World Heritage List, when it has deteriorated to such an extent that it is no longer of "outstanding universal value", or when a State Party fails to adopt the measures that, at the time of nomination, were considered necessary to protect a

site threatened "by action of man" (see Operational Guidelines, 192-198). This has happened only twice: with regard to the Arabian Oryx Sanctuary (delisted in 2007) and to the Dresden Elbe Valley (delisted in 2009).

2. *Materials*

- UNESCO, Convention concerning the Protection of the World Cultural and National Heritage, Adopted by the General Conference at its seventeenth session, Paris, 16 November 1972 (http://whc.unesco.org/archive/convention-en.pdf);
- UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention, WHC. 08/01 January 2008 (http://whc.unesco.org/archive/opguide08-en.pdf);
- UNESCO, *Strategic guidelines for the future*, WHC-92/CONF.002/4 16 November 1992 (http://whc.unesco.org/archive/1992/whc-92-conf002-4e.pdf);
- ICCROM Statute (http://www.iccrom.org/eng/00about_en/00_01govern_en/statutes_en.shtml);
- ICOMOS Statute (http://www.international.icomos.org/statuts_eng.htm);
- IUCN Statute (http://cmsdata.iucn.org/downloads/statutes_en.pdf);
- WHC, 5D: Roles of the World Heritage Centre and the Advisory Bodies (http://whc.unesco.org/archive/2011/whc11-35com-5De.pdf);
- WHC, *Decision 31 COM 7B.24*, 2007 (http://whc.unesco.org/en/decisions/1405);
- WHC, *Decision 32 COM 7B.18*, 2008 – Aeolian Islands (http://whc.unesco.org/en/decisions/600).

3. *Analysis*

The UNESCO Advisory Bodies play a major role within the system of the World Heritage Convention, reflecting a specific decision of the World Heritage Committee that they do so. During its Sixteenth session, on November 1992, the Committee adopted its "Strategic guidelines for the future", which provide (in Recommendations 12 and 13) that "The [World Heritage] Centre should build on

the special historic and traditional partnership which exists between IUCN, ICOMOS and ICCROM in implementation of the Convention"; "Furthermore, a genuine partnership should be established between the Centre and the three organizations, both as regards technical matters and as regards the conceptual framework of conservation. These organizations should no longer be considered as merely suppliers of services".

Each of the three Advisory Bodies has a different organizational structure.

ICOMOS is a non-governmental organization created in 1965, during the 2nd International Congress of Architects and Technicians of Historic Monuments, to promote the conservation and protection of cultural heritage places. It has 11,088 individual members and 95 National Committees, which are formed by ICOMOS members in each country (see Art. 6, b of the Statute). 27 International Scientific Committees carry out specialised studies on "professional problems with which ICOMOS is concerned" (Art. 14 of the Statute). Besides the National Committees and the International Committees, the organs of the organization are the General Assembly, the Executive Committee and Bureau, the Advisory Committee and Bureau, and the Secretariat.

IUCN was founded in 1948. It is an international association of governmental and non-governmental members constituted in accordance to the Swiss Civil Code. Its has 89 States, 119 government agencies, 854 national NGOs, 101 international NGOs and 37 affiliates as members. As in the case of ICOMOS, "Members of IUCN within a State, a Region or a part of a Region may organize national committees to facilitate cooperation among Members, coordination of the components of IUCN, and participation of Members in the programme and governance of IUCN" (Art. 66 of the Statutes of the ICUN).

ICCROM is an intergovernmental organization composed of individual States (currently numbering 130), established in 1956 by a decision of the 9th UNESCO General Conference in New Delhi. According to its Statute, its organs are the General Assembly, the Council and the Secretariat. The ICCROM's General Assembly is composed of the delegates of Member States, chosen amongst the best qualified experts in the field of conservation and restoration of cultural property. A representative of the UNESCO and a representative of the *Istituto Centrale per il Restauro* are to participate as observers. The ICCROM's Council is composed of 25 members elected by the General Assembly from amongst qualified experts; a representative of the Director-General of UNESCO; a representative of the Italian Government; a representative of the *Istituto Centrale per il Restauro*; and, as non-voting members, a representative of the International Council of Museums and of the International Council on Monuments and Sites.

Even though the World Heritage Committee is the sole organ formally endowed with decision-making power (in particular concerning the identification

of properties to be inscribed on or deleted from the World Heritage List and from the List of World Heritage in Danger, and the granting of international assistance from the World Heritage Fund), this power is shared, *de facto*, with the Advisory Bodies and particularly with IUCN and ICOMOS. Hence, while the ICCROM deals essentially with monitoring the state of conservation of cultural and natural properties, the technical advice of the other two represents the factual basis for the Committee's decisions regarding natural heritage (IUCN) and cultural heritage (ICOMOS) respectively. It has been noted that "the Committee is not bound by the Advisory Bodies' evaluations and recommendations, although in practice it regularly avoids making use of its capacity to deviate" (Zacharias, 1853).

In particular, the inclusion of a property in the World Heritage List or in the List of Word Heritage in Danger, as well as the disbursement of financial support, depends on a recommendation of the competent Advisory Body.

As specified in section III.E of the Operational Guidelines, "The Advisory Bodies will evaluate whether or not properties nominated by State Parties have outstanding universal value, meet the conditions of integrity and/or authenticity and meet the requirements of protection and management". In performing this function, IUCN and ICOMOS follow the procedures set out in the Operational Guidelines and in its Annexes.

With regard to financial assistance, State Parties are encouraged to consult the Secretariat and the Advisory Bodies during the elaboration of each request (Operational Guidelines, VII.F, 242). The requests are then evaluated by a panel composed of the Chairperson of the World Heritage Committee, a representative of the World Heritage Centre Regional Desks and the Advisory Bodies (Operational Guidelines, VII.F, 252). The Advisory Bodies also cooperate with the Secretariat in monitoring and evaluating the implementation of the International Assistance (Operational Guidelines, VII.I).

Other competencies of the Advisory Bodies include the provision of assistance to State Parties in the harmonization of their Tentative Lists in order to review gaps and identify common themes (Operational Guidelines, II.C, 73); assisting under-represented States in the preparation of their Tentative Lists and nominations; and monitoring and reporting on the state of conservation of specific World Heritage Properties under threat.

To sum up, the role of the Advisory Bodies is to provide the WHC with the technical assistance necessary to the successful implementation of the Convention. Their presence is meant to confer legitimacy on the system of protection of cultural heritage built by the Convention, and to foster the authority of the WHC. Put simply, World Heritage Committee decisions are

more likely to be implemented if they are based upon unquestionable technical knowledge and expertise.

The role of the Advisory Bodies in the listing procedure is particularly important. In fact, the Advisory Bodies are distinguished by their impartiality and technical expertise, whereas the Committee – which is composed by 21 representative of Member States – may appear as a "political" organ, at risk of being swayed by the influence of powerful national interests. In this way, the Advisory Bodies contribute to the legitimation of the WHC system of protection.

Finally, it is worth noting that, despite the lack of a specific provision in the Convention, the Advisory Bodies also appear to exercise a quasi-normative power of their own. Not only did they contribute to the drafting of the World Heritage Convention, but they also take part in the process of updating the Operational Guidelines, which, as previously noted, is a key document regulating the activity of the World Heritage Committee (see Zacharias, 1848-1849). In fact, the Operational Guidelines implement the Convention, setting forth the procedures for its application and setting out the role and competencies of the very Advisory Bodies that have a hand in its drafting (I-G-30-37).

4. *Issues: Promoting the Emergence of Global Interests through Hybrid Bodies?*

The presence of the three Advisory Bodies, besides making the World Heritage Convention a complex and multiform regime and fostering its legitimacy, may also affect the way in which global interests emerge through the WHC system of protection.

Actually, despite the differences in the organization of the Advisory bodies, there are some common features which seem especially relevant in the selection of heritage properties to be protected at the global level. As already observed, both ICOMOS and IUCN are characterized by mixed membership, as they are composed of public institutions and private actors. Moreover, both organizations allow for the creation of national or regional committees. At the same time, the membership of none of the Advisory bodies neatly coincides with that of UNESCO.

These peculiar characteristics give rise to two different issues. First of all, do the UNESCO Advisory Bodies represent a channel through which interests other that those of nation-States can be protected at the global level? Secondly, do the UNESCO Advisory Bodies ensure that UNESCO Members States are equally represented in the listing process?

With regard to the first issue, it has been observed that membership in the Advisory Bodies may allow NGOs to raise their concerns within the WHC,

activating its system of protection of cultural or natural heritage even in cases in which this conflicts with other local interests.

The case of *Aeolian Islands* provides an example of this (see Battini, 2010). The volcanic archipelago of Aeolian Islands in the Tyrrhenian Sea has been included in the World Heritage List since 2000, as the islands' volcanic landforms display certain features important to the continuing study of volcanology world-wide.

Issues arose when it emerged that the economic exploitation of pumice, which played a major role in the general economy of local communities, risked causing irreperable damage to those features of the Islands that had mad it suitable for listing in the first place. The decision of the Sicilian regional authority to prohibit the relevant mining activities, supported by several NGOs (such as Italia Nostra, WWF and Legambiente) was strongly contested by local authorities, who challenged the decision before the Administrative Court. The NGOs then took their concerns about the situation in the Aeolian Islands to IUCN, of which they were members.

The IUCN reported the case raised by the NGOs to the World Heritage Committee, stressing its view that mining should be prohibited within World Heritage Sites. On this basis, the World Heritage Committee began monitoring the situation, and urged Italy to prohibit the expansion of pumice extraction in order to preserve the value of the site. Despite the continuing opposition of the local community, the extraction of pumice was finally brought to a halt in 2008.

It is probable that Italian authorities would not have taken the decision to prohibit mining without the involvement of the WHC, given the importance of this activity for Aeolian economics. Once the attention of the international community had been focused on this issue by the intervention of the World Heritage Committee, the global interest in protecting natural heritage prevailed over the local interests of pumice workers.

This case created some debate regarding the role of the Advisory Bodies in legitimizing the World Heritage Convention system. Even though it seems important and necessary that every decision of the Committee relies on technical expertise, it also seems true that certain decisions require that other public interests (e.g., those concerning the use of land, or the protection of workers and of local economies) are also taken into account (see Affolder, 360). Failure to do so could result in the legitimacy of the institution being undermined, as the Advisory Bodies could appear democratically unaccountable (see Zacharias, 1834). Some critics, considering the national impact of global decisions taken by the World Heritage Committee, especially those concerning land use, observe that the nomination process at the national level should be more democratic and transparent (Affolder, 346).

With regards to the second issue, it must be noted that the influence of the three Advisory Bodies in promoting the protection of cultural property at the global level, in particular through mixed membership and the involvement of technicians and NGOs, is intended to ensure that all UNESCO Member States of UNESCO can have a say in the listing procedure, even where they are not represented in the WHC itself.

Despite the hope that this would guarantee impartiality in the listing procedure, and avoid any abnormal concentration of world heritage in a few regions of the world (as had happened in ancient Greece, where the World's Wonders were entirely located in the Mediterranean and in Middle Eastern Regions), the relevant data implies a different conclusion.

As of November 2011, 188 States had ratified the World Heritage Convention. The World Heritage List includes 939 properties (725 cultural, 183 natural, and 28 mixed properties) in 153 State Parties. There are, therefore, States that are party to the Convention that do not have any property inscribed on the List.

It is worth noting that many of these States are not well represented in the three Advisory Bodies. In particular, 16 such States have representatives in only one Advisory Body (Bhutan, Burundi, Cook Islands, Equatorial Guinea, Fiji, Guinea-Bissau, Jamaica, Liberia, Samoa, Sierra Leone, and Tonga are members of IUCN; Brunei Darussalam, Chad, Guyana, Myanmar are members of ICCROM); 7 have joined two Advisory bodies (Angola, Congo, Kuwait, Lesotho, Rwanda, Swaziland, Trinidad and Tobago), and 9 have no representatives at all (Antigua and Barbuda, Comoros, Djibouti, Eritrea, Grenada, Micronesia, Niue, Palau, San Vincent and the Grenadines). Monaco is the only State to be a member of all the three Advisory Bodies without any properties inscribed in the List.

At the same time, the distribution of properties between Member States appears disproportionate, as the majority are located in Europe and North America. In October 2011, of the 911 properties included in the List, 78 were in Africa, 66 were in Arab States, 197 were in Asia and the Pacific, 124 were in Latin America and the Caribbean, and 446 were in Europe and North America.

These data suggest that elements other than "outstanding universal value" may influence the listing process; particularly important given the unquestionable advantages (such as UNESCO financial support, increased public attention and tourism, and the attraction of potential funding from new donors) that inscription on the World Heritage List can bring.

These elements may include the global reputation of a site, the importance of the State in which the property is located, the "openness" in terms of international relations and the democratic nature of the State in question, the role of the media, and the question of whether the State concerned is represented in

the World Heritage Committee (for a detailed analysis on how this factors affect the process of listing, see the work listed below by Frey, Pamini and Steiner). Indeed, the presence of the three technical Advisory Bodies, intended to guarantee impartiality in the listing procedure, may not be sufficient to counteract this tendency. The Aeolian Islands case demonstrates that the Advisory Body may play a crucial role in giving voice to weaker national interests. However, not all States are represented (nor *equally* represented) in these organisations, with potential consequences on their weight in the WHC system of protection.

Such an anomaly in the functioning of the World Heritage List may lead to disregard of the cultural heritage concerns of minority populations (for instance, in the case of diaspora populations), favouring the sites that are more well-known or States that have more influence at the international level (see Anglin, 243-244).

These criticisms, together with the ever increasing number of properties included in the World Heritage List (which, during the last 10 years, grew from 586 to 936) call for some reflection on how well the global system for protection of cultural and natural heritage is functioning. One key risk is that the entire system will be devalued unless the List reflects an equal balance in the distribution of cultural and natural heritage amongst Member States. Even though the decision to limit the number of nominations annually reviewed by the Committee should be welcomed, further steps seem necessary in order to preserve the credibility of the List, such as establishing an overall maximum number of properties that can be included. Such a limit may draw more attention to the technical evaluation of the "outstanding universal value" of cultural heritage by the Advisory Bodies, thus limiting the weight of other factors that could affect the listing process.

5. *Further Reading*

a. N. AFFOLDER, "Democratizing or Demonizing the World Heritage Convention?", 5 *University Of Wellington Law Review* 1 (2006);
b. R. ANGLIN, "The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide", 20 *Yale J.L. & Human.* 241 (2008);
c. S. BATTINI, "The procedural side of legal globalization: The case of the World Heritage Convention", 9 (2) *International Journal of Constitutional Law* 340 (2011);
d. L. CASINI, "'Italian Hours': The Law of cultural properties in a globalized world", 9 (2) *International Journal of Constitutional Law* 369 (2011);
e. B.S. FREY, P. PAMINI, L. STEINER, *What Determines the World Heritage List? An Econometric Analysis*, Working Paper Series, Department of Economics,

University of Zurich, 2011 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1782702);

f. M. MACCHIA, *La tutela del patrimonio culturale mondiale: strumenti, procedure, controlli*, in L. CASINI (ed.) *La globalizzazione dei beni culturali*, Bologna (2010);

g. J.H. MERRYMAN, *Cultural Property Internationalism*, 12 *Int'L J. Cultural Prop.* 11, 32 (2005);

h. J.H. MERRYMAN, A.E. ELSEN, S.K. URICE, *Law, Ethics and the Visual Arts*, The Netherlands, Kluwer, 5th ed. (2007);

i. J.AR. NAFZIGER, R. KIRKWOOD PATERSON, A. DUNDES RENTELN, *Cultural Law: International, Comparative, and Indigenous*, Cambridge, Cambridge University Press (2010);

j. L. STEINER, B.S. FREY, *Imbalance of World Heritage List: Did the UNESCO Strategy Work?*, University of Zurich, Working Paper n. 14, March 2011, (www.econ.uzh.ch/static/wp/econwp014.pdf);

k. D. ZACHARIAS, *The UNESCO Regime for the Protection of the World Heritage as a Prototype of an Autonomy-Gaining International Institution*, 9 (11) *German Law Journal* 1856 (2008).