What is Global Administrative Law and why study it?

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I. Contents

The purpose of this conference is to present the work of a group of about thirty Italian scholars (ten of whom are present today)[1]. These scholars have, to date, written more than a hundred articles or books on Global Administrative Law (GAL) (refer to the list of the works published by the participants and to the IRPA website), have been or are engaged in around ten collective enterprises on the subject, have organized, from 2005 to 2012, eight GAL international seminars (seven in Viterbo and one in Rome) and have published a "GAL Casebook" (first edition 2006; second edition 2008; third edition 2012).

By way of introduction, I shall address the following questions:

- Why study Global Administrative Law?
- What is the Global Polity?
- What are the main features of the Global Legal Space?
- What role does the law play in the Global Space?
- How is the problem of legitimacy in the Global Legal Space solved?
- What are the main characteristics of Global Administrative Law?
- Why is the study of Global Administrative Law an important intellectual exercise?

II. Why study Global Administrative Law?

Why did so many Italian legal scholars start to study Global Administrative Law in the early days of this century? Some reasons are peculiar to Italy, while others are common to European and American scholars.

1. Global Administrative Law is the major development in the field of public law in the second half of the 20th century:

a. Global Administrative Law has evolved according to an incremental pattern: first, it was applied to peace and human rights (the UN); then, to areas such as the sea, nuclear waste, health, labor, the environment; subsequently, to trade; finally, to global terrorism and global crises;

b. the process of globalization has been piecemeal, and globalization has developed through crises and unbalances, by accretion and accumulation;

2. the study of Global Administrative Law is the logical sequel to the study of EU law, in order to integrate EU law in the larger world context and to understand what there is beyond the State;

3. there is a strong need to break with cultural nationalism, according to which public law is connected to the State and, therefore, each State has its own public law and there is no link between the different national legal environments. It is necessary to expose each national legal culture or scholarship to international evaluation and to let cross-national fertilization develop.

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National scholarship should be less parochial and more outward-looking. It is, thus, necessary to substitute the global paradigm to the statist paradigm and let institutions and ideas migrate from one area (and level) to the other;

4. international law does not fully capture the peculiarities of globalization (it is focused on relations between States), whilst GAL is better capable of analysing both transnational and transgovernmental relations and civil societies acting as global actors, on the premise that States are fragmented.

III. What is the Global Polity?

I shall now examine the process of globalization from a political science point of view and then review the main features of the global legal space.

The main features of the Global Polity are the following:

1. There is no global government, but rather several global regulatory regimes (from health to labor, to trade, to sea, to banking), without one single hierarchically superior regulatory system. The Global Polity is the empire of "ad-hoc-cracy": global regulatory regimes do not follow a common pattern. This highly a-systematic system has been nicely encapsulated in the formulation "governance without government" (a formulation which already dates back twenty years[2]). What unifies this mosaic of legal orders is the "wechselseitige Eigennutz" ("reciprocal interest")[3].

Vertically, there is continuity and no clear dividing line between global and national levels. "Global" does not mean that the State is excluded. National civil societies, national bureaucracies, national executives are all important actors in the global arena, where they accept to lose some of their autonomy (sovereignty) in exchange for getting influence in a much larger area than that of the national State. The bazaar replaces the cathedral[4].

"Global" does not mean intergovernmental: in the global space, there are transnational networks and links among civil societies that are as important as International Governmental Organizations (IGOs). While global regulatory regimes are approximately two thousand, Non Governmental Organizations (NGO) number more than forty thousand[5].

2. There is no representative democracy and there are no periodic elections at the global level; but deliberative democracy can work as a valid surrogate, granting participation in the decision making processes.

Global regulatory regimes impose democratic principles on national governments. In particular, some democratic principles (free elections, freedom of association, free speech) are imposed by global actors (such as the European Union and the Council of Europe) on national governments. An example is the conditionality for accession to the European Union (EU). Another example of this phenomenon is provided by the European Convention on Human Rights, which provides for individual complaints to be brought before the European Court of Human Rights, which in turn has compulsory jurisdiction over its Member States[6].

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2 J. N. Rosenau, E.-O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge, 1992.

3 I. Kant, *Perpetual Peace and Other Essays on Politics, History and Morals* (English transl.), Indianapolis, 1983.

4 The metaphor is taken from E. S. Raymond, *The Cathedral and the Bazaar*, Sebastopol, 1999.

5 Union of International Associations, *Yearbook of International Organizations*, München, Saur, 2005.

6 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocol No. 11, art. 34.

3. The global polity is porous and open: national governments, other global regulatory regimes and civil societies can interfere with and influence the global institutions.

IV. The Global Legal Space

I shall now turn to the legal aspects of my analysis and examine the Global Legal Space, the role that the law plays in such space and the issue of legitimacy that has been raised in this context.

The area beyond the State is not only "global" from an economic point of view; rather, also a global legal space exists, encompassing a vast number of different regulatory bodies, a mass of rules, a great quantity of procedures, and a complex array of links both to national bureaucracies and civil society.

What is missing is a single general and unitary body of global law. Instead, there are numerous global regimes. However, both the administrative actors and the judicial bodies (where these exist) within each individual regime establish links to, and rules of engagement with, other regimes. Cooperation, division of labor and dialogue are common among global regimes and their constituent institutions. Cooperative dialogue between regimes means that the principles of each regime should not be interpreted and applied in a vacuum. It is in this process that some have recognized the emergence of a general body of law at the global level[7].

Moreover, each national legal order has developed a certain number of common rules, and these now provide core standards that can be shared and even codified at a supranational level (take, for example, the Council of Europe's codification of rules on administrative procedure[8]).

Given that the global legal order is fragmented, there are no general legal principles common to all. But some common understandings are developing: the duty to respect human rights and the rule of law; the obligation to inform and to hear interested parties before a decision is taken (as held, for example, in the *Juno Trader* case before the International Tribunal of the Law of the Sea);[9] a number of due process obligations; and substantive duties relating to the principles of fairness and reasonableness, amongst others.

The widely-used expression "multilevel governance" is misleading, insofar as there is no clear-cut separation of competences between national governments and global institutions, structured within a definite hierarchy, of the type that this expression seems to suggest. Rather, the global arena is characterized by the spread of powers between the global and the national levels of government. For instance, environmental protection is at once a global and a national task, and competencies in this

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7 "The current range of international legal obligations benefits from a process of accretion and cumulation" in Arbitral Tribunal, *Southern Bluefin Tuna case*, n. 52, 14 August 2000. "[….] the principles underlying the Convention [on Human Rights] cannot be interpreted and applied in a vacuum", in European Court of Human Rights, *Bankovic v. Belgium and others*, 12 December 2001, para. 51. See also European Court of Human Rights, *Loizidou v. Turkey*, II, 18 December 1996, para. 43. "The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply", from UN Study Group on the Fragmentation of International Law, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, 2006, in *The Work of the International Law Commission*, ed. by UN Secretariat, New York, 2007, vol. 1, 399.

8 Council of Europe, *The administration and you: principles of administrative law concerning the relations between administrative authorities and private persons*, Strasbourg, 1996.

9 International Tribunal of the Law of the Sea, *Saint Vincent and the Grenadines v. Guinea-Bissau*, case no. 13, December 18, 2004 (www.itlos.org/cgi-bin/cases/case_detail.pl?id=13&lang=en). On the case, see D. Agus, M. Conticelli, "The International Tribunal for the Law of the Sea (ITLOS): The Juno Trader Case", in *Global Administrative Law: Cases, Materials, Issues*, II ed., ed. by S. Cassese, B. Carotti, L. Casini, M. Macchia, E. MacDonald, M. Savino, Rome/ New York, 2008, 124-128, also available at http://www.iilj.org/GAL/documents/GALCasebook 2008.pdf.

field are not merely shared by global and national bodies; areas of jurisdiction overlap and compete with each other. The line between the national and the international is becoming increasingly blurred (see, for example, the Cybersquatting cases before the World Intellectual Property Organization[10] dispute resolution panels). In the case of shared powers of this kind, the rule is not strict separation and rigid hierarchy, but permeability, intermingling, interpenetration.

Global institutions derive their jurisdiction and their powers from national governments. It does not necessarily follow, however, that all of their powers originate in direct delegation from States. For example, there are international institutions that were not established by national governments, but by other international bodies (for example, the Codex Alimentarius Commission)[11].

Moreover, cooperation in the global arena does not occur only between international institutions and national governments, but also between international institutions themselves. The global order can be illustrated by the well-known metaphor of the marble cake, as there are no clear dividing lines between layers (national and global) and (global) sectoral regimes; rather, the two worlds are linked both vertically and horizontally through a complex array of relations and networks.

V. The law in the Global Space

In domestic legal orders, there is a clear-cut dichotomy between legal and non-legal prescriptions, because there is a higher authority that establishes the dividing line between what is and what is not law. This picture, however, changes as we move into the global arena. There, we are confronted by a world that is highly formalized, but not in strictly legal terms. For example, many World Bank "legal" instruments are simply referred to as "policy" documents; yet in many cases these can scarcely be considered less important than statutes passed by national parliaments. They regulate important aspects of the Bank's activity, such as the duty to perform an environmental impact assessment, and all relevant procedural requirements[12]. Private parties in India or South Africa can appeal to these standards, and ask that global and national governance bodies comply with them. Must we concede that anything that is not binding is, *ipso facto*, not law? If there is an area of law in which the Latin motto "ubi societas, ibi ius" holds true, then surely this must be the global arena.

At this point, a second dichotomy emerges, related to the first: that between binding ("hard") and non-binding ("soft") law. The basic question that we might pose in this regard is as follows: is a formally binding commitment to obey a rule the only means of producing rule-conforming behavior?

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[10] See, for example, World Intellectual Property Organization, Arbitration and Mediation Center, Administrative Panel Decision, decision of 22 July 2003 *Casio Keisanki Kabushki Kaisha, dba Casio Computer Co., Ltd v. Fulviu Mihai Fodoreanu*, case No. DRO2003-0002; decision of 4 August 2000 *Excelentisimo Ayuntamiento de Barcelona v. Barcelona.com Inc.*, case No. D2000-0505. Decisions are available at http://arbiter.wipo.int/domains/ decisions/index-cctld.html.

[11] See M.D. Masson-Matthee, *The Codex Alimentarius Commission and Its Standards*, The Hague, 2007. Further information is available in J.A. Bobo, The Role of International Agreements in Achieving Food Security: How Many Lawyers Does It Take to Feed a Village?, 40 *Vand. J. Transnat'l L.* 937 (2007).

[12] Elsewhere, I have defined the WB's operative policies as "*ad hoc* international administrative norms": see S. Cassese, "Global Standards for National Administrative Procedures", 68 *L. & Cont. Prob.*, 109 (2005). Moreover, NGOs and local communities have been increasingly addressing the WB's policies within the context of global compliance mechanisms, see, for instance, M. Circi, "The World Bank Inspection Panel: the Indian Mumbai Urban Transport Project Case", in *Global Administrative Law: Cases, Materials, Issues, supra*, note 7, 129-133. A broader analysis of the WB social policies can be found in A. Vetterlein, "Economic Growth, Poverty Reduction, and the Role of Social Policies: The Evolution of the World Bank's Social Development Approach", 13 *Global Gov.* 513 (2007). See also K. Tomasevski, "The Influence of the World Bank and IMF on Economic and Social Rights", 64 *Nordic J. of Int. L.* 385 (1995), M. Nesbitt, "The World Bank and de facto Governments: A Call for Transparency in the Bank's Operational Policy", 32 *Queens L.J.* 641 (2006-2007), K.W. Simon, "World Bank Wants a New Approach to Consultations with Civil Society", I *Int. J. of Civ. Soc. L.* 41 (2003).

Even in domestic legal orders, not all rules are binding or compulsory. National legislation also establishes incentives and issues guidelines; it seeks not only to compel, but also to promote, to correct, to educate, and so on.

An example from the global arena is provided by the standards generated by the Codex Alimentarius Commission. These are not, in and of themselves, compulsory; they are, however, in effect given binding force by the World Trade Organization[13]. One authority produces rules, another endows them with binding force. The rule is not binding from its inception, rather only becoming so because another authority imposes conformity upon those under its jurisdiction. Therefore, in this case the rule is binding in the field of global trade, but not in other areas, giving rise to a "dédoublement".

A third point, also related, concerns the concept of authority. Power, not authority, is central in the global arena. Power can be exercised through authoritative means (such as the "command and control" models familiar to domestic administrative systems), but also through agreements, contracts, incentives, standards and guidelines.

Finally, while in the national legal orders a law which did not emanate from the State (Hans Kelsen) was (once) not conceivable, globalization breaks the link between sovereignty, territoriality and legislation, and opens the way to private legislation (for example, ICANN). In a system with a multiplicity of sources of law, law and the State are not the same thing, and the rule of law does not mean the rule of (State) law.

VI. Legitimacy in the Global Legal Space

There exists no cosmopolitan democracy, no planetary constitution, no global Parliament. Is this cause for concern?

Here again it is necessary to return to certain basic questions. Why do we want national governments to be legitimate? Simply put, the answer might consist of something as follows. National governments exercise their power through authority: they oblige and impose. Therefore, they must be run on the basis of the consent of the governed. Through recurrent elections, politicians are chosen and kept under control by the people.

A number of differences emerge, however, when we move from the national to the global context. First, global bodies do not normally exercise power through authority: they seek not to simply impose their will, but rather to influence the behavior of national bureaucracies and private parties through a variety of different mechanisms.

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[13] See, for a general overview of the Codex Alimentarius Commission within the World Trade Organization, J. Vapnek, "Legislative Implementation of the Food Chain Approach", 40 *Vand. J. Transnat'l L.* 987 (2007); J. Kurtz, "A Look behind the Mirror: Standardisation, Institutions and the WTO SPS and TBT Agreements", 30 *U.N.S.W.L.J.* 504 (2007), also available at http://www.austlii.edu.au/au/journals/UNSWLJ/2007/31.pdf; T.P. Stewart, D.S. Johanson, "The SPS Agreement of the World Trade Organization and International Organizations. The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics", 26 *Syracuse J. Int'l L & Com.* 27 (1998-1999). An analysis of the complex relationship between the global standards of the Codex Alimentarius Commission and domestic States is provided by D. Livshiz, "Updating American Administrative Law: WTO, International Standards, Domestic Implementation and Public Participation", 24 *Wis. Int'l L.J.* 961 (2006-2007), also available at http://hosted.law.wisc.edu/wilj/issues/24/4/livshiz.pdf. A more general overview is provided by K. Claire, "Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes", 24 *Berkeley J. Int'l L.* 79 (2006). A further analysis of the Codex Alimentarius standards and their connection to the FAO and WTO is given by M. D. Masson-Matthee, *supra*, note 9. It is worth noting that the standards can also diverge. See, for instance, E. D'Alterio, "Relations between Global Law and EU Law", in *Global Administrative Law: Cases, Materials, Issues*, *supra*, note 7, 199-208; H.S. Shapiro, "The Rules That Swallowed Exceptions: The WTO SPS Agreement and Its Relationship to GATT Articles XX and XXI – The Threat of the EU-GMO Dispute", 24 *Ariz. J. Int'l & Comp. L.* 199 (2007) .

Secondly, global bodies are usually established in order to keep national governments under control, or to provide services or pursue goals that governments alone are unable to. Therefore, they place limits on the activities of national executives. In this regard, we might suggest, they are on the same "side" as the people, formally speaking at least.

Thirdly, national governments and infra-national agencies keep each other and global institutions under control (horizontal accountability).

Fourthly, periodic elections are not the only means of legitimizing public power. Global institutions seek to forge their legitimacy through ensuring openness, dialogue and the participation of private parties ("Legitimation durch Verfahren")[14] in the decision-making process. Examples of this abound within global regimes: consider, for instance, the International Preliminary Examination procedure for the protection of inventions, established by the Patent Cooperation Treaty; or the complaints procedure before the World Bank Inspection Panel.

Judicial protection is not guaranteed by every global regulatory regime. However, many do establish mechanisms that can act as a surrogate for formal judicial protection, for example granting "ex ante" participation rights to affected private parties or national governments, establishing quasi-judicial procedures and ensuring some degree of independence to decision-making bodies.

Finally, there are now around one hundred and ten extra-national courts around the world (most of them with jurisdiction in criminal matters)[15]. Technical and scientific expertise often play an important role in the controversies brought before these courts (see, for example, the *Apples and Fire Blight* case before the World Trade Organization Dispute Settlement Body[16] and the *Southern Bluefin Tuna* case before the Arbitral Tribunal of the United Nations Convention on the Law of the Sea[17]). Some internationalized forms of administrative review of domestic agencies also exist (for example, the NAFTA Chapter 19 Panels[18]); and there are many more bodies that provide some sort of judicial review by acting as quasi-independent courts, open to petitions from the affected citizens, and following adversarial or quasi-adversarial procedures. These are often referred to as, for example,

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14 N. Luhmann, *Legitimation durch Verfahren*, Frankfurt am Main, 1969.

15 See the Project on International Courts and Tribunal International (PICT) and the synoptic chart available at http://www.pict-pcti.org/publications/ synoptic_chart/synop_c4.pdf

16 The relevant decisions in this case are Panel Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/R, 15 July 2003 and Report of Appellate Body, *Japan – Measures Affecting the Importation of Apples*,WT/DS245/AB/R, AB-2003-4, 26 November 2003. On the case, see A. Albanesi, "The WTO 'Science-Fest': Japan Measures Affecting the Importation of Apples", in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 45-50.

17 Arbitral Tribunal established under Annex VII of the United Nations Convention on the Law of the Sea, *Australia and New Zealand v. Japan*, Award on Jurisdiction and Admissibility, 4 August 2000. See also B. Carotti, M. Conticelli, "Settling Global Disputes: The Southern Bluefin Tuna Case", in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 145-149.

18 NAFTA Article 1904 establishes a mechanism that provides an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases: the binational panel system. This system uses panels consisting of US and Canadian or Mexican panelists to review antidumping and countervailing duty decisions taken by national administrative authorities. The Panel may uphold or remand the national administrative action, and its decisions are binding. The binational panel system represents an internationalized form of administrative judicial review of domestic agencies: it reviews decisions of domestic agencies; its decisions are based on domestic law, not international trade rules; and the private parties involved (e.g. firms) have a right to initiate the panel review. For an overview on this topic, see G.R. Winham, A. Heather, "Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and beyond", 3 *Minn. J. Global Trade* 1 (1994); G.R. Winham, G.C. Vega, "The Role of NAFTA Dispute Settlement in the Management of Canadian, Mexican and U.S. Trade and Investment Relations", 28 *Ohio N.U. L. Rev.* 651 (2001-2002); E.J. Pan, "Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication", 40 *Harv. Int'l. L. J.* 379 (1999). See also M. Macchia, "Reasonableness and Proportionality: The NAFTA Binational Panel and the Extension of Administrative Justice to International Relations", in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 86-91.

"compliance committees"[19] or "inspection panels"[20]. In many regards, these latter bodies resemble the French *Conseil d'État* in the period between 1800 and 1872, when the Council was not legally recognized as a judicial body despite the fact that it exercised *de facto* judicial review.

VII. The main features of Global Administrative Law

I return to the question: is there a global administrative law? This question must be answered in the affirmative. This law has the following features:

1. Notwithstanding some areas of overlap, global administrative law should be distinguished from traditional international law. "Ius gentium", "Ius inter gentes" and the law of the nations refer to the law established between the governments of States to regulate relations between States as legal

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[19] The term "compliance committee" is used in multilateral environmental agreements (MEAs). See Convention on Biological Diversity, COP-MOP 1, *Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety*, Decision BS-I/7, Kuala Lumpur, 23 - 27 February 2004, also available at http://bch.cbd.int/protocol/decisions/ decision.shtml?decisionID=8289; Economic Commission for Europe, *Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, *Report of the First Meeting of the Parties, Addendum, Decision I/7 Review of Compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002*, ECE/MP.PP/2/Add.8, 2 April 2004, also available at http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf; Commission for Environmental Cooperation, Council, *Adoption of the Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Council Resolution 99-06, C/99-00/RES/07/Rev.3, 28 June 1999, also available at http://www.cec.org/Page.asp?PageID=122&ContentID=1150&SiteNodeID= 276.

[20] The term "inspection panel" is used by the Multilateral Development Banks (MDBs, consisting of the World Bank Group and the four Regional Development Banks: the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group). See International Bank of Reconstruction and Development, I.B.R.D. Res. 93-10 (Sept. 22, 1993); International Development Association, IDA Res. 93-6, Sept. 22, 1993 (the two Resolutions are identical and are reprinted in World Bank, *World Bank Operational Manual: Bank Procedures*, 17.55, annex A, 1999, also available at http://siteresources.worldbank.org/EXTOPMANUAL/Resources/EntireOpManualExternal.pdf?resourceurlname=EntireOpManualExternal.pdf); Asian Development Bank, *Establishment of an Inspection Function*, ADB Doc. R225-95 (Nov. 10, 1995); *id*., *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism*, May 2003, also available at http://www.adb.org/documents/policies/adb_accountability_mechanism/ADB_accountability_mechanism.pdf . And for an Executive Summary of the reform undergone by the ADB Accountability Mechanism see http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/accnt000.asp?p=policies; IFC/MIGA's Office of the Compliance Advisor/Ombudsman, (see Compliance Advisor/Ombudsman- CAO, *Operational Guidelines*, April 2004 (revised April 2007), also available at http://www.cao-ombudsman.org/howwework/filecomplaint/documents/English CAOGuidelines06.08.07Web.pdf); European Bank for Reconstruction and Development, *Independent Recourse Mechanism: As Approved by the Board of Directors on 29 April 2003* (2003), available at http://www.ebrd.com/downloads/research/policies/irmback.pdf (see also *id*., *Independent Recourse Mechanism Rules of Procedure: As Approved by the Board on 6 April 2004*, available at http://www.ebrd.com/downloads/ research/policies/procedur.pdf*)*; Inter-American Development Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism*, 4 February 2010, available at http://www.iadb.org/en/mici/publications,1768.html ; African Development Bank, African Development Fund, Board of Directors, *Enabling Resolution*, B/BD/2004/9- F/BD/2004/7- B/BD/2004/10, 30 June 2004, as amended pursuant to Resolution B/BD/2010/10 – F/BD/2010/04, 16 June 2010, available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/ Compliance-Review/Boards%20Resolution%2016%20June%202010.pdf; African Development Bank Group, *The Independent Review Mechanism. Operating Rules and Procedures*, 16 June 2010, available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/ IRM%20Operating%20Rules%20and%20Procedures%20-%2016%20June% 202010.pdf]. For an overview, see E. Suzuki, S. Nanwani, "Responsibility of International Organizations: the Accountability Mechanisms of Multilateral Development Banks", 27 *Mich. J. Int'l L.* 177 (2006); W. Namita, "Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability", 12 *U. C. Davis J. Int'l L. & Pol'y* 331 (2005-2006).

entities. Despite displaying some features to the contrary, this law is still largely non–hierarchical, arises on a voluntary basis and contractual in nature. Global law, on the other hand, consists largely of the rules produced by international organizations of different kinds.

2. International law is mainly based on transactions, while global law has developed a more robust hierarchy of norms. This hierarchy has developed within each individual regulatory regime; it is now emerging among the different regulatory regimes as well (for example, the European Court of Justice, in the *Kadi* and *Yusuf* cases[21], recognized the primacy of United Nations law over European law).
3. International organizations currently are often capable of reproducing other such organizations (in fact, many of them were themselves established by other global bodies). They conclude treaties and make rules, and can no longer be considered to be the mere agents of States. Indeed, they can even create standards that are aimed at transforming national governments' internal structure.
4. Perhaps the most important global bodies are those that carry out a standard-setting function. These standards are generally addressed to national governments; but this does not mean that private parties are not affected by them. For example, the food that we eat is subject worldwide to the standards of the already mentioned Codex Alimentarius Commission[22]. The standards established by the Forced Labour Convention (1930) are addressed to national governments, but affect private individuals (see, for example, the case of Myanmar and the International Labour Organization[23]).
5. Such bodies are at the top of many sectoral regimes. These regimes – as already noticed - do not, however, exist entirely independently of each other, but rather are linked in myriad different ways – either in relatively structured "regime complexes",[24] or simply through the significant areas of overlap in their respective fields of jurisdiction (e.g., trade and labor; trade and human rights; environmental protection and human rights; etc.[25]).

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21 European Court of First Instance, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 21 September 2005, case 315/01, in Rec., 2005, pp. II-3649; European Court of First Instance, *Ahmed Ali Yusuf e Ali Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 21 September 2005, case 306/01, in Rec., 2005, pp. II-3533. For an overview, see A. Bainham, "Is it Really for the European Community to Implement Antiterrorism UN Security Council Resolutions?", *Camb. L. J.*281 (2006); E. Cannizzaro, "Machiavelli, the UN Security Council and the Rule of Law", 3 *Int'l Org. L. Rev.* 189 (2006); M.M. Winkler, "When legal systems collide: the judicial review of freezing measures in the fight against international terrorism", 40 *Yale Law School Student Scholarship Series* 1 (2007), also available at http://digitalcommons.law.yale.edu.

22 See J. Kurtz, *supra* note 11; D. Livshiz, *supra* note 11. See, with particular reference to the interactions with the US system, D.M. Strauss, "International Regulation of Genetically Modified Organisms: Importing Caution into the U.S. Food Supply", 61 *Food & Drug L.J.* 167 (2006) or, also, S. Keane, "Can a Consumer's Right to Know Survive the WTO: The Case of Food Labelling", 16 *Transnat'l L. & Contemp. Probs.* 291 (2006-2007).

23 Commission of Inquiry, ILO, *Forced labour in Myanmar (Burma), Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930* (No. 29), Geneva, 2 July 1998, available at http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm. See also E. Morlino, "Labour Standards: Forced Labour in Myanmar", in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 1-9.

24 A 'regime complex' can be defined as "an array of partially overlapping and non hierarchical institutions governing a particular issue-area [...] [R]egime complexes are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors. The rules in these elemental regimes functionally overlap, yet there is no agreed upon hierarchy for resolving conflicts between rules. Disaggregated decision making in the international legal system means that agreements reached in one forum do not automatically extend to, or clearly trump, agreements developed in other forums": see K. Raustiala, V. David, "The Regime Complex for Plan Genetic Resources", 2 *Int.'l Org.* 279 (2004).

25 The many linkages between protection of human rights and protection of the environment have long been recognized. Principle 1 of the 1972 United Nations Conference on the Human Environment (Stockholm Declaration) stated that man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a

6. The global and the national levels interact in a number of different ways: for example, national governments act as law-makers at the global level, but are also the addressees of global substantive and procedural standards.
7. A global administrative law has thus developed, in terms of which global regimes are encouraged, and sometimes compelled, to ensure and promote the rule of law and procedural fairness, transparency, participation, and the duty to give reasons throughout all areas of their activity.
8. The public-private divide is blurred (there exist many significant cases of "hybridization": see, for instance, the ICANN, WADA, IUCN, WIPO, ISO, etc.) and does not follow their domestic paradigm of government regulating business.
9. Dispute settlement by mandatory adjudication remains, as yet, the exception rather than the rule within the global legal order. Traditional diplomatic relationships and negotiations survive and operate side by side with compulsory and binding adjudication by supranational courts and the non-binding decisions of different quasi-judicial bodies.
10. Compliance in the global space is "induced". Global regulatory regimes become effective through various means. Global bodies use surrogates to implement their standards: retaliation, authorizing controlled self-enforcement (in particular, the certification and accreditation mechanisms applied to the implementation of global food standards, forestry rules, ISO standards, etc.); introduction of incentives for compliance. Implementation and enforcement may also be left to national governments acting as instruments of global institutions[26].
11. While there is a well-developed administration, governed by a well-developed set of administrative laws, in the global space there is no constitutional law because constitutionalization applies mainly to national legal systems.

(Contd.)

life of dignity and well-being. It also recognized the responsibility of each person to protect and improve the environment for present and future generations. Almost twenty years later, in Resolution 45/94, the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts towards ensuring a better and healthier environment. In contrast to the earlier documents, the 1992 Rio de Janeiro Conference on Environment and Development formulated the link between human rights and environmental protection largely in procedural terms (see Principle 10). This angle was further developed in 1998, with the conclusion of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) . The Convention focused on the same issues as Principle 10 of the Rio Declaration and Principle 1 of the Stockholm Declaration, but in a more concrete manner, which strengthens the areas of overlap between human rights and environmental issues. For a comment on the Aarhus Convention, see M. Macchia, "Legality: The Aarhus Convention and the Compliance Committee", in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 71-76.

[26] For example, within the WTO, a number of different mechanisms are used to ensure that the rules of the regime are enforced: mutual support, dumping/antidumping, subsidies/countervailing measures, non-implementation of WTO judicial decisions/retaliation, etc. On the retaliation principle and on countervailing measures, see K. Anderson, "Peculiarities of Retaliation in WTO Dispute Settlement", 2 *World Trade Rev.* 123 (2002); T. Giannakopoulos, "Safeguarding Companies' rights in competition and antidumping/antisubsidies proceedings", 43 *Common Mkt. L. Rev.* 268 (2006); T. Jurgensen, "Crime and punishment: retaliation under the World Trade Organization Dispute Settlement System", 39 *J. World Trade* 327 (2005); Y.H. Ngangjoh, R.R. Herran, "WTO Dispute Settlement System and the Issue of Compliance: Multilateralizing the Enforcement Mechanism", 1 *Manchester J. Int'l Econ. Law* 15 (2004); J. Pauwelyn, "Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach", 94 *Amer. J. Int.'l L.* 335 (2000). In this regard, an important case arose before the WTO Appellate Body with reference to the reactions of WTO member States against the Continued Dumping and Subsidy Offset Act of 2000 (also known as the "Byrd Amendment") approved by the US Senate. See WTO Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 ("Byrd amendment")*, WT/DS217/AB/R, WT/D234/AB/R,16 January 2003, available at http://www.wto.org/english/tratop_e/dispu_e/217_234_abr_e.pdf and Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/217/R, WT/DS234/R, 16 September 2002, available at http://www.sice.oas.org/dispute/wto/ds217_234/ds217r_5e.asp. For an analysis of the case, see M. Benedetti, "EU Countermeasures against the US Byrd Amendment", in *Global Administrative Law: Cases, Materials, Issues*, *supra* note 7, 185-191.

12. A process of constitutionalization is already underway at the global level through the strengthening of an international civil society, the creation of a global public sphere, the growing number of transnational networks and the proliferation of global courts. But there is no government in this global constitution. This is why global law is mostly administrative law, not constitutional law.

VIII. The study of Global Administrative Law as an important intellectual exercise

I return now to the first topic that I have addressed, the study of Global Administrative Law.

We are currently engaged in a very important intellectual exercise – no less important, indeed, than that undertaken by the 19th century "founding fathers" of public law, such as Laferrière in France, Gerber, Laband and Mayer in Germany, Orlando and Romano in Italy. Scholars in New York, Rome, Heidelberg and elsewhere are working on a new area of legal theory and practice: that of global law[27].

This scholarly work has three main features. It is, firstly, a truly global effort. Jurists from all over the world are engaged in such research, some providing in-depth analyses of individual global regimes, while others seek to deduce a body of common principles and rules from the many and varied governance experiences.

It is worth noting that a scholarly endeavor of this sort has not been undertaken since the 17th century. Indeed, ever since the attack from legal positivism led to the collapse of natural law approaches to the discipline, law has been conceived of as the product of nation-States exclusively, with international law conceptualized mainly on the basis of "contractual" relations between them. As a consequence, the study of each national system of law has become, for the most part, limited to national "schools" of lawyers, with occasional raids into foreign legal systems permitted to scholars of a more comparative orientation.

Secondly, this endeavor deals with an entirely new subject-matter; one that has developed only relatively recently and, chiefly, in the last twenty years. It encompasses a vast array of different treaties, rules, standards, institutions, and procedural arrangements established beyond national frontiers either by the States themselves, or by other global institutions, in order to deliver services, establish further standards, monitor compliance, or act more generally as "clearing houses".

This body of law is confusing, at least when viewed through the lens of traditional conceptual criteria. It is law, but in most cases is not binding. It does boast established institutions, but these can most often proceed only tentatively at best, because their authority is not yet widely recognized.

Thirdly, in the study of this field one cannot rely upon the usual paradigms of public law. These were developed in national contexts as a set of values, principles, and rules necessary to the proper functioning of domestic institutions. For example, regular elections at the national and local levels serve the purpose of democracy; and the due process of law is instrumental to the protection of fundamental rights. But can they be transposed mechanically to an entirely new environment, beyond the State? Can new wine be poured into old bottles?

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[27] See the Global Administrative Project launched by New York University in 2005 (http://www.iilj.org/GAL/default.asp), the research on Global Administrative Law led by the Institute for Research on Public Administration (IRPA) in Rome (http://www.irpa.eu/gal-section/), and the Project on The Exercise of Public Authority by International Institutions at the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht in Heidelberg (http://www.mpil.de).