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List of Abbreviations

AB	Appellate Body of the World Trade Organization
AC	Aarhus Convention
ADR	Alternative Dispute Resolution
ARC	EU Accounting Regulatory Committee
ARPA	Advanced Research Project Agency
ATC	Agreement on Textiles and Clothing
BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
BIT	Bilateral Investment Treaty
CAA	US Clean Air Act
CAO	Compliance Advisor Ombudsman
CAS	Court of Arbitration for Sport
ccTLDs	Country code top-level domain names
CEA	European Insurance Organization
CEACR	Committee of Experts on the Application of Conventions and Recommendations within the ILO
CCRA	Canada Customs and Revenue Agency
CCSBT	Convention for the Conservation of the Southern Bluefin Tuna
CDSOA	US Continued Dumping and Subsidy Offset Act
CESR	Committee of European Securities Regulators
CFI	European Court of First Instance
CITT	Canadian International Trade Tribunal
CRA _s	Credit rating agencies
CRS	Computerized Reservation System
DNSO	Domain Name Supporting Organization
DSB	Dispute Settlement Body of the World Trade Organization
DSU	Dispute Settlement Understanding of the World Trade Organization
EBF	European Banking Federation
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECommHR	European Commissioner for Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EEOC	World Bank Equal Employment Opportunity Commission
EFAA	European Federation of Accountants and Auditors

EFRAG	European Financial Reporting Advisory Group
EIS	Environmental Impact Statement
EU	European Union
FAO	Food and Agriculture Organization
FEE	European Federation of Accountants
FINA	International Swimming Federation
FISCAP	National Fisheries Inspection and Control Service
FMCSA	US Federal Motor Carrier Safety Administration
FSAP	Financial Sector Assessment Program
FSF	Financial Stability Forum
GAC	Governmental Advisory Committee within the ICANN
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GFCM	General Fisheries Commission for the Mediterranean
gTLDs	Generic top-level domain names
IAASB	International Auditing and Assurance Standards Board
IAESB	International Accounting Education Standards Board
IAIS	International Association of Insurance Supervisors
IANA	Internet Names Assigned Authority
IAS	International Accounting Standards
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
IBRD	International Bank for Reconstruction and Development
ICANN	Internet Corporation for Assigned Names and Numbers
ICATT	Convention for the Conservation of Atlantic Tunas
ICFTU	International Confederation of Free Trade Unions
ICN	International Competition Network
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IESBA	International Ethics Standards Board for Accountants
IFAC	International Federation of Accountants
IFAC	International Federation of Accountants
IFC	International Finance Corporation
IFRIC	International Financial Reporting Interpretation
IFRS	International Financial Reporting Standards
IFs	Sport International Federations
IGOs	International Governmental Organizations
ILO	International Labor Organization
IMCC	Interministerial Maritime Control Commission
IMF	International Monetary Fund
IOC	International Olympic Committee
IOs	International Organizations
IOSCO	International Organization of Securities Commissioners
IPs	Internet Protocols

IPSASB	International Public Sector Accounting Standards Board
ISA	International Standards on Auditing
ISO	International Organization for Standardization
ISOC	Internet Society
ISPM	International Standards for Phytosanitary Measures
ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunications Union
LICRA	Ligue contre le Racisme et l'Antisémitisme
MFA	Multifiber Agreement between European Community, United States, Canada, Austria, Norway and Finland signed the
MOP	Meeting of the Parties of the Aarhus Convention
NAFTA	North American Free Trade Agreement
NCA	National Competition Authority
NEPA	US National Environmental Policy Act
NOCs	National Olympic Committees
OECD	Organization for Economic Co-operation and Development
OPCW	Organization for Prohibition of Chemical Weapons
PIOB	Public Interest Oversight Board
PRA	General Guidelines for Pest Risk Analysis
PTC	Patent Cooperation Treaty
RFC	Request for Comments
RFMOs	Regional Fisheries Management Organizations or Arrangements
ROSCs	Reports on the Observance of Standards and Codes
SAC	Standards Advisory Council
SARG	Standards Advice Review Group
SEC	Securities and Exchange Commission
SIMA	Canadian Special Import Measures Act
SIS	Schengen Information System
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSSC	Textiles-Specific Safeguard Clause
UDRP	Uniform Dispute Resolution Policy adopted by ICANN
UEAPME	European Association of Craft, Small and Medium-sized Enterprises
UEJF	Union Des Etudiants Juifs De France
UNAMI	UN Assistance Mission in Iraq
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNFSA	United Nations Fish Stocks Agreement
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor

USDA	US Department of Agriculture
USDOC	US Department of Commerce
USITC	United States International Trade Commission
USTR	United States Trade Representative
WADA	World Anti-Doping Agency
WB	World Bank
WBAT	World Bank Administrative Tribunal
WGIG	Working Group on Internet Governance
WHC	UNESCO World Heritage Committee
WIPO	World Intellectual Property Organization
WSIS	World Summit on Information Society
WTO	World Trade Organization

Foreword

In his masterpiece *Der Mann ohne Eigenschaften* (1930), Robert Musil ironically baptized the Austro-Hungarian Empire as “Kakania”, a title formed by taking the initial letters of the two labels adopted by that State: *kaiserlich* (Imperial) and *königlich* (Royal). Describing it as the “State since vanished that no one understood”, Musil noted that Kakania was at once “*kaiserlich-königlich*” (*k-k*, or “Imperial-Royal”) and “*kaiserlich und königlich*” (*k & k*, or “Imperial and Royal”):

“[...] but to be sure which institutions and which persons were to be designated by *k.k.* and which by *k. & k.* required the mastery of a secret science. On paper it was called the Austro-Hungarian Monarchy, but in conversation it was called Austria, a name solemnly abjured officially while stubbornly retained emotionally, just to show that feelings are quite as important as constitutional law and that regulations are one thing but real life is something else entirely. Liberal in its constitution, it was administered clerically. The government was clerical, but everyday life was liberal. All citizens were equal before the law, but not everyone was a citizen. There was a Parliament, which asserted its freedom so forcefully that it was usually kept shut; there was also an Emergency Powers Act that enabled the government to get along without Parliament, but then, when everyone had happily settled for absolutism, the Crown decreed that it was time to go back to parliamentary rule”.

The description of Kakania shows the decadence of the form of the imperial State that had survived until the early 20th century, and was then overwhelmed by the rise of mass society and destroyed during the two World Wars. Since then, the historical and political context has been profoundly transformed; yet the idea of Kakania, with its inner contradictions, still seems to be a useful metaphor for understanding the legal issues and challenges with which States are confronted in an age of globalization. Just as it was a century ago, the very idea of the State is under transformation; its centrality to the notion of public powers has become illusory, and new forms of governance are emerging. The conceptual juridical tools built during the 20th century no longer appear sufficiently refined in order to address the problems raised within the contemporary global arena; and some “cornerstones” of modern legal jurisprudence, such as the idea that administrative law is essentially and only national in nature, are vanishing; just as did the “misunderstood State” evoked by Musil.

Today almost all human activity is subject to some form of global regulation. Goods and activities that are beyond the effective control of any one State are, in almost all cases, regulated at the global level. Global regulatory regimes cover a

vast array of different subject-areas, including forest preservation, the control of fishing, water regulation, environmental protection, arms control, food safety and standardization, financial and accounting standards, internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labour standards, antitrust regulation, to name but a very few.

This increase in the number and scope of regulatory regimes has been matched by the huge growth of international organizations: nowadays over 2,000 IGOs, and around 40,000 NGOs, are operating worldwide. In the environmental area alone, for instance, there are – amongst many others – the International Whaling Commission, the UN Framework Convention on Climate Change Secretariat, the UNEP Ozone Secretariat, the Secretariat of the Convention on Biodiversity, the Secretariat of the Convention on International Trade in Endangered Species, the Basel Convention Secretariat, the UN Secretariat of the Convention to Combat Desertification, the FAO/UNEP Secretariat on the Rotterdam Convention on Prior Informed Consent, the UNEP Convention on Migratory Species Secretariat, the International Tropical Timber Organization; not to mention the large number of interested NGOs.

There are, of course, great differences among the various different types of regulatory regimes. Some merely provide a framework for State action, whereas others establish guidelines addressed to domestic administrative agencies, and others still impact directly upon national civil society actors. Some regulatory regimes create their own implementation mechanisms, while others rely on national or regional authorities for this task. To settle disputes, some regulatory regimes have established judicial (or quasi-judicial) bodies, or refer to those of different regimes; while others resort to “softer” forms, such as negotiation.

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 subjects, both public and private, affected by their activities. Ultimately, they have emerged as genuine global public administrations.

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 coming to form a specific field of legal theory and practice: that of global administrative law. The main focus of this emerging field is not the particular content of substantive rules generated by global regulatory institutions, but rather the actual or potential application of principles, procedural rules and reviewing and other mechanisms relating to accountability, transparency, participation, and the rule of law in global governance.

Some specific characteristics of the emerging global administrative law can already be identified.

Firstly, it is sectoral, due to the presence of many different global regulatory regimes. This feature stems directly from the very origin of global regulation itself, which follows first of all the emergence of a specific public aim that cannot be achieved by the actions of one State alone. This sectorality itself has effects on the organization of global governance, with the variety of regimes producing various forms of global administration: from formal international organizations (such the WTO) to private institutions with regulatory functions (such the ICANN). This lack of unity, however, is to some extent counterbalanced by a strong inter-connection between different sectors: for example, global bodies are formed by other international institutions (such the Codex Alimentarius Commission, created by the FAO and the WHO); agreements or networks are established that connect different regimes (as is the case of agreements between the WTO and the WIPO, or between the WTO and the WHO); and dispute settlement bodies created by one regime can be used to resolve disputes raised within another: (the WIPO Arbitration and Mediation Center addressing disputes involving internet domain names provides one example).

Secondly, global administrative law addresses a wide range of actors – States, domestic public administrations, global institutions, NGOs, citizens. The role of States within the global arena has become increasing multifaceted, and there is a constant interaction between the global and national levels; indeed, global administration cannot plausibly be said to exist in isolation from the national level. It is for this reason that an examination of the decision-making processes of IOs reveals a plurality of techniques of joint action and mutual conditioning. In other words, there is no clear way of separating, either analytically or empirically, the global from the national.

Thirdly, global administrative law operates beyond State borders and, in so doing, becomes divorced from any constitutional basis (which is, otherwise, one of the main characteristic of national administrative law). At the global level, there is no government or higher authority; only a plurality of sectoral “sub-governments”. The absence of a constitutional foundation to global administration and administrative law again gives rise to new – and quite

particular – issues of legitimacy and accountability.

Fourthly, and in a profoundly related manner, the primary focus of global administrative law is aimed at increasing the various protection mechanisms in operation to ensure that the institutions of global governance are properly responsive to the interests of those on whom their activity impacts. The lack of constitutional basis, discussed above, and, indeed, of any realistic possibility of achieving a “global democracy” anytime soon, compels the emphasis of other legitimacy- and accountability-promoting mechanisms, such as, for example, the spread of principles transposed from national legal orders (transparency, participation, duty to give reasons, review, etc.).

Lastly, from a strictly legal perspective, the global administrative space is both international and administrative: in this way, the global legal order might actually begin to appear as *Kakania*, as at once – in a sense – “imperial” and “royal”. To prevent the theoretical study of these going the way the vanished Empire described by Musil, the coexistence of both international and administrative law aspects must neither be denied nor conceptualized as a rigid dichotomy; rather, it should simply be recognized, accepted, and confronted as a new challenge, necessitating the development of a new set of conceptual tools.

* * *

This book is an attempt to analyze global administrative law through the elaboration and examination of a number of different cases and case studies.

The architecture of its contents mirrors the characteristics of this emergent field.

The first chapter addresses one of the most important activities of global administrations: standard-setting. Global standards provide a clear example of the spread of global regulatory regimes, and of the ways in which they interconnect; in addition, they illustrate well the various interactions between the global and domestic levels. Moreover, these standards can be set either by private bodies (such as, for example, in the accounting sector), or by formal IGOs (such as the labour standards approved by the ILO).

The public-private distinction is also evident in the second chapter, in which the various forms of governance existing within the global order are illustrated. The different sections of this chapter demonstrate both the sectorality and the complexity of global administrative law, incorporating analyses of hybrid governance solutions (the ICANN and the WADA); multipolar conflicts (the Chinese textiles affair involving the WTO and the EU); shared powers (the Patent Cooperation Treaty); mutual recognition (the free movement of professionals); joint decision-making processes (fisheries governance); and

transgovernmental networks (the Basel Committee).

Moving from the structure of global regimes to the activity of global administrations, chapters three and four address the application of different legal principles within global regulatory governance.

Chapter three examines the increasing spread of principles, established by global bodies, which must be respected within national administrative procedures. Examples of most of these can be found within the WTO system, such as the duty to disclose information (here dealt with in relation to anti-dumping duties), the duty to give reasons (definitive safeguard measures), and transparency (subsidies and countervailing measures). Other important principles present within the global context are the legality (as shown by the Compliance Committee of the Aarhus Convention), the reasonableness and the proportionality (applied by the NAFTA Binational Panel), and the review of discretionary power (such as the case of Bilateral Investment Treaties' disputes resolved by ICSID arbitration).

Chapter four is wholly dedicated to the issue of due process. It thus examines a number of cases in which global bodies, such as the ITLOS, the World Bank Inspection Panel, and the World Bank Office of the Compliance Advisor Ombudsman (CAO), have relied upon this principle. But it considers also cases in which this principle has received a weaker defense than within the domestic orders (such as in the Security Council's actions in relation to the "war on terror").

Chapter five considers another important topic in contemporary global governance: the rise of judicial globalization. Since the 1990s, the number of international courts and tribunals has grown rapidly. Before this, there were only a handful of operative international courts; in the last fifteen years, however, more than twenty new permanent adjudicative mechanisms and quasi-judicial bodies have been established. One of the most important global dispute settlement bodies is that of the WTO, as shown by the high number of its cases examined in this book. This chapter, however, broadens this focus significantly, analyzing other examples of courts or quasi-judicial bodies such as the international administrative tribunals, the ITLOS, ICSID arbitral tribunals, and the alternative dispute resolution mechanisms created by the ICANN. Lastly, the impact of human rights law – namely of European Convention of Human Rights and of its Court – on supranational regimes is also considered.

The analysis of judicial globalization leads directly on to another issue of real significance: the enforcement of global decisions, either administrative or "judicial" in nature. From this perspective, chapter six focuses on five examples that highlight the difficulties that might be encountered in relation to the implementation of such decisions, which might in some circumstances be granted only in an incomplete or ambiguous manner.

The presence of many sectoral regimes does not, however, only give rise to

varied forms of cooperation or interaction; it also creates conflicts. This happens in particular when separate jurisdictions reciprocally overlap, as is brought out in the four examples presented in chapter seven, dealing with the relations between global law and EU law, the Shengen Information System, the governance of cyberspace, and the international antitrust regime, respectively.

Finally, the last chapter moves from the general perspective that informs the preceding ones, focusing on the specific field of global security. This example is strongly representative of the increasing importance of global administrative law, illustrating the extent to which it has begun to affect even those functions traditionally viewed as forming the core of State sovereignty, and fundamentally political in nature.

While the structure of the book appears similar to that followed in the first edition, published in 2006, this new edition makes some important changes. The earlier version actually represented something of an experimental attempt to demonstrate the relevance of global administrative law issues, collecting the cases and materials used for courses on Global Administrative Law taught by Professor Sabino Cassese at the University of Rome “La Sapienza” and at the *Institut d’Etudes Politiques* in Paris. In this edition, three sections have been removed, while nine new ones have been added. Most importantly, however, each of the forty-one sections has been considerably extended, and now they all follow the same basic schema: each has a section on the relevant background; a list of materials and sources (with hyperlinks wherever possible); an analysis of the example in question; and a discussion of the various issues to which it gives rise, enabling each author to flag some basic theoretical problems, and to highlight the relations between the different topics examined in the book. Each section concludes with list of recommended further reading, relating specifically to the topic with which it dealt. Lastly, a general bibliography provides an overview of the most relevant works on global legal issues, and particularly global administrative law, divided into twelve different categories.

* * *

In conclusion, this new edition aims to offer a more refined resource for the study and practice of global administrative law. Nevertheless, it is clear that the task that it sets itself is far from complete in its present iteration. Although most of the significant issues raised by global administrative law (such as accountability, participation, transparency, and due process) are examined in detail in this book, there are important aspects of the field still outstanding, which future editions will undoubtedly have to confront

Amongst these, perhaps the most pressing is the need – given the vast

increase in the scope and importance of the activities of IOs – to begin examining, from a specifically administrative law perspective, not only the regulations that such bodies generate and the procedural rules that guide this, but also their organizational structure and the broader web of institutional relations within which they are implicated. One result of such an examination would be to point up the areas of overlap between global administrative law and international institutional law; another would be to enable the field to move beyond the fairly narrow, US-influenced procedural model of administrative law that has, until now, informed much of the scholarship, and to complement this view with a broader, more European perspective.

Moreover, there are other significant examples of innovative governance methods, mechanisms and principles, of which any fully-rounded theory of global administration would have to take account. They can be found in specific organizations (such the ISO) or in specific sectors (such as those of health or environmental regulation, fields in which new international institutional models are emerging), both of which provide important evidence of the emergence and development of this new field.

Ultimately, the most important factor to consider is that the emergence of global administrative law should be seen as a great opportunity to create a more just legal order, wherein the weaker actors in global governance can have their claims heard and satisfied through the use of the protection mechanisms of administrative law. Global administrative law is not, in fact, intended to help powerful States entrench their position of domination in, and control of, the global legal order; on the contrary, it is meant to level the playing field, ensuring that global regulatory bodies are responsive to the interests of all of those upon whom their activities impact; and that those – increasingly important – areas of global governance that escape the jurisdiction of both public international and domestic administrative laws are not thereby beyond the reach of the rule of law altogether.

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1. GLOBAL STANDARDS

1.1. Labour Standards: Forced Labour in Myanmar

Elisabetta Morlino

1. *Background*

Myanmar, formerly known as Burma, is the largest country in the Indochinese peninsula. It covers a territory of over 678,500 square kilometers, and has an ethnically mixed population. An English colony until the late 19th century, it gained independence on 4 January 1948. Myanmar is currently governed by a military regime that Freedom House has judged to be one of the most repressive in the world (as illustrated recently – in Autumn 2007 – by the violent military reaction to the anti-government protests involving students and Buddhist monks).

Burma joined the United Nations on 19 April 1948, and ratified the Forced Labour Convention of 1930.

The International Labour Organization (ILO) is the body charged with monitoring the proper implementation of both the 1930 convention and the Abolition of Forced Labour Convention of 1957.

The ILO is composed of a General Conference of representatives of the Members, a Governing Body representing governments, employers and workers, and an International Labour Office controlled by the Governing Body.

The Organization pursues four main objectives: to promote and protect workers' fundamental rights through the application of specific norms and principles; to create greater employment opportunities and guarantee basic incomes to all men and women; to secure the extension of social security benefits to provide a basic level of protection to all; and to strengthen the social dialogue between governments, employers and workers. The ILO thus functions both as a standard-setter (proposing conventions or recommendations) and as an oversight

body (monitoring the implementation of its standards by Member States).

This monitoring is carried out by means of three administrative-type processes: the annual report (ILO Constitution, Articles 22-23), the representation procedure (ILO Constitution, Article 24), and the complaints procedure (ILO Constitution, Articles 26, 27, 28 and 33).

Regarding the first of these processes, all Member States are obliged to submit an annual report on the measures it has taken to give effect to the Conventions to which it is a party. On the basis of these reports, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) evaluates the national implementation of international labour standards and sets forth its conclusions in an annual report. This report is presented to the International Labour Conference and examined there by the Conference Committee on the Application of Standards, which identifies the observations requiring further discussion. The interested governments are invited to respond before the Commission and to provide all necessary information. Where it sees fit, the Commission recommends that the governments take specific measures or accept ILO missions or technical assistance. The discussion and conclusions are published in a report prepared by the Commission. Copies of the report are then submitted to national industrial associations of workers and of employers, which can communicate their observations to their governments or directly to the ILO.

In terms of the representation procedure, any industrial association of workers or employers can make representations to the International Labour Office against any of the Member States. The representation may be communicated by the Governing Body to the government against which it is made. If no statement is received from the government in question within a reasonable period of time, or if the statement when received is not deemed satisfactory by the Governing Body, the latter has the right to publish the representation and the statement, if any, made in reply to it.

Lastly, a complaint against one Member State may be filed with the International Labour Office by either another Member, by one of the delegates to the Conference or by the Governing Body acting on its own initiative. It may be followed by a communication to the government in question and, where the Governing Body thinks fit, by the appointment of a Commission of Inquiry. The latter, after fully considering the complaint, prepares a report presenting its findings on all questions of fact and such recommendations as it may think proper. The report is first communicated to the Governing Body and to each of the governments concerned in the complaint, and then is published. The concerned governments can choose to accept the Commission's recommendations or not. If not, the complaint may be referred to the International Court of Justice. If the government does not take the action necessary to comply with the recommendations of the Commission of Inquiry or a decision of the International Court of Justice within the required time, the

Governing Body may recommend to the Conference such action as it deems expedient to secure compliance therewith (ILO Constitution, Article 33).

2. *Materials: Norms and Relevant Documents*

- ILO Constitution
(<http://www.ilo.org/ilolex/english/constq.htm>);
- ILO Declaration on Fundamental Rights and Principles at Work
(<http://www.ilo.org/ilolex/english/index.htm>);
- C29 Forced Labour Convention, 1930
(<http://www.ilo.org/ilolex/english/convdisp1.htm>);
- International Labour Law, ILO Bureau for Workers' Activities
(<http://www.itcilo.it/english/actrav/telearn/global/ilo/law/lablaw.htm>);
- 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
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(<http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>);
- *Complaint concerning the non-observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), made by delegates to the 83rd (1996) Session of the Conference under article 26 of the Constitution of the ILO*, GB.267/16/2 267th Session, Geneva, November 1996
(<http://www.ilo.org/public/english/standards/relm/gb/docs/gb267/gb-16-2.htm>);
- Myanmar Government, Letter to the Director-general of the *International Labour Office*, 4 February 1999
(<http://www.ilo.org/public/english/standards/relm/gb/docs/gb274/gb-5.htm>);
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- (<http://www.ilo.org/public/english/standards/relm/gb/docs/gb274/dg-myanm.htm>);
- Governing Body, International Labour Office, *Measures, including action under article 33 of the Constitution of the International Labour Organization, to secure compliance by the Government of Myanmar with the recommendations of the Commission of Inquiry established to examine the observance of the Forced Labour Convention, 1930 (No. 29), 277th session, GB 277/6* (<http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/gb-6.pdf>);
 - *ILO high level team departs for Myanmar, Mission to assess government actions concerning forced labour*, press release, 17 September 2001 (ILO/01/29) (<http://www.ilo.org/public/english/bureau/inf/pr>);
 - Governing Body, International Labour Office, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Report of the High-Level Team, GB.282/4, Genève, November 2001* (<http://www.ibiblio.org/obl/reg.burma/archives/200111/msg00018.html>);
 - *ILO Appoints Liaison Officer in Myanmar*, press release, 4 September 2002, (ILO/02/40) (<http://www.ilo.org/public/english/bureau/inf/pr>);
 - Myanmar Government-ILO, *Joint Government of the Union of Myanmar-ILO Plan of Action for the Elimination of Forced Labour Practices in Myanmar* (http://www.ibiblio.org/obl/docs/ILC2003special_sitting.htm);
 - Governing Body, International Labour Office, GB.292/7/2, Addendum (<http://www.ilo.org/public/english/standards/relm/gb/docs/gb292/index.htm>);
 - Governing Body, International Labour Office, GB.292/7/3 (<http://www.ilo.org/public/english/standards/relm/gb/docs/gb292/index.htm>);
 - Governing Body, International Labour Office, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Conclusions*, march 2005, GB.292/7/1 (<http://www.ilo.org/public/english/standards/relm/gb/docs/gb292/index.htm>);
 - CEACR, *Individual Observation concerning Forced Labour Convention, 1930 (No. 29) Myanmar, 2006* (<http://www.ilo.org/ilolex/gbe/ceacr2006.htm>);
 - ILCCR, *Individual Observation concerning Convention No. 29, Forced Labour, 1930 Myanmar, 2006*

which began an investigation into the case. In the Commission's report of 2 July 1998, it analyzed the legal rules and practices adopted in Myanmar, and found Myanmar to be in ongoing violation of the Convention. The Commission called for the urgent abrogation of the laws and the adoption of practices coherent with international principles. On 14 May 1999, the Myanmar Minister of Internal Affairs adopted Order n. 1/99, *Order Directing Not To Exercise Powers Under Certain Provisions of the Towns Act, 1907 and the Village Act, 1907*, which seemed to implement the ILO's recommendations.

The Myanmar Government's response was held to be unsatisfactory. In June 1999, the International Labour Conference adopted a resolution condemning Myanmar's substantive refusal to fulfil the Commission's recommendations. It blocked all forms of technical assistance to the government of Myanmar and excluded it from most of the meetings of the ILO. Furthermore, it asked the Governing Body to evaluate the possibility of applying Article 33 of the Constitution.

In March 2000, for the first time in the history of the ILO, the Governing Body invoked Article 33, specifying the measures it deemed necessary to ensure the implementation of its recommendations. The application of these measures was then temporarily suspended, due to the commencement of a new phase of direct monitoring. In 2001, an ILO High Level Team was sent to Myanmar to conduct on-site investigations and observe the implementation of the recommendations. The next year, an ILO Liaison Officer was appointed in Rangoon and charged with ensuring "the prompt and effective elimination of forced labour in the country." In May 2003, following the agreement for the appointment of a Liaison Officer, the Director-General of the ILO and the Government of Myanmar adopted a Joint Plan of Action for the Elimination of Forced Labour Practices in Myanmar.

That same year, a number of States also decided to act on this issue, either individually or through international organizations, as permitted by the International Labour Conference of 2000. The United States, Japan, Australia, Great Britain, Switzerland and Canada adopted different kinds of measures, such as import restrictions, the freezing of bank accounts, the prohibition of financing and investments and visitation limitations.

In March 2005, the Governing Body of the ILO, on the basis of the reports submitted by the Liaison Officer and the High Level Team, abandoned its "wait-and-see" attitude and recognized the right of each member State to adopt the measures that it held best suited to ensure compliance with the June 2000 recommendations.

Finally, in 2006, the International Labour Conference decided that all of the ILO's decisions relating to Myanmar had to be brought to the attention of ECOSOC and other international organizations.

4. *Issues: The Functions of IOs within the Global Administrative Space*

This case of Myanmar before the ILO enables us to draw a number of conclusions regarding both the structure of this international organization, and the substantive and procedural norms that regulate its activity.

First of all, on the basis of the facts set out above, it is possible to detect within the ILO the presence of the three elements – legislation, administration and jurisdiction – that typically characterize national legal systems. The ILO has a Constitution containing normative prescriptions that produce legal relations between private actors and public authorities of national legal systems, and sets standards that must be observed by all States Parties. It has its own administrative apparatus, with the ability to initiate and prosecute actions, evaluate charges and levy sanctions. The administrative bodies are instrumental in ensuring the correct implementation of the standards. Finally, it performs quasi-judicial functions and can, in certain cases, trigger the involvement of the International Court of Justice.

The ILO's quasi-judicial nature is particularly evident in the complaint procedure. This can be broken down into three phases. First, the communication with the government subject to the complaint, and the evaluation of the basis of the complaint; second, the investigation, through the establishment of a Commission of Inquiry; and third, the formal recognition of the failure to implement the Commission's recommendations, the communication of this outcome to the Governing Body and to the governments concerned, and its general publication. The first phase has a purely administrative character. Most aspects of the second phase, and some of the third, are judicial in nature. The Commission of Inquiry collects evidence, questions witnesses and performs all of the other functions required for a careful ascertainment of the facts. There is thus a hybridization of administrative and judicial tools that can be interpreted as a progressive "judicialization" of administrative procedures.

Secondly, an analysis of the constitutional norms and administrative practices of the ILO also enables us to observe the existence of a certain level of commitment to the principle of the rule of law in the implementation of international standards. In performing its inquiries, the Commission must respect the principles of a fair procedure. Part II, 2, para.13 of the Commission's report specifies that "...the rules of procedure had to safeguard the right of the parties to a fair procedure as recognized in international law." There are at least four such principles: 1) the complaint must be well founded; 2) the competent authority must decide on the basis of legal evidence; 3) the accused party must be given the opportunity to respond; 4) the complaint must be considered within a reasonable time and without undue delays. The geographically diverse and legally

competent nature of the ILO Commission in the Myanmar case was a further guarantee of its impartiality. Finally, the possibility of recourse to the International Court of Justice in a complaint procedure promotes the legal accountability of ILO bodies. The use of administrative tools in procedures for creating international standards thus ensures that, in this context at least, the principles of the *Rechtsstaat*, originally developed at the national level, are respected.

Finally, looking at the values that underpin the norms, the Myanmar case provides a good example of the relationship between different regulatory regimes. The main purpose of the ILO and its Constitution is to promote social justice. However, in the face of repeated appeals to respect the Constitution, and the reluctance of the Government of Myanmar to comply with its ILO obligations, the International Labour Conference of June 2000 encouraged Member States to adopt such measures as import restrictions, freezing the individual funds of government officials, and blocking economic subsidies. This implies a connection between values that belong, in large part at least, to different regulatory regimes: on the one hand, the respect of human dignity and integrity of work, on the other hand purely economic interests. These connections, promoted by an international body but concretely pursued by national administrative agencies, thus ultimately increase the efficacy of supranational norms.

5. *Further Reading*

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1.2. International Accounting Standard Setting and the IASC Foundation

Constitutional Review

Maurizia De Bellis

1. *Background*

The International Accounting Standards Board (IASB) is an international organization composed of private entities, which establishes standards and guidelines for the accounting sector. Founded in 2001, it is the successor of the International Accounting Standards Committee (IASC), which was created in June 1973 in London. As the standards it develops have been steadily gaining more widespread acceptance, it is a particularly interesting example of global private regulation.

The objectives of the IASC Foundation are to develop a single body of high quality, comprehensible and enforceable global accounting standards; to promote the use and rigorous application of those standards; and to bring about the

convergence of national and international accounting standards. The accounting standards established by the IASC up until 2001 are referred to as the International Accounting Standards (IAS), while the standards produced by the IASB after that date are termed the International Financial Reporting Standards (IFRS). As the IASB adopted the IAS, and continues to update it, global accounting standards are frequently referred to as the IAS/IFRS.

Both the IAS and the IFRS have gained increasing prominence over the last decade.

First, they have been used by the Financial Stability Forum (FSF), which brings together the representatives of such global financial regulators as international intergovernmental organizations (in particular, the International Monetary Fund (IMF) and the World Bank); by transgovernmental networks for banking, securities and insurance regulation (the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissioners (IOSCO), the International Association of Insurance Supervisors (IAIS)); by private bodies with regulatory functions, such as the IASB and the International Federation of Accountants (IFAC); by representatives of the European Central Bank (ECB), and the Bank for International Settlements (BIS) and its committees; and finally, by national administrative authorities (such as central banks, supervisory authorities and treasury departments) in the G7 countries. The FSF is thus an example of hybrid intergovernmental-private administration.

One of the Forum's most important achievements is its *Compendium of Standards*, which brings together the various financial and economic standards internationally recognized as "important for sound, stable and well functioning financial systems", as established by the members of the FSF. The Compendium highlights 12 "key standards" that are deemed essential for sound financial systems. Within the FSF Compendium, some of the IAS/IFRS are also included; which illustrates how standards originally established by a private regulator can later be recognized by a hybrid, private-public regulator.

There is another consequence of the incorporation of the IASB's standards in the Compendium. The twelve key standards set out in the latter are used by the IMF and the World Bank in their Reports on the Observance of Standards and Codes (ROSCs). These are a part of the Financial Sector Assessment Program (FSAP), founded in 1999 by these two intergovernmental organizations. These reports address the degree of countries' compliance with certain global financial standards – namely, the twelve contained in the FSF Compendium. The IMF and World Bank's staff prepare the reports at the request of the State concerned. Thus, the compilation of an ROSC is voluntary, just as the publication of the report depends on the consent of the State in question. At the same time, a State's refusal to publish an ROSC may negatively affect market operators' judgments. Both the IMF and the World Bank (not to mention the FSF) have emphasized the important role that can be played by these assessment

instruments, and the number of ROSCs that have been prepared is considerable: by the end of December 2004, 605 ROSC modules had been completed for over 116 States, 74% of which have since been published on the IMF's website. Therefore, through these mechanisms, the compliance of States with rules that were, in effect, established by private bodies is subject to assessment by intergovernmental organizations.

The growing recognition of the IASB's standards has also been helped by their incorporation into the EU law: EC Regulation n. 1606/2002 (the IAS Regulation) refers specifically to the IAS/IFRS (for a more in-depth analysis, see *infra*, Ch. 1.3).

2. *Materials*

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3. *Analysis*

The IASC Foundation Constitution, which outlines the IASB's structure and establishes the rules it must respect in setting its standards, was first approved in 2000 and then amended in 2001, 2002, 2005, and again most recently in October 2007 (simply to reflect the expansion of The International Financial Reporting Interpretation (IFRIC) to 14 members). In November 2003, the Constitution Committee was established and charged with consulting with a large number of organizations on several issues addressed by the Constitution. A public consultation document was published on 23 November 2004 (the *Proposals of the IASC Foundation Trustees*) and, after a period for comments by the interested parties (until 23 February 2005), the new text was approved on 21 June 2005. The reform of 2005 modified both the IASB's structure and its standard-setting procedure.

The IASB's structure is complex: it is modeled on the US Financial Accounting Standards Board (FASB), a private regulator that sets standards for the American accounting sector. It is made up of four main constituent bodies. The IASB is the standards-setting body of the IASC Foundation (Constitution, Art. 1). The Standards Advisory Council (SAC), which represents the accountancy industry and profession, is responsible for commenting on the IASB's projects. The IFRIC is charged with interpreting accounting standards; these interpretations, however, are valid only if approved by the IASB. The Trustees of the International Accounting Standards Committee Foundation (IASC) appoint the members of the three other bodies (IAS, SAC and IFRIC) (Constitution, Art. 15).

The 2005 revision changed the size and the composition of the board of trustees. According to the 2002 text, there were to be nineteen members of the board: six to be appointed from North America, six from Europe, four from the Asia/Pacific region, and three others from any area. After the revision, the number of the trustees was raised to twenty-two, increasing the representation from the Asia/Pacific region to six and from other areas to four (Constitution, Art. 6; further discussion on this point can be found in the *Proposals*, para. 31 et seq.). The aim of this revision was to introduce a more balanced geographical representation, redressing the previous Euro-American dominance.

The amendments to the IASC Constitution also granted the trustees new functions: to establish the operating procedures and due process for the IASB, the IFRIC and the SAC, and to review compliance with these procedures (Constitution, Arts. 15(f) and (g), 57 and 106 et seq.). In the previous text, due process was not mentioned in relation to the ordinary activity of the IASB's bodies, but only in the context of the procedure for reviewing the Constitution itself. Article 15(h) of the Constitution establishes that amendments thereto must

be approved “following a due process, including consultation with the SAC and publication of an exposure draft for public comment”. After the revision of the Constitution, due process is intended as a principle that must be respected in a greater proportion of IASB activity; not only when amending the Constitution, but also in the activity of each of its bodies. This provision was included in the IASB’s *Due Process Handbook* of 2006.

During the debate concerning the Constitution’s revision, one proposal would have allowed alternative funding arrangements for the IASB. The IASB Foundation had depended upon voluntary contributions from public and private sources. This raised the concern of a conflict of interests, as the standard setting procedure might be expected to favour the interests of the largest financial contributors. For these reasons, an alternative system was proposed, which would have used listing or registration fees (*Proposals*, para. 68). This attempt to promote the IASB’s independence failed, however, and nothing changed regarding the financing rules in the text of the Constitution.

4. *Issues: The Structure and the Functions of Global Private Regulators*

The acceptance and use by public regulators of standards set by private bodies raises a number of questions concerning the accountability of such entities. Is it possible to increase the accountability of global private regulators? To what extent can changing the composition and operating procedure of the IASB, through amendments to its Constitution, promote its legitimacy? How can global administrative tools, such as notice and comment procedures, be adapted to the activity and structure of global regulatory bodies? Do these tools serve the same function at both the global and national levels, or do they pursue different ends, notwithstanding their similar structures?

Another set of problems is related to the content of global private accounting regulations. As mentioned above, the international institutional structure for setting accounting standards is modeled after the American FASB. Moreover, there have been several recent meetings between representatives of the two regulators (the first one taking place in September 2002), in order to foster convergence between the IAS/IFRS and the FASB’s General Accepted Accounting Principles (GAAP). Does this suggest that there is an Americanization, rather than a globalization, of law?

5. *Further Reading*

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 - i. A. NÖLKE, “The Globalization of Accounting Standards”, 7 *Business and Politics*, No. 3 (2005);
 - j. J. PERRY, A. NÖLKE, “International Accounting Standard Setting: A Network Approach”, 7 *Business and Politics* (2005), Issue 3, Article 5
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 - l. H. SCHEPEL, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, Oxford (2005).

1.3. Global Private Standards and Public Law: The EU Approach to Accounting Harmonization

Maurizia De Bellis

1. *Background*

Beginning with the Communication of the Commission on *Accounting Harmonisation: A New Strategy vis à vis International Harmonisation* in 1995, EU strategy in the accounting sector has changed steadily in recent years: from an approach based on the establishment of binding rules, developed by EU bodies, it has moved towards one aimed at incorporating into Community law internationally recognized accounting standards and principles, the International Accounting Standards (IAS) and the International Financial Reporting Standards (IFRS), established by a private international organization, the International Accounting Standards Board (IASB) (*supra*, Ch. 1.2).

This choice originated from the observation that public rules quickly become obsolete (due to the long approval procedure to which they are subjected), in contrast to the greater flexibility of standards set by private regulators.

In particular, EC Regulation n. 1606/2002 (the “IAS Regulation”) provided for the systematic incorporation of IAS/IFRS standards. In this way, global accounting standards, originally established by private entities, gained binding force through their recognition in the European context. Nevertheless, EC Regulation n. 1606/2002 does not authorize the straightforward incorporation of internationally recognized accounting standards, but rather establishes an extremely complex procedure in this regard.

2. *Materials*

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- Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 *on the application of international accounting standards*, in Official Journal of the European Union L 243, 11 September 2002, p. 1 – 4;
- Working Arrangement between European Commission and EFRAG (<http://www.efrag.org/images/Efrag/EFRAGEC%20Working%20Arrange>)

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- Commission Decision 2006/505/EC of 14 July 2006, *setting up a Standards Advice Review Group to advise the Commission on the objectivity and neutrality of the European Financial Reporting Advisory Group's (EFRAG's) opinions* (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006D0505:EN:NOT>);
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- CESR, *Consultation on the Statement of Principles of Enforcement of Accounting Standards in Europe, Feedback Statement*, 12 March 2003, Cesr/03-074;
- CESR, *Standard No. 2 on Financial Information. Coordination of enforcement activities*, April 2004, Cesr/03-317c.

3. *Analysis*

The IAS Regulation requires, from 2005 onward, all publicly traded EU companies to prepare their consolidated accounts using the IFRS. According to the IAS Regulation, when deciding on the applicability of IAS/IFRS, the European Commission must evaluate whether the international standards correspond to the criteria set out in the regulation itself: in particular, IAS/IFRS standards can be endorsed only if they are conducive to the European public good, and if they meet the criteria of understandability, relevance, reliability and comparability required of the financial information needed for making economic decisions and assessing management.

When deciding on the adoption of the standards, the European Commission is assisted by two committees. The Accounting Regulatory Committee (ARC), established by Art. 6 of the Regulation, is a comitology committee: composed of representatives from the Member States, it decides whether the IAS are to be adopted, on the basis of the Commission's proposals.

In the assessment of international accounting standards, a technical committee, the European Financial Reporting Advisory Group (EFRAG), also provides support and expertise to the Commission. The EFRAG is an experts' committee, made up of representatives from the private sectors of several Member States (for example, the European Federation of Accountants (FEE), the European Insurance Organization (CEA), the European Banking Federation (EBF), the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), and the European Federation of Accountants and Auditors (EFAA)). The IAS Regulation provides for support by a technical committee (Preamble, Recital 10); later, cooperation with the EFRAG was strengthened by the Working Arrangement developed between that body and the European Commission. This Committee has a consultative function, providing the support and expertise needed to assess the compatibility of the IAS with the criteria set forth in the Regulation, and advising the Commission on whether or not to adopt the standards.

Moreover, Commission Decision 2006/505/EC of 14 July 2006 set up a Standards Advice Review Group (SARG). The SARG was established to create an institutional structure for advising the Commission on the objectivity and neutrality of the EFRAG's opinions, given that the latter is a private body, in order to increase the transparency and credibility of the adoption process. The SARG is composed of seven members, appointed on the basis of technical expertise and independence.

When the Group identifies a particular concern in an EFRAG opinion, the chairman is supposed to enter into dialogue with the EFRAG with a view to resolving the matter before the Group issues its final decision.

Lastly, the Committee of European Securities Regulators (CESR) is charged with assisting the Commission in implementing the IAS.

The approval of the IAS Regulation has been followed by a period of intense activity in terms of endorsing accounting standards: by October 2007, seventeen adoption regulations had been approved. This separate endorsement procedure can, however, create some ambiguities in the field of accounting standards harmonization: for example, IAS Standard 39 has been amended several times by the IASB, and thus applies only partially in the European legal system.

4. *Issues: The Relationship between Private and Public Regulators*

The new European strategy for the accountancy sector outlines a hybrid public-private model, the consequences of which still have to be explored. How does the public regulator control the private one? Is it a purely *ex post* control, or can the public regulator play a more active role in the international standard setting process?

The EU makes originally voluntary standards mandatory; moreover, it also reviews the compatibility of these standards with European law, and their effectiveness. Public enforcement of global private standards thus cannot be explained simply in terms of public body's decision to retreat from the regulation of a certain sector (in this case, the accounting sector): the rules are not entirely private, but rather take on a hybrid form, including both private and public elements.

Moreover, there is considerable evidence of the EU's efforts to become more engaged in the international standards setting process within the IASB: from this point of view, the incorporation of the IAS within European law is offset by the more active role played by the EU in the formulation of accounting standards by the global private body.

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1.4. Control by Public Regulators over a Private Standard-Setter: The IFAC and the Establishment of the PIOB within the Auditing Sector

Maurizia De Bellis

1. Background

The International Federation of Accountants (IFAC) is a private international organization that establishes standards for auditing: in particular, it sets the educational, ethical and professional standards for auditors.

Founded at the 11th World Congress of Accountants in Munich in 1977, it has been based in New York City since its inception. The IFAC has long worked closely with the more famous International Accounting Standard Board (IASB), and has only recently acquired a measure of independence. Over the past 30 years, the IFAC has grown from 63 to 155 members. It is composed of private entities, representatives of accountants’ professional organizations (for example, the Italian *Consiglio nazionale dei dottori Commercialisti* and the *Consiglio nazionale dei ragionieri e periti commerciali*). Like the IASB, the IFAC is an example of a global private regulator; moreover, its standards (the International Standards on Auditing (ISA)) are also part of the Financial Stability Forum (FSF)’s *Compendium of standards*, which brings together internationally recognized standards for financial stability, compliance with which is subject to IMF and World Bank assessment (see *supra*, Ch. 1.2).

According to the IFAC Constitution (in the text last modified in 2006), the mission of the Federation is to “serve the public interest”. More specifically, it aims at strengthening the accountancy profession in several ways, most

importantly through establishing and promoting adherence to high quality professional standards and furthering the international convergence of such standards (Constitution, Art. 1.4).

The IFAC's structure is as follows: the Council consists of one representative of each member, and is responsible for deciding constitutional and strategic matters, and for electing the Board. The Board, comprised of the President, the Deputy President and not more than 20 members (chosen according to the level of the financial contribution made to the IFAC), has all of the powers necessary to fulfill the IFAC's mission (including those not explicitly mentioned in the Constitution: see Constitution, Arts. 3 and 5).

There are also ten committees, four of which are charged with a standard setting function: the International Auditing and Assurance Standards Board (IAASB), the International Accounting Education Standards Board (IAESB), the International Ethics Standards Board for Accountants (IESBA) and the International Public Sector Accounting Standards Board (IPSASB). During the standards setting procedure, each of these committees must follow the due process rules set out in the *IFAC's Standards-Setting Public Interest Activity Committees' Due Process and Working Procedures*. The Compliance Advisory Panel (CAP), which another IFAC committee, is charged with assessing members' compliance with the IFAC's standards.

2. *Materials and Links*

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3. *Analysis*

With a view to reforming the organization, the IFAC conducted an intense series of consultations in 2003 with both global financial regulators (such as the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissioners (IOSCO), and the International Association of Insurance Supervisors (IAIS)), and the international organizations representing the accounting profession.

The objective of this effort was to strengthen the IFAC's role in global financial governance and to restore confidence (which had been impaired by the corporate failures and collapses in the late 1990s) that its activities were properly responsive to the public interest and conducive to the establishment of high quality standards. Moreover, it was intended to contribute to the convergence of international auditing standards.

The resulting reforms created new bodies, such as the Public Interest Oversight Board (PIOB), the Monitoring Group (MG) and the IFAC Leadership Group; they also changed the internal structure of the IFAC, and, more specifically, the composition and functioning of the Council, the Board and the Committees, through the revision of the Constitution and the approval of certain by-laws (*Reform Proposals*, p. 3 and 4).

The PIOB is particularly interesting, due to its composition and its functions. It was established in February 2005, and is based in Madrid, where it operates as *La Fundación Consejo Internacional de Supervisión Público en Estándares de Auditoría, Ética Profesional y Materias Relacionadas* (a non-profit Spanish foundation). It has eight members, who are nominated by the BCBS, the IOSCO, the IAIS and the World Bank. The European Commission names two observers. Global public regulators have thus created a private regulatory oversight body. The relationships between the PIOB and the transnational networks and international organizations mentioned above are not defined exclusively by the PIOB's constitution: on the contrary, the PIOB is subject to a periodic evaluation by the Monitoring Group, which has the power to remove its members.

The PIOB oversees the IFAC's activities, which must be carried out in the "public interest". In particular, the current mandate of the PIOB (although it might be expanded in the future) allows for the exercise of oversight over all of the IFAC's "public interest activity committees" (PIACs), i.e. the IAASB, IESBA and the IAESB, which establish standards for auditing, ethics and education. Moreover, the CAP (the body which evaluates members' compliance with the IFAC's standards) is also subject to the PIOB's oversight.

This oversight role implies a number of powers. First, the PIOB can approve or reject the nominations of members to all of the bodies that it oversees, and can request the removal of the chair if necessary. Thus, one might infer that global public regulators such as the BCBS, the IOSCO, the IAIS and the World Bank can indirectly affect the composition of the IFAC's internal committees, through the members that they appoint to the PIOB. Moreover, the PIOB oversees the internal functioning of the IFAC's committees, through the evaluation of their due process procedures, and even influences the content of their regulatory activity, by suggesting issues that might be included in their respective work programs. Finally, the PIOB prepares an annual report on its own activity, which must be transmitted to the IFAC's members, to the FSF and the global financial regulators, and to the general public through publication on its website.

4. *Issues: The Accountability of Global Private Regulators*

The IFAC's particular activities, and its expanding role in global financial governance, raise core questions surrounding its accountability.

The recent reforms suggest two complementary methods for improving the accountability of global private regulators.

The first method consists in requiring private regulators to undergo organizational changes, which might include the establishment of new bodies, public or hybrid, with which the private regulators have to interact. The second method focuses on procedural standards, such as those established in the Constitution and in the *IFAC's Standards-Setting Public Interest Activity Committees' Due Process and Working Procedures*, both amended in 2006.

But are these instruments genuinely capable of promoting the accountability of global private regulators, and of ensuring that their activity is responsive to the public interest?

A second question is implied by the transformations examined above. Given the PIOB's institution, its peculiar composition and its functions, can we still consider global auditing regulation as private governance, or is it evolving toward a hybrid model, due to the increasing influence of public global regulators?

During the 2002 meeting in which the reforms were first discussed, the

IFAC's specific purpose was to introduce a hybrid regulation model, in order to effectively respond to the financial crisis of the 1990s. Nonetheless, the role of the big auditing firms within the IFAC cannot be underestimated: private firms in fact have their own committee, the Transnational Auditors Committee (TAC) (which includes representatives of *Deloitte*, *Ernst & Young*, *PricewaterhouseCoopers* and *KPMG*). An example of how private regulators can resist efforts by public regulators to oversee the sector is provided by the special procedure that was established when the PIOB attempted to include the TAC's activity in its mandate.

5. *Further Reading*

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1.5. The Public Enforcement of Global Private Standard Setting: The Role of Credit Rating Agencies in Basel II

Maurizia De Bellis

1. *Background*

Credit rating agencies (CRAs) are private firms that provide an independent evaluation (the rating) of the credit-worthiness of issuers of financial securities. A credit rating is an assessment of how likely the issuer is to make timely payments

on a financial obligation. Ratings have letter designations such as AAA, B, CC; a lower rating corresponds to a greater perceived risk of defaulting on a loan.

The assessments and opinions of CRAs play an important role in capital markets, providing information and enhancing transparency.

Two of the largest CRAs, Standard & Poor's and Moody's, control eighty percent of the ratings market. CRAs offer credit ratings to any kind of issuer: companies and banks, but also national or regional governments.

The rating process is the following. First, the issuer requests the rating and agrees to pay for it. The issuer provides much of the information to be used in the evaluation process, but the rating agencies also use publicly available information in making their evaluation. CRAs do not issue a rating if they feel that they do not have sufficient information to do so. The first report is prepared by a junior analyst, and then reviewed by senior analysts.

This procedure has two main features. First, as issuers pay for their own ratings, there are real risks concerning the effective independence of the evaluation. Second, rating agencies use specific criteria for their evaluations, and provide a brief memo giving reasons for each specific assessment. The agencies periodically publish the criteria that they use in the rating process. From this point of view, rating agencies are genuine, private, financial standard setting bodies.

2. *Materials and Links*

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<http://www.c-ebs.org/pdfs/CP07.pdf>).

3. *Analysis*

The Basel Committee on Banking Supervision (BCBS), established in 1974, groups together representatives from the G10 central banks: it is a *transnational regulatory network*, and thus an example of a global public regulator that is not intergovernmental in nature (see *infra*, Ch. 2.7). The BCBS sets standards for banking supervision. A particularly interesting example is the *International Convergence of Capital Measurement and Capital Standards: a Revised Framework* (“Basel II”); approved in June 2004, it replaces the 1988 Capital Accord.

One of the main features of this accord is its use of ratings: in this case, a global public regulator’s standard incorporates the ratings (i.e. the evaluations and underlying criteria) of a private entity into its regulatory activity.

The new Capital Accord modifies the determination of bank capital adequacy requirements. Under the 1988 Accord, one method was used for all banks (the amount of capital had to be equal to at least 8 percent of “risk weighted” assets). The new Accord allows banks to choose between two methods for calculating the capital requirements for credit risks: the standardized approach, based upon the ratings of CRAs, and the “internal ratings” method. According to the standardized approach, risk weights (and, consequently, the capital requirements that a bank has to respect) depend on each bank’s rating. In this way, the capital requirements depend on an external criterion, the rating, which is determined by a private entity.

It is important to note that Basel II set forth specific criteria that CRAs must fulfill in order for their assessments to be used for regulatory purposes. These include the obligation to make objective and independent assessments; to allow access by both domestic and foreign institutions to their assessments; to disclose assessment methodologies; to have sufficient resources to carry out high quality credit assessments; and a general requirement of credibility (paras. 90 and 91). National supervisors are responsible for determining whether an external credit assessment institution meets these criteria. Similar criteria have been established in Directive 2006/48/EC, which implements Basel II within the EU (Annex VI,

Part II).

4. *Issues: Hybrid Public-Private Regulation*

The decisions of a private entity (in this case a CRA) are thus incorporated into public regulatory standards. This is an effective example of hybrid regulation. Moreover, the rating, which is the most visible of the agencies' determinations, is the final stage of an evaluation process that uses standards created by the agency itself. Thus, there is an indirect incorporation not only of the final assessments of these private entities, but also of the underlying standards they use in coming to these conclusions.

This is not a completely new technique. Even though it was first adopted at the global level with Basel II, it has been used in the national context for a long time. The American banking supervision authority, the Securities and Exchange Commission (SEC), began using ratings for regulatory purposes at the beginning of the 1970s.

The tendency of public regulators to use the standards set forth by private entities raises a number of concerns about the accountability of these latter bodies. Institutional reforms may help to promote accountability, such as the establishment of the PIOB, which oversees the public interest standard setting activities of the IFAC, a global private regulator (*supra*, Ch. 1.3).

The role of CRAs seems even more problematic, however, given that oversight by a public regulator might affect the agency's independence, which is at the very core of its reputation. This has been called an "accountability paradox": strengthening the accountability of CRAs might diminish their performance and effectiveness. What tools can be used to address the accountability gap within these agencies, without affecting their independence? And at the same time, how can we ensure their effective independence from the interests of borrowers?

Recently, there have been efforts to improve the accountability of CRAs through the establishment of codes of conduct. In December 2004, the International Organization of Securities Commissions (IOSCO) published a *Code of Conduct Fundamentals for Credit Rating Agencies*, aimed at reinforcing the quality and integrity of the rating process, promoting the independence of CRAs and thus the avoidance of conflicts of interest.

The same approach is followed at the European level by the Committee of European Securities Regulators (CESR): in giving technical advice to the European Commission on possible measures concerning credit rating agencies, it adopted the IOSCO Code of Conduct.

But are these codes enough to address accountability concerns? Are there effective alternative methods of holding credit agencies accountable? In

particular, would a system of public recognition and registration, as proposed by some European supervision authorities, be effective?

5. *Further Reading*

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2. COMPLEX GOVERNANCE FORMS: HYBRID, MULTI-LEVEL, INFORMAL

2.1. 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*

There are more than one billion internet users. Data traffic has reached extraordinary levels: the Internet has become one of the most important means of communication. One can use the internet to send electronic mail, acquire goods and services, debate with others, and obtain the most varied information. Some newspapers, like New York Times, are planning to suspend their printed editions in the near future, in favor of the free online version. A new form of interactive encyclopedia, Wikipedia, has achieved unprecedented levels of popularity.

The situation was originally very different. The information exchanged on the internet involved only a few servers or university laboratories. It served scientific demands and those 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 with the aid of grants from the United States Government to university research centers (in particular, the *Advanced Research Project Agency*, ARPA, which named the network *Arpanet*).

From a technical point of view, the internet can be defined as a system that allows the exchange and communication of data through the use of common

technical parameters. This is achieved through the use of technical protocols called internet protocols (IPs). The most well known are the TCP/IP and the domain names system. These protocols were adopted spontaneously by the early internet community of computer engineers.

The original method for choosing standards and technical protocols is known as the Request for Comments (RFC). Every time that a new proposal for the adoption of a technical measure was made, the opinion of the embryonic internet community was surveyed. The users provided answers and, if a good degree of consensus was reached, the technical measure was adopted. The model thus developed 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 particular, attention was turned to domain names, which enable the communication of data. The internet is composed of various sites, and to reach one of them (for instance, in order to access some 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 fulfill this function, by changing the numerical series into names. For instance, 128.122.255.255 becomes www.nyu.edu.

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

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 *infra*, Ch. 5.4). This prevents the centralization of the internet as a resource; that there exists a plurality of domestic bodies responsible for domain name registration helps to ensure its fair allocation. The system thus creates a form of “distributed administration”.

It is however still 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. For instance, if “.edu” were not listed in this server, it would not exist. Control of this infrastructure means authority over the internet as a whole.

The increasing commercial importance of domain names has led to their institutionalization. Problems of allocation have arisen, as domain names are a scarce resource; there are, for example, important intersections with trademark rights (domain names often correspond to corporations’ names). Their importance (they are accessible from any computer connected to the internet) has created the need to define specific, globally valid rules.

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 sectoral 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. The General Assembly of the United Nations, in a 2001 Resolution, asked the ITU to reconsider the issue during the World Summit on 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. But UN involvement has not changed the position of the ICANN. Discussion of these issues now continues in a new forum, the Internet Governance Forum.

2. *Materials and Links*

- Working Group on Internet Governance, *Report of the Working Group on Internet Governance*, Château 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 21 December 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 effective 15 February 2008
(<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 21, 1998
(<http://www.icann.org/general/articles.htm>).

3. *Analysis*

The ICANN was originally intended to operate on the basis of private coordination. Thus, the internet was left to develop in an autonomous manner. This model, however, did not work properly: the interests at stake were not adequately represented and protected.

The ICANN was thus reformed in 2002 to recalibrate the balance between users, operators and public bodies, promoting the position of the stronger economic actors. The powers of the Governmental Advisory Committee (GAC) were also reinforced. National governments participate in this Committee, playing an important role in the definition of sectoral policy. The 2002 reform thus gave new importance to both the strongest economic actors and to public authorities, creating a form of hybrid governance.

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

The WGIG attempted to address these problems. First, it searched for an unambiguous definition of internet governance and came up with 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”.

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.

The first proposal suggests the creation of a Global Internet Council (GIC), in which States would be represented. The functions of the GIC, which would replace the Governmental Advisory Committee, would include the management of domain names, the infrastructure and technical parameters; the protection of privacy and online security; the promotion of international treaties and agreements; and the adoption of new rules for dispute resolution mechanisms.

The second proposal is to redefine the characteristics of the ICANN and the GAC, and is intended to guarantee the effective participation of all national governments.

The third proposal is for the creation of an International Internet Council (IIC), which would give governments a predominant role, while civil society and private sector actors would have only advisory functions.

The fourth proposal would have the most significant impact upon the current order. It contains a mixture of all the elements outlined in the other three, and introduces other innovative features. 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 have the function of promoting 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.

There are three interesting features in this model. First, there is the constant presence of national governments. Second, there is the recognition of the public nature of the internet governance, or the need for a global public policy on the matter. Third, it is important to highlight the proposed use of hybrid solutions, through the recourse to different tools and regimes, in order to attain a higher degree of efficiency and thus create a system responsive to all the interests involved. From this point of view, the problem of legitimacy can be resolved with public law tools (i.e. multilateral agreements), while economic development can be addressed by other mechanisms, in order to ensure greater flexibility.

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

The domain names sector of internet governance is very interesting from the institutional perspective, as this sector is closely linked to the presence of a particular regulatory body, the ICANN, which has a significant effect upon individual interests.

In this sector, we see the creation of administrative structures that operate “beyond the State”. The ICANN raises the question of how international administrations can grow to include bodies that do not originate from an interstate agreement (as do international organizations). The ICANN is national, but it fulfills a function of global importance (related to the diffusion of a new medium of communication). And although it is private, national governments still participate in it, through the GAC.

As for the relevant sources of law, there are a significant variety of norms: first of all, we see the presence of national law (e.g. the Memorandum of Understanding with the Department of Commerce, the Articles of Association). However, the rules adopted by the ICANN Board (see Art. III of the Bylaws) transcend national law: they are decided with the participation of global actors.

A different issue relates to the selection of the body entrusted with internet governance. This matter is related to the problem of the legitimacy of the institutions assigned to regulate global regimes. 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 fulfill 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?

To address the question of which legal instruments ought to be created, 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 the ICANN (see *infra*, Ch. 5.4 and 5.5). Some specific mechanisms might be incorporated: participation, through notice and comment procedures (art. III Bylaws); complaint to internal bodies, entrusted with the review of Board decisions (Reconsideration Committee, Ombudsman, Independent Review Panel, Arts. IV and V Bylaws); and, finally, the possibility of appeal to national courts, which functions as a kind of relief valve, as it brings the task of supervising the regulatory body back into the national legal order.

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 the International Organization for Standardization (ISO) standard ISO-3166 and the RFC 1591 (one of the most important and still in use), adopted by the Internet Names Assigned Authority (IANA), the predecessor of the ICANN. Such standards define the categories of domain names and also apply to national administrations. Thus, private determinations also stand apart from the national public powers. The following question thus arises: can a private organization like the IANA impose its standards on national agencies?

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

- International Organization for Standardization (ISO)
(<http://www.iso.org>);
- ISO 3166-1 and country coded Top-Level Domains (ccTLDs)
(www.iso.ch/iso/en/prods-services/iso3166ma/02iso-3166-code-lists/list-en1.html);
- 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*

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- b. H. BURKERT, “About a Different Kind of Water: An Attempt at Describing and Understanding Some Elements of the European Union Approach to ICANN”, 36 *Loyola of Los Angeles Law Review* 1111 (2003);
- c. B. CAROTTI, “European Union and Internet Governance: the Creation of «eu»”, 84 *European Public Law Series* 157 (2006);
- d. S.P. CRAWFORD, “The Icann Experiment”, 12 *Cardozo Journal of International and Comparative Law* 409 (2004);
- e. J.W. DELLAPENNA, “Law in a Shrinking World: The Interaction of Science and Technology with International Law”, 88 *Kentucky Law Journal* 809 (1999-)

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- f. J.H.H. PERRITT, JR., “The Internet is Changing the Public International Legal System”, 88 *Kentucky Law Journal* 885 (1999-2000);
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 - o. H. KLEIN, *Icann Reform: Establishing the Rule of Law*, Internet & Public Policy Project, 2005
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 - q. W. KLEINWÄCHTER, “From Self-Governance to Public-Private Partnership: the Changing Role of Governments in the Management of the Internet’s Core Resources”, 36 *Loyola of Los Angeles Law Review* 1103 (2003);
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(<http://www.unicttaskforce.org/perl/documents.pl?id=1294>);
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- w. G. TEUBNER, “Global Bukowina?: Legal Pluralism in the World Society”, in G. TEUBNER (ed.), *Global Law without a State* Dartmouth (1997), pp. 3 et seq.;
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2.2. Hybrid Public-Private Bodies within Global Private Regimes: The

World Anti-Doping Agency (WADA)

Lorenzo Casini

1. *Background*

In August 2008, in Beijing, over 10,000 athletes from 205 States – more than the 192 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 of Sport): it is for this reason that some talk of “International Sports Law”, “Global Sports Law” or a *lex sportiva*. 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 Internationale de l’Automobile).

The main characteristic of sports regimes is that they are private and voluntary; therefore, they don’t 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 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 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 U.S.A. and U.R.S.S. during the Cold War. Moreover, the recent story of the journey of the Olympic torch to Beijing 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 the EU Law, see *infra*, Ch. 7.1).

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).

3. *Analysis*

In response of the increase of 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, the WADA was created on 10 November 1999 in Lausanne to promote and coordinate the fight against doping in sport internationally.

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”.

WADA has the typical structure of most foundations, with a Board, an Executive Committee, and an Auditing Body. This notwithstanding, however, it carries out public functions, such as 1) promoting and coordinating at the international level the fight against doping in sport in all its forms, including through in- and out-of-competition tests (to this end, the Foundation cooperates

with intergovernmental organizations, governments, public authorities and other public and private bodies fighting against doping in sport, and seeks from all of them the moral and political commitment to follow its recommendations); 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, actually 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.

However, the most important activity of WADA in terms of its “public” function is its role 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 (a revised version of the Code will entered into force on January 1, 2009). 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).

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, universal criteria were set 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 (moreover, the revised version of the Code will introduce 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 asserted to have committed an anti-doping rule violation (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, until now ratified by 80 States, refers explicitly to the WADA and its Code, providing an illustration of one good practice of cooperation between public and private authorities within the global context. In the fight against doping in sport, standards and rules set by a private body have gradually been accepted as binding by States; a process made possible mostly as a result of the particular hybrid structure of the WADA.

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

The structure and the functions of the 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 World Anti-Doping Code 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 the 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 WADA hybrid public-private organization 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?

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. It seems clear, then, that the WADA is an example of genuine global public administration, and its existence provides us with real evidence of the development of a global administrative law.

5. *Similar Cases*

There are other international bodies and regimes that might be compared with the 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 *supra*, Ch. 1). 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 *supra*, Chs. 2.1, 5.3, and 5.4). Both the ICANN and the IOC are private bodies; and the Domain Names 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 the ICANN’s GAC and the composition of the WADA Board.

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2.3. 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 accession 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 adherence 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 increase: 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*

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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 accession 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 a large

manufacturing industry (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 favorable 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?

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2.4. Shared Powers: Global and National Proceedings under the International Patent Cooperation Treaty

Manuela Veronelli

1. Background

The Patent Cooperation Treaty (PCT) is a multilateral treaty, the implementation of which is overseen by the World Intellectual Property Organization (WIPO). This Treaty establishes the rules that enterprises must follow when filing for international patents, in a procedure that is, at least partially, carried out at international level. The PCT was signed in Washington in 1970, and amended many times during the 1980s and 1990s. It did not enter into force until 1984.

The PCT and its implementing regulations outline in detail the procedure for issuing international patents. Other implementing rules are found in the administrative instructions issued by the Director General of WIPO (Art. 58, § 4 of the PCT and Art. 89 of the implementing 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.b, 16.c, 17.1, 34.1).

The international rules set up a networked, polycentric organizational structure, involving an International Bureau based in Geneva (Art. 55) – 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 approving (or otherwise) the agreements executed between the International Bureau and national administrations concerning the implementation of individual procedures; an Executive Committee (Art. 54) 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).

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3. *Analysis*

The PCT procedure is a composite or mixed administrative procedure that takes place partly at the international level and partly at the national level. A company wishing to file a patent application may commence the PCT procedure either directly with the International Bureau or, as is more often the case, with a national office acting as part of the global patent regime (in which case, if there are 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 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 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 and the International Preliminary Examining Authorities) in carrying out their tasks under the Treaty (Art. 55 of the PCT). The administrative bodies in charge of the procedure at the international level are required to forward all documentary materials (including any statements submitted by applicants during the international search or the preliminary examination) to the designated national patent offices (Art. 20.1 and 20.2 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.

The international phase of the procedure is divided into two stages. The first stage is mandatory, and consists of an international search aimed at discovering the “relevant prior art” with respect to the invention that is the subject of the application (Art. 15 of the PCT and Rules 33 and 34 of the implementing regulations). The second stage is optional, and is commenced only upon request of the applicant. It consists of a detailed examination by the competent authority 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).

During both stages of the international procedure, applicants may make verbal and written statements and comments before a deadline indicated by the administrative authorities (appropriate to each circumstance), that in any case shall not be less than one month (Rule 66 of the implementing regulations). This

exchange with applicant can become more intense 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 (Rules 19, 34(d) and 66(2)(d) of the implementing regulations). In these circumstances, applicant companies can be required to pay an additional fee in order to submit comments or amendments (Arts. 17(3) and 34(d) 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, with the issuing of an opinion by the International Bureau, applicant companies must commence the national phase within 30 months from the priority date of the international application.

4. *Issues: Multilevel Governance and its Effects*

As the preliminary examination takes place at the global level, the PCT procedure gives rise to certain issues concerning the right to defense (or participation) and the justiciability of the relevant claims.

How is the company's right to participate in the global examination stage conceived? Which entities should be contacted? Only those directly concerned? 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 of payment of 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 incumbent 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?

Last but not least, 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 signatory 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?

2.5. 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 EC and the WTO.

The EC 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*

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3. *Analysis*

The EC 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 EC 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 attention 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 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 the 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

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2.6. Decision-Making Procedures in Fisheries Governance: The Role of the General Fisheries Commission for the Mediterranean (GFCM)

Nicola Ferri

1. *Background*

The realization that fish stocks had been overexploited led States to create Regional Fisheries Management Organizations or Arrangements (RFMOs) in order to govern international fisheries and to fill regulatory gaps in the global regime. RFMOs can be viewed as fora for cooperation among States. There are 17 RFMOs in existence at present, each one responsible for establishing management measures within its jurisdiction. Conflicts between different RFMOs with overlapping competences tend not to occur: when common issues are at stake, the RFMOs involved normally look to adopt co-management

strategies.

The majority of RFMOs were set up as a series of post-1945 fisheries conventions negotiated between two or more States to curtail the exploitation of particular species, usually within a given geographic area. States approached the process of fisheries management in an evolutionary manner: first, initiatives for international cooperative research in marine fisheries were launched (the International Council for the Exploration of the Sea, for example, was created as far back as 1902, with a mandate to promote research on marine living resources). Subsequently, the first rudimentary management systems, dealing with issues such as mesh size limits (e.g. the 1937 Convention for the Regulation of the Meshes of Fishing Nets and Size of Fish for the Northwest Atlantic Fisheries) and closed seasons (e.g. the 1950 International Convention for Northwest Atlantic Fisheries, precursor to the existing RFMO Northwest Atlantic Fisheries Organization, set up in 1978) were adopted.

The negotiation of key international fisheries instruments has improved fisheries management, significantly impacting upon the role of the RFMOs: the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provided guidelines for managing living marine resources and established the exclusive economic zone within which coastal States have certain exclusive rights, including fishing. When the 1995 United Nations Fish Stocks Agreement (UNFSA) emerged to better define high-seas fisheries management, RFMOs were involved in the design. Since the adoption of these Conventions (and other international agreements, such as the 1993 FAO Compliance Agreement, the 1995 Food and Agriculture Organization (FAO) Code of Conduct for Responsible Fisheries and its subsequent International Plans of Action), some RFMOs have been partly retrofitted to accommodate the new rules, while still maintaining their original mission and independence. As evidence of this, the UNFSA mandates that any fishing nation can join an RFMO at any time. More specific requirements are, however, necessary to join some RFMOs.

2. *Materials and Main Sources*

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(<http://www.fao.org/fi/website/FIRetrieveAction.do?dom=topic&fid=2940>);
- 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).

3. *Analysis*

In the case of the General Fisheries Commission for the Mediterranean (GFCM), the rules on membership are as follows: participation in the GFCM is open to members and associate members of the FAO and, subject to approval by two-thirds of existing members, any non-members that are members of the United Nations, any of its Specialized Agencies or the International Atomic Energy, that are (i) coastal States or associate members situated wholly or partly within the region; (ii) States or associate members whose vessels engage in fishing the region for stocks covered by the agreement; or (iii) regional economic integration organizations of which any State that would qualify for membership as above is a member, and to which that State has transferred competence over matters within the purview of the GFCM (e.g. the European Union).

The GFCM was established by an international agreement in 1949, pursuant to article XIV of the FAO Constitution (and subsequently amended in 1963, 1976 and 1997), 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, the Black Sea and connected waters. Like other RFMOs, the GFCM performs a number of functions, and has the power to adopt management measures to fulfill its responsibilities. Management measures are agreed upon in accordance with the decision-making procedure of the RFMO in question (by consensus, or by simple or qualified majority). The most important feature of these measures is their binding nature, as they are mandatory for members that have not exercised the right to object, normally provided for in the regulations of the RFMO (the opt-out procedure). RFMOs are usually competent to (i) collect and distribute fishery statistics; (ii) provide evaluations of the state of fish stocks; (iii) determine the total allowable catch (TAC) quotas for members; (iv) set limits on the number of vessels allowed to exploit fisheries; (v) allocate fishing opportunities to members (using such measures as area and seasonal closures, by-catch limits, and limitations on fleet capacity and fishing gear); (vi) regulate the types of gear used; and (vii) ensure compliance with the management measures it adopts.

GFCM management measures generally aim at encouraging members to take action on specific objectives, based on the precautionary approach and taking into account the best scientific evidence available. According to Article III of the GFCM Agreement, management measures can be formulated and recommended for the conservation and rational management of living marine resources; the regulation of fishing methods and fishing gear; the prescription of the minimum

size for individuals of specified species; the establishment of open and closed fishing seasons and areas; and the regulation of the amount of total catch, fishing effort and their allocation among members. These measures must be adopted by a two-thirds majority of the members of the GFCM (present and voting). They are thereafter communicated by the GFCM to each member. Members, for their part, undertake to give effect to them from the date determined by the GFCM, which shall not be before the period for objection has elapsed (any member may object within 120 days from the date of notification of the adoption of a measure, and will then not be obliged to give effect to that measure). If an objection is lodged within the 120-day period, any other member may similarly object at any time within a further period of 60 days. A member may also withdraw its objection at any time and give effect to the measure. If objections are made by more than one-third of the members, the other members are not to give effect to that measure. Once adopted, however, they become obligatory for the members. An example is provided by that establishing a GFCM record of vessels over 15 meters authorized to operate in the GFCM area. All vessels larger than 15 meters not entered into the record were not authorized to fish, and members were supposed to take all necessary actions to ensure the compliance of their recorded vessels with this rule. In order to achieve this, it was specifically provided that all members “shall take measures, under their applicable legislations, to prohibit the fishing of, the retaining on board, the transshipment and landing of species in the GFCM area by the vessels larger than 15 meters in length overall which are not entered into the GFCM record.” This rider is typical of RFMO management measures, in that they are addressed to members but it is usually the fishing fleets themselves that must comply with them. For compliance purposes, RFMOs therefore need members to follow-up with management measures of their own at the national level

In managing the living marine resources of their area, RFMOs have also the duty to cooperate with other organizations in matters of mutual interest. As an example of this, the GFCM has recently stressed the need for close collaboration with another RFMO, the 1966 Convention for the Conservation of Atlantic Tunas (ICCAT), which is charged with maintaining the population of tuna and tuna-like species found in the Atlantic at levels permitting the maximum sustainable catch for food. ICCAT adopts measures that are then to be implemented by its members. For the better management of bluefin tuna stocks in the Eastern Atlantic and the Mediterranean, the GFCM asked its members to implement an ICCAT measure concerning the establishment of a multi-annual recovery plan for bluefin tuna in January 2007. Some GFCM members expressed concern over this request, as they are members of the GFCM but not of ICCAT. Such a procedure, which is not novel within the context of the GFCM, can create binding effects on members even though the measure in question was actually adopted in another forum.

4. *Issues: The Enforcement of Regional Decisions within the Global Administrative Space*

An underlying problem for high seas fisheries management is that States that are not signatories or members of the RFMOs are not subject to their measures. Article 8(3) of UNFSA requires States to become members of RFMOs in order to give effect to the general duty of cooperation. Alternatively, States can agree to apply management measures of RFMOs without joining them. Participation in RFMOs thus imposes a number of obligations on the fishing fleets of member States. Furthermore, owners and captains of fishing vessels must comply with management measures, and the national provisions enacted to implement them, or they will incur sanctions, such as fines or the seizure of vessels.

Incentives have to be created by RFMOs for States fishing within the remit of their mandates to encourage them to become members. When States decide to fish outside the management measures of the RFMOs, the persistent problem of illegal, unreported and unregulated (IUU) fishing arises. IUU fishing can be described as any fishing that takes place within the jurisdiction of an RFMO in breach of its management measures. Such practices seriously undermine the regulatory powers of RFMOs. To prevent this, membership rights have been revised by RFMOs in order to include distant-water fishing States (Japan became a GFCM member in 1997). In addition, framework provisions on cooperation with non-members have been adopted to allow access to resources to States that agree to comply with the RFMOs' management measures. For instance, the GFCM may confer the status of "cooperating non-contracting party" on non-members known to be fishing in the GFCM area. Applicants for this status are required to provide information to the GFCM (data on historical fisheries in the GFCM area, and on current fishing presence), to confirm their commitment to respect the GFCM management measures and to report to the GFCM on how they are ensuring the compliance of their fleet with those measures.

Generally speaking, the cooperating status, once conferred, involves the application of positive measures to cooperating non-contracting parties, such as participation in the fisheries (allowing access to a "cooperation quota") and in RFMOs meetings as observers. Benefits to cooperating non-contracting parties from participation are usually commensurate with their commitment to comply with management measures. Will the persistent incidence of IUU fishing severely undermine the management measures adopted by RFMOs? To avoid this, will States apply for this new status, thus ensuring compliance with the regime in question? Or will States prefer to fish outside the scope of RFMOs, and forfeit the benefits of cooperation?

5. *Further Reading*

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2.7. An Unaccountable Transgovernmental Branch: The Basel Committee

Mario Savino

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), 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; see *supra* Ch. 1.5).

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), 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).

2. *Materials*

Global consultation on the proposed “Basel II” standard:

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3. *Analysis of the Basel Process*

The Basel Committee is a “horizontal” transgovernmental body that was established in 1974. Assisted by the Secretariat of the Bank for International Settlements, this Committee carries out an important function in the internationalization of banking standards. The standards it develops are not legally binding. However, important IOs – such as the World Bank and the IMF – require the implementation of those standards as a precondition for accessing the benefits of their respective regimes. This policy conditionality helps explain why the Basel standards are implemented to a greater or lesser degree by more than 100 States. Despite the worldwide impact of its decisions, the Basel Committee has a very restricted make-up: its members are the heads of the central banks and banking regulatory agencies of only twelve countries (Luxembourg, plus the eleven members of the G-10 – Belgium, Canada, France, Germany, Great Britain, Italy, Japan, Netherlands, Sweden, Switzerland and the United States).

The tension between the restricted composition of the body and the global influence of its standards emerged after the conclusion of the 1988 Basel Accord, known as “Basel I”. The standards thereby established were implemented not only by the Committee members, but also by many other States. However, these standards have attracted criticism for two related reasons. Firstly, the final agreement largely reflected the wishes and needs of the US regulator. Secondly, it produced very different compliance costs in the various national banking sectors: according to some accounts, Japanese banks were forced to withdraw so much money from circulation that the Japanese recession of the nineties was triggered.

To address these criticisms, the Basel Committee launched a revision of the 1988 Accord, and adopted an informal decision-making procedure aiming at increasing transparency and strengthening the participation of regulators and regulated parties. On June 3, 1999, the Committee published a consultative paper on “A New Capital Adequacy Framework”. This was accompanied by a call for comments. In this first stage of the procedure, the Committee received 250 comments. Before the final approval (June 2004), the new agreement, known as “Basel II”, was subjected to two more notice and comment exercises. The second draft standard received 148 comments, the third 200. Most of the commentators were banks, self-regulation organizations and national regulators.

This “global” consultation was mirrored by similar national consultations. 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.

An analogous procedure was followed in the European Union. 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. Moreover, the full scrutiny of both the Council and the European Parliament was guaranteed by the incorporation of the Basel II Accord into EU law through a legislative act (Directive 2006/48/EC), instead of a secondary regulatory measure (as in the US).

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). Transgovernmental fora 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 and, given their frequently informal nature, often circumvent the need for parliamentary ratification. 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 II 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*

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- c. 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>).
- d. 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), pp. 133 et seq. (<http://ssrn.com/abstract=283976>);
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3. GLOBAL PRINCIPLES FOR NATIONAL PROCEDURES

3.1. Legality: The Aarhus Convention and the Compliance Committee

Marco Macchia

1. Background

In 2002, Green Salvation – an NGO working in the field of environmental protection – was denied access to a feasibility study originally requested by the National Atomic Company (Kazatomprom) of Kazakhstan. The President of the company wanted to use the feasibility study to ask Parliament to allow the importation and disposal of radioactive waste from foreign countries on Kazakh territory. After a number of attempts, the NGO decided to litigate the controversy before the national courts. In the end, Green Salvation’s petition to file a suit in its own name was denied.

The NGO brought the issue to the Compliance Committee, a subsidiary body of the Meeting of the Parties (MOP) of the Aarhus Convention (AC). The Compliance Committee was called upon to decide whether a private company, the National Atomic Company, which performs public functions under public control and is fully owned by the State, falls within the category of “public authority”, as set out in Article 2(2) of the AC. Moreover, it was asked to rule on whether access to environmental information should also be required when information does not concern a decision-making process already under way, but only proposals; and, finally, it had to decide whether an NGO was entitled to such information.

The Committee affirmed that an obligation to guarantee access to environmental information also applies to private companies that perform administrative functions (and operate under the control of public authorities), and that these entities are required to meet requests for information, even where detailed reasons behind the request are not provided. Moreover, under the AC,

any procedure for appealing denial of access to information must be expeditious.

Thus, as a result of having failed to guarantee access to an expeditious procedure and denied standing to bring a lawsuit, Kazakhstan was held to be in breach of its obligations under the AC. The Committee recommended that the MOP request the Government of Kazakhstan to develop a strategy, “including a time schedule”, to bring its administrative practice into conformity with the provisions of the Convention. This measure was accompanied by other recommendations, namely to engage the judiciary and public officials involved in environmental matters in training and capacity-building activities. The MOP implemented the Compliance Committee’s findings in Decision II/5a. In follow-up to the recommendation, Kazakhstan’s Ministry of the Environment sent the Compliance Committee its implementation plan in March 2006, acknowledging the measures required of it in the MOP Decision.

This case describes a national government that was held accountable for the non-conformity of its national law with its international commitments. This took place through a compliance procedure that could be initiated by a private person, under an international treaty.

This cooperation system involves different players. States and private persons can raise non-compliance issues; the Committee reviews the compliance of national measures with the international rule; the MOP is responsible for making a final decision on the Committee’s findings; and the Committee later verifies the national implementation plan “for transposing the Convention’s provisions into national law and developing practical mechanisms and implementing legislation that sets out clear procedures for their implementation”.

2. Materials

- Compliance Committee *Decision II/5a Compliance by Kazakhstan with its obligations under the Aarhus Convention* (<http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.7.e.pdf>);
- Findings and Recommendation Adopted by the Aarhus Convention’s Compliance Committee (<http://www.unece.org/env/pp/compliance/C2004-01/C01findings.pdf>);
- *Communication* ACCC/C/2004/01 of NGO Green Salvation (Kazakhstan);
- Fourth Meeting Compliance Committee, Doc. ECE/MP.PP/C.1/2004/4, para. 18;
- Report on the Seventh Meeting, Compliance Committee, *Findings and Recommendations*, 11 March 2005, Doc. ECE/MP.PP/C.1/2005/2/Add.1;

- Report of the Second Meeting of the Parties, Decision II/5a, *Compliance by Kazakhstan with its obligations under the Aarhus Convention*, 13 June 2005, Doc. ECE/MP.PP/2005/2/Add.7;
- Kazakhstan, *Draft Findings and Recommendation*, ACCC/C/2004/06;
- Report of the First Meeting of the Parties Decision I/7 Review of Compliance
(<http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>);
- Report of the First Meeting of the Parties, 17 December 2002
(<http://www.unece.org/documents/2002/pp/ece.mp.pp.2.e.pdf>);
- The Aarhus Convention
(<http://www.unece.org/env/pp/welcome.html>).

3. *Analysis*

The Compliance Committee, a subsidiary body of the MOP, was established under the provisions of Article 15 AC. This Article provides that the MOP can establish, on a consensual basis, procedures of a “non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention”. In further describing the character of these procedures, it is added that appropriate public involvement is allowed, which “may include the option of considering communications from members of the public on matters related to this Convention”.

This “review of compliance” system does not replace, but rather is an alternative to, the dispute settlement mechanism, providing for the submission of conflicts between two or more States concerning the interpretation or application of the Convention to the International Court of Justice or an arbitration panel.

The Committee is made up of nine members who are selected on the basis of their specific expertise in environmental, legal and non-legal issues, taking into consideration the geographical area from which they come. The members are elected “by consensus or, failing consensus, by secret ballot” by the MOP, which helps to insulate the selection process from government pressure. A significant role in the process is also afforded to NGOs. The intention was clearly to have a balanced and unbiased body responsible for compliance review.

The Compliance Committee is responsible for monitoring procedures and reviewing compliance. In monitoring procedures, the Committee examines the regular reports of the State Parties, which provide useful information on the particular context of each national legal system. Compliance review can be triggered by a request called “submission”, “referral” or “communication”, depending on the entity submitting the request – Member States, Secretariat or

citizens, respectively. The request must be made in written form, can be sent electronically and must be accompanied by relevant information or adequate evidence. There is no time limit within which such requests must be made.

Private individuals enjoy broad access to the procedure; however, there are some admissibility requirements. The Committee may make a “preliminary determination”, in which it declares the inadmissibility of anonymous, abusive, unreasonable or otherwise incompatible communications. At the same time, the Committee “should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress”.

An exchange between the Compliance Committee and the State concerned commences as soon as the request is made. Once the State has been informed, it has up to five months to send the Compliance Committee written notes or necessary documents. The Compliance Committee can gather information in the territory of the State concerned, with its consent; it can consider information from different sources, guaranteeing confidentiality to those who would otherwise risk being discriminated against or penalized; and it can seek the services of experts and advisers. At the end of the review, the Committee presents its Findings and Recommendations, including its assessment of the alleged violation and proposal of measures to be adopted. These Findings and Recommendations are then sent to the MOP.

The findings are decided upon on the basis of the cause, degree and frequency of non-compliance. The Committee may a) “provide advice and facilitate the implementation” of the Convention; b) “make recommendations”; c) “request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy”; d) “issue declarations of non-compliance”; e) “issue cautions”; f) “suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention”.

In cases of communications from private actors, the MOP must urge the State to commit to a plan, to be sent to the Compliance Committee, with a view to reaching full compliance with the international provisions through the introduction of “specific measures to address the matter raised by the member of the public”.

4. *Issues: The Accountability of Governments for Their International Commitments*

In the international legal system, the absence of a central authority traditionally makes it very difficult to determine illegality, and often leads to a lack of effective

sanctions for violations. The problem of state non-compliance with international norms was first addressed through bilateral mechanisms of self-help and the threat of sanctions. After a time, these instruments were replaced with a multilateral system aimed at supporting and facilitating compliance with international obligations and preventing litigation. Within such frameworks, States are no longer able to determine the legality of their own conduct or that of third parties for themselves; rather, this task falls to independent global bodies. And particularly interesting are the consequences of these instruments when *locus standi* is granted to private actors.

From the perspective of private individuals or enterprises, when international provisions have a mandatory and binding nature, the task of monitoring whether public entities abide by their requirements is usually entrusted to national judicial authorities. However, this option is not always available. It is, therefore, crucial that the interested parties are assured a further remedy in cases of rule violation.

These developments have resulted in the emergence of different compliance systems, or, more accurately, systems aimed at realizing compliance: at bringing about the full and proper implementation of obligations arising from international rules. Such compliance systems are useful due to the insufficiency or lack of effectiveness of traditional dispute resolution mechanisms.

This case highlights a new feature of the international system: private citizens can request that governments be held accountable for their international commitments. The adoption of these tools, aimed at assuring the compliance of public powers, is increasing within international organizations, both regional and universal.

This might imply a risk of overlapping jurisdictions, between national, regional or international entities, which might in turn result in conflicting or mutually conditioned decisions. Moreover, there is not even a general prohibition on one body reviewing requests which have already been dealt with in another international forum. In any event, there is no equivalent to the rule adopted by the European Court of Human Rights, according to which “States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system”.

The Aarhus Convention has introduced an innovative system for reviewing compliance, which deserves attention for two closely related reasons. The Convention sets out obligations that directly bind public administrations, in order to increase levels of environmental protection. These obligations, from access to information to participation rights and review requirements, represent some of the core elements of administrative law. Moreover, this procedure allows any individual to request that an independent, international body review whether the national public authority has correctly applied the global regulation in question.

This mechanism raises a number of questions. What are the criteria informing the operation of such a compliance procedure? Are there risks that it

might overlap and conflict with other dispute resolution bodies? Can this procedure require the national authority to comply with the international rule? Are the Committee's decisions *de facto*, though not formally, binding? Lastly, does this procedure help make national governments more accountable?

5. *Further Reading*

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- c. S. CHARNOVITZ, "Two Centuries of Participation: NGOs and International Governance", 18 *Mich. J. Int'l L.* 183, 268 (1997);
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- e. S. KRAVCHENKO, *Strengthening Implementation of MEAS: The Innovative Aarhus Compliance Mechanism*, Seventh International Conference on Environmental Compliance and Enforcement, 9-15 April 2005, Morocco, 257 (<http://www.inece.org/conference/7/vol1/Kravchenko.pdf>);
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3.2. The Disclosure of Information: Anti-Dumping Duties and the WTO

System

Maurizia De Bellis

1. *Background: The Facts, the Law, and the Parties*

In April 1999, following an application lodged by the Defence Committee of Malleable Cast Iron Pipe Fittings Industry of the European Union, the European Communities commenced an anti-dumping investigation into this kind of pipe fittings originating in Brazil, China, Croatia, the Czech Republic, the Federal Republic of Yugoslavia, Japan, South Korea and Thailand.

The only Brazilian producer investigated was *Industria de Fundicao Tupy Ltda.* (“Tupy”). In the course of the investigation, a verification visit took place at Tupy’s premises in September 1999; moreover, there were many communications and exchanges between the European Communities and both Tupy’s legal counsel and Brazilian officials.

On February 28, 2000, the European Communities imposed provisional anti-dumping duties (Reg. n. 449/2000), and, on August 11, 2000, adopted the definitive Regulation (Reg. n. 1784/2000) on imports of malleable cast iron tube or pipe fittings from, *inter alia*, Brazil. Following this, Brazil requested consultations with the European Communities, as provided for by the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO); and, after the failure of the negotiations, it further requested the establishment of a panel.

The Panel concluded that the EC had acted inconsistently with its obligations under Article 2.4.2 of the Anti-Dumping Agreement in “zeroing” negative dumping margins in its dumping determination, and under Articles 12.2 and 12.2.2, as it did not explain why it did not take into account, in deciding to introduce anti-dumping duties, certain “injury factors” listed in Article 3.4 (which sets out the various elements that must be taken into consideration when determining whether there is a causal link between the alleged dumping and the injury to the domestic industry). The Appellate Body upheld most of the Panel’s findings, except one. Unlike the Panel, the AB found that the European Communities had also acted inconsistently with the Anti-Dumping Agreement by failing to disclose to interested parties all information that could be necessary for the defense of their interests in the anti-dumping investigation.

The 1994 General Agreement on Tariffs and Trade (GATT) and the Agreement on the Implementation of Article VI of the 1994 General Agreement on Tariffs and Trade (the Anti-dumping Agreement) were the legal instruments applicable in this case.

According to GATT Article VI.1, dumping occurs when “products of one country are introduced into the commerce of another country at less than the normal value of the products”; this practice is prohibited by the WTO only when “it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry” (Art. VI.1). In this case, anti-dumping duties may be applied in order to offset or prevent dumping (Art. VI.2).

The Anti-dumping Agreement was approved during the Uruguay Round in order to implement GATT Article VI and identify the criteria and procedures for quantifying the level of dumping and of the injury to the domestic industry. More specifically, Articles 5 and 6 of the Anti-dumping Agreement set rules for the investigation procedure.

The parties were Brazil, the appellant, and the EU, the appellee. Chile, Japan, Mexico and the USA intervened as third parties.

According to Article 6.11 of the Anti-dumping Agreement, “interested parties” in the anti-dumping investigation (carried out by the importing country’s authorities, and aimed at verifying the dumping and at determining the appropriate anti-dumping measures) include both public and private parties: the Government of the exporting Member is included, as are “an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association”, and “a producer of the like product in the importing member or a trade and business association”. The agreement does not preclude the Member States from hearing domestic and foreign parties other than those explicitly mentioned.

2. *Materials*

- WTO Appellate Body
(http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm);
- WTO Appellate Body Report, European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS/219/AB/R, adopted on July 22 2003. Brazil, Appellant; European Communities, Appellee; Chile, Japan, Mexico and US, Third Participants. Division: Ganesan, Baptista and Sacerdoti
(http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds219_e.htm);

- WTO Panel Report, European Communities – Anti Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, March 7 2003
(http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds219_e.htm);
- Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement)
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- Council Regulation (EC), no. 436/2004, of March 8 2004, amending Regulation (EC) No 1784/2000 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People’s Republic of China, the Republic of Korea and Thailand, in Official Journal L 072, 11 March 2004, p. 15 et seq.
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0436:EN:HTML>).

3. *Analysis*

The Panel rejected Brazil’s claim that the EU investigation violated Articles 6.2 and 6.4 of the Anti-dumping Agreement, according to which all interested parties in an anti-dumping investigation “shall have a full opportunity for the defence of their interests”, and the authorities “shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases”.

Brazil had argued that the European Communities had failed to disclose the information contained in an internal “note for the file” submitted by the EC to the Panel, Exhibit EC-12, which showed the evaluation of the injury factors listed in Article 3.4. The Panel found that the European Communities had not violated Articles 6.2 and 6.4 with respect to the information on injury factors referred to exclusively in Exhibit EC-12, because the data it contained were consistent with other data (which had been disclosed); had no “value added” for the investigation; were not relevant to the case; and were not specifically relied upon by the EC in reaching its anti-dumping determination.

The AB reversed the Panel’s findings, deciding that the information contained in Exhibit EC-12 should have been disclosed; this conclusion was reached by articulating a more precise set of requirements for the disclosure of documents under Art. 6.4. of the Anti-dumping Agreement.

According to this provision, interested parties must be given a full

opportunity to see information that is relevant, not confidential, and was used in the anti-dumping investigation. The EU had never argued that the document was confidential, although it did contest the other two requirements. The AB, in claiming that the document was both relevant and used in the investigation, gave a more precise definition of these two requirements.

First, it explained that it was necessary to examine whether the information was “relevant” to the presentation of the cases of the interested parties, and not simply the perspective of the investigating authority (AB Report, para. 145).

Second, it held that, in order to meet the third requirement, the information need not have been specifically relied upon in reaching the determination, nor have an “added value”; it is sufficient that it was used during the anti-dumping investigation (para. 147, AB Report).

Moreover, the Appellate Body stated that the obligations contained in Articles 6.2 and 6.4 establish a framework of procedural and due process obligations, which apply *throughout* the course of the anti-dumping investigation (par. 138, AB Report).

4. *Issues: Global Review of National Administrative Processes*

In the AB’s view, the obligation to disclose information is an authentic due process requirement. But how far does this procedural duty go within the WTO system? And is it imposed on States alone, or also on private parties?

In this case, national authorities were held to have an international treaty obligation to disclose information, subject to review by a global tribunal. Although only States can request a panel, the disclosure of information requirement also serves the interest of the private parties subjected to the anti-dumping investigation and affected by the anti-dumping duties: the category of “parties interested in the investigation” (who have the right to present in writing all evidence they consider relevant thereto) covers not only the government of the exporting State, but also includes the producers and exporters themselves. Moreover, the evaluation of whether the information is relevant or not (the requirement on which the very existence of the disclosure duty depends) is to be made from the perspective of ensuring that the interests of the private parties involved are fully represented.

5. *Further Reading*

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- b. R. BHALA, *New WTO Antidumping Precedents (Part One: The Dumping Margin Determination)*, 6 *Sing. J. Int'l & Comp. L.* 335 (2002);
- c. R. BHALA, D. A. GANTZ, "WTO Case Review 2003", 21 *Arizona Journal of International & Comparative Law* 317 (2004);
- d. J. BOURGEOIS, "WTO Dispute Settlement in the Field of Anti-Dumping Law", 1 *J. Int'l Econ. L.* 259 (1998);
- e. R. CUNNINGHAM, "Five Years Of The WTO Antidumping Agreement And Agreement On Subsidies And Countervailing Measures", 31 *Law and Policy in International Business* 897 (2000);
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3.3.A Duty to Provide Reasons: *Definitive Safeguards Measures on Imports of Certain Steel Products*

Maurizia De Bellis

1. *Background*

On the request of the United States Trade Representative (USTR), in June 2001 the United States International Trade Commission (USITC) initiated a safeguard

investigation to determine whether certain steel products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury (or threat thereof) to the domestic industry. At the end of the investigation, the USITC made affirmative injury determinations for eight steel products, and forwarded its remedy recommendations in a report to the US President. Under Proclamation No. 7529 of 5 March 2002, the President imposed ten definitive safeguard measures on imports of certain steel products, for a period of three years.

Alleging that these measures were a breach of US obligations under the Agreement on Safeguards and GATT 1994, on March 7, 2002 the European Communities requested consultations and, on June 3, 2002, the establishment of a panel. The Panel issued eight Reports – in the form of a single document – and concluded that all ten US safeguard measures were inconsistent with both the Agreement on Safeguards and the GATT 1994. The US appealed the Panel report, but lost its appeal before the Appellate Body.

Under the 1947 General Agreement on Tariffs and Trade (GATT), safeguards measures were permitted under Article XIX (the GATT “escape clause”). The exceptions and obligations contained in Article XIX and the conditions under which States can establish safeguards measures were refined and elaborated during the Uruguay Round in the Agreement on Safeguards.

According to Article XIX, a Member State can adopt safeguard measures (i.e., can suspend an obligation or withdraw or modify a tariff concession) under the following conditions: when “any product is being imported into the territory of that contracting party in such increased quantities as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products”, and when such an increase is the result of “unforeseen developments and of the effect of the obligations incurred by a contracting party” under the Agreement.

The Agreement on Safeguards sets rules for the procedures through which States check that all the preconditions necessary for the legal application of such measures have been met. According to Article 3.1 of this Agreement, “[a] Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public”. This investigation shall include “reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest”. Moreover, the competent authorities shall “publish a report *setting forth their findings and reasoned conclusions* reached on all pertinent issues of fact and law” (emphasis

added).

The parties to this dispute were the EU (complainant) and the US (respondent). Later, pursuant to Article 9.1 of the Dispute Settlement Understanding (DSU), the Dispute Settlement Body referred to the Panel complaints on the same matter brought by Japan, Korea, China, Norway, Switzerland, New Zealand and Brazil.

2. *Materials*

- WTO Appellate Body
(http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm);
- WTO Appellate Body Report, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248, 249, 250, 251, 252, 253, 254, 258, 259/AB/R, adopted on December 10, 2003. United States, Appellant/Appellee; Brazil, China, European Communities, Japan, Korea, New Zealand, Norway and Switzerland, Appellant/Appellees; Canada, Cuba, Mexico, Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, Thailand, Turkey and Venezuela, Third Participants. Division: Bacchus, Abi-Saab and Lockhart
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- General Agreement on Tariffs and Trade 1994, art. IX, X, XIX
(http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm);
- Dispute Settlement Understanding – DSU, Art. 11
(http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm).

3. *Analysis*

The Panel found that the US had violated the duty to “provide a reasoned and adequate explanation” in connection with many of the requirements necessary for the adoption of safeguards measures under the WTO Agreement. More specifically, it had failed to provide a reasoned and adequate explanation of how

“unforeseen developments” resulted in “increased imports”, of the “causal link” between the alleged increased imports and serious injury to the relevant domestic producers, and of “parallelism” (between the scope of the safeguard investigation and the scope of the measures imposed as a result thereof).

The US argued that the USITC might have violated Article 3.1, but that a failure to provide a “reasoned and adequate explanation” of certain findings cannot constitute a violation of other articles of the Agreement on Safeguards or of Article XIX of GATT 1994, contrary to what the Panel had concluded (para. 18, AB Report). Moreover, it argued that it was not necessary to provide a reasoned and adequate explanation of the unforeseen developments requirement, as these are mentioned in Article XIX GATT, but not in the Agreement on Safeguards (para. 273-274, AB Report).

In the Appellate Body’s view, the same *standard of review* – namely, the duty to provide a *reasoned and adequate explanation* – applies generally to all of the obligations under the Agreement on Safeguards as well as to the obligations contained in Article XIX of the GATT 1994 (para. 276, AB Report). The AB stated that the Panel should have checked whether national authorities had respected this standard for each obligation of the safeguard investigation under the Agreement on Safeguards (and also for the “unforeseen developments” requirement, which is not in the Agreement, but comes from Article XIX of the GATT).

The Appellate Body both extended the requirement for a “reasoned and adequate explanation” and made it more precise.

First, it argued that both Articles 3.1 and 4.2 of the Agreement on Safeguards require States to provide a reasoned and adequate explanation of their findings in a published report (para. 273 - 277 and 289, AB Report).

It also argued, on the basis of Article 11 of the DSU, that the Panel was required to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case”. According to the AB, if the competent authority had not provided a “reasoned and adequate explanation”, the Panel would not have been able to make an objective assessment of the matter before it (para. 278 – 279, AB Report). As the AB stated, “a panel must not be left to wonder why a safeguard measure has been applied”, and “this is all the more reason why they must be made explicit by a competent authority” (para. 297 - 299, AB Report).

4. *Issues: The Duty to Give Reasons as a Global Principle?*

What, then, is the basis for the duty to provide reasons? Is there a specific rule in the Agreement on Safeguards that requires it (and is it therefore limited to this sector), or is it rather a general principle of law, applicable universally?

Through the creative interpretation of an international treaty, the duty to provide reasons seems to be recognized as a general principle of WTO law, subject to global judicial review.

But what is the purpose of the duty to provide reasons in this case? Is it for the benefit of States, private entities (i.e., in this case, producers affected by the safeguard measures), or both? More generally, what is the function of the duty to provide reasons at the global level, in a context very different from that in which it was first developed?

5. *Further Reading*

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3.4. Reasonableness and Proportionality: The NAFTA Binational Panel and the Extension of Administrative Justice to International Relations

Marco Macchia

1. Background

In the summer of 1999, the Canadian Commissioner of Customs and Revenue, acting under Subsection 38 of the Special Import Measures Act (SIMA), began an investigation to ascertain the existence of dumping in the importation of radiographic contrast media. The Canadian company petitioning the Canada Customs and Revenue Agency (CCRA) was Mallinckrodt, the only domestic manufacturer of the goods in question. Two US exporters, Nycomed and Bracco, were accused of dumping.

The Canadian system provides for two monitoring bodies – the CCRA and the Canadian International Trade Tribunal (CITT) – to protect the domestic industry from dumping practices and State subsidies that distort international trade competition. The two bodies operate simultaneously, though they institute two distinct proceedings. The CCRA's proceedings aim at determining the normal value of the goods, the export price and the dumping margins. The Canadian International Trade Tribunal is responsible for establishing whether the practice in question has caused damage to the domestic market. In order to make this decision, the Tribunal has to hold public hearings with the participation of all concerned parties.

In this particular case, Mallinckrodt claimed that the exporting companies were selling their products at an excessively low price and giving excessive rebates to their customers, thus damaging the domestic market. Nycomed and Bracco defended themselves by arguing that the problems in the domestic market were due to factors independent of their business practices, citing, for example, a general market crisis, the higher quality of the imported product, and excessive domestic controls. In addition, it was not certain that the Canadian company was suffering injury as a result of the alleged dumping, because its losses on the domestic market were compensated for by its exports.

At the end of the proceedings, the CCRA determined the existence of dumping. The CITT found (with one dissenting opinion) that the importing companies had caused material injury to the domestic industry, and that, although both domestic and (up to a point) foreign companies were entitled to engage in a “price war” (aggressively pricing their products in order to maintain or increase market share), “once the imported product is offered at dumped prices which cause injury to the domestic industry, the line is crossed”. Also, it found that the quality of the imports in question, relative to those produced domestically, was not sufficiently high to account for the increased purchases of the imported products at the expense of the Canadian company. The extra level of control exercised over the product in Canada by the Patent Medicine Prices Review Board did not influence price trends, because it only aimed at establishing a ceiling price that must be respected by any company intending to enter the market. Lastly, the Tribunal found that the exports of the domestic company were not relevant.

When a foreign company is faced with anti-dumping sanctions, there is usually just one available remedy: to appeal the decision made by the national administrative agency. However, the North American Free Trade Agreement (NAFTA), a regional agreement establishing a free-trade area between Canada, Mexico and the United States, signed in 1992 and in force since 1994, provides for an additional remedy. Under the rules of Chapter 19, a NAFTA binational panel, made up of representatives from the countries involved in the controversy, can review national decisions in the fields of anti-dumping and export subsidy. This international level review of national administrative decisions is therefore aimed at ensuring the full implementation of the free movement of goods and services between NAFTA Member States.

The final determinations of the CCRA and the CITT were challenged by Nycomed and Bracco before a NAFTA binational panel. The Panel ruled that the determination of the CCRA was not in compliance with Canadian law, and remanded the decision to that body for reconsideration. It upheld the determination of the CITT.

After reviewing the evidence and identifying the exporters and export price, one key issue was determining the standard of review to apply in this particular case. Theoretically, Canadian law provides three possible criteria for the review of administrative decisions: correctness, unreasonableness and patent unreasonableness. Under the correctness standard, the degree of deference afforded to the administrative decision is minimal; while under the patent unreasonableness standard it is very large. Generally speaking, under Canadian law, the standard applied to questions of fact is that of patent unreasonableness, while questions of law are evaluated according to the standard of unreasonableness. In any event, the role of binational panels in reviewing national administrative decisions is well illustrated by these cases.

2. *Materials and Sources*

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3. *Analysis*

As noted above, NAFTA promotes investment and trade in Member States, but it does not require them to change their domestic state subsidy and anti-dumping laws, provided that they comply with some minimum standards set forth in the Agreement and in the anti-dumping codes. However, Members must accept the dispute settlement mechanism under NAFTA Chapter 19.

This mechanism combines traditional judicial review (which can also be requested by foreign exporters, and was introduced for the first time by the United States with the 1979 Trade Agreement Act) with the review carried out by a binational panel made up of panelists drawn from a roster of qualified Canadian, Mexican and US citizens (including, “to the fullest extent possible”, judges and former judges). This kind of review can be accessed by all parties that would otherwise have standing in a national court, under their own domestic law. In practice, binational panels remove the exclusive review of domestic administrative decisions from national courts. When a national provision is challenged before a binational panel, it cannot then be challenged in a national judicial proceeding. There is no national appeal against a Panel’s decision.

Binational panels are responsible for reviewing the case documents, and establishing whether the decision made by the national administration is generally supported by evidence, and legal according to the domestic law in question (rather than according to international trade rules). The Panel is required to apply the law of the importing country, including statutes, regulations, administrative practices, and judicial precedents, to the same extent that a national court would.

This serves to create pressure for legal harmonization.

In addition to this, the panelists are required to respect the interpretative parameters existing in the country in question; they cannot “create law”, and must observe the importing country’s standards of review. These standards are described in Annex 1911. For Canada, for instance, the administrative activity is unlawful when, *inter alia*, it violates a principle of natural justice, when it has erred in law or fact in reaching its decision, or where it has acted without jurisdiction, under the provisions of Article 18 of the Federal Court Act. In contrast, the criteria used in the United States are different: in most cases an administrative decision is unlawful when “unsupported by substantial evidence on the record, or otherwise not in accordance with law”.

After the preliminary investigation, the panel can choose to confirm the administrative decision, or to remand it to the domestic authority in question order for reconsideration in the light of the panel’s prescriptions. Unlike most international dispute settlement mechanisms, decisions of binational panels are binding upon national governments.

The only mechanism for appealing against the decision of a panel is the extraordinary challenge procedure, to which a part can have recourse if it alleges that, firstly, a member of the panel was guilty of bias, gross misconduct or serious conflict of interests, or that the panel exceeded its powers or departed from a fundamental rule of procedure (for instance, by failing to apply the appropriate standard of review); and, secondly, that one of these actions has materially influenced the panel’s decision or has threatened the integrity of the proceedings.

4. *Issues: Global Judicial Review of National Decisions*

In order for international trade to function, a consistent international anti-dumping system should be maintained. It is therefore important to promote the wide acceptance of a common anti-dumping code, and to ensure that national laws comply with it. This can best be achieved through an effective dispute resolution mechanism, which induces governments to respect their international obligations. This might not, however, be sufficient. At present, anti-dumping measures depend on the decisions made by national agencies and are based on proceedings in which national administrations generally have wide discretion. There are few guarantees that they will apply the letter of the law, and often even fewer guarantees that they will conform to the general principles of legitimacy and due process. Thus, in order to effectively implement an anti-dumping code, we must address the key issue of administrative practice.

For this purpose, NAFTA Chapter 19 establishes a sort of judicial review for anti-dumping decisions taken by national administrative agencies. A mechanism of this sort clearly functions best where there is some degree of homogeneity in

the administrative laws of the Member States involved, both from a procedural perspective (in that the members of the panel have to apply the law of another country) and from a substantive perspective (if the rules differ significantly between countries, exporters from different countries might receive differential procedural treatment).

Such a system is not immune from the risk of allowing for differential treatment. For instance, as highlighted earlier, the Canadian and American standards of administrative review are different, in that Canadian courts are more deferential to administrative discretion than are their American counterparts. For this reason, practically speaking it is more difficult to obtain a negative review of a Canadian measure than it is an American one.

5. *Further Reading*

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3.5. National Regulatory Autonomy within the GATS: The Gambling

Dispute

Maurizia De Bellis

1. *Background*

On March 21, 2003, Antigua and Barbuda requested consultations with the US regarding American federal and state laws affecting gambling and betting services. Antigua and Barbuda argued that the cumulative impact of the US measures resulted in the “total prohibition” of the cross-border supply of

gambling and betting services from WTO members to the United States, and that this violated the General Agreement on Trade in Services (GATS).

On 12 June 2003, Antigua and Barbuda requested the establishment of a panel, which found that the GATS Schedule of the United States (under the subsection entitled “Other recreational services (except sporting)”) included specific commitments for gambling and betting services, and that three US federal laws (the Wire Act, the Travel Act and the Illegal Gambling Business Act) and four out of the eight state laws it examined (enacted in Louisiana, Massachusetts, South Dakota and Utah) violated US commitments under Article XVI concerning market access. The Panel also found that the US had failed to make out a defense under Article XIV, which sets forth the general exceptions to the GATS regime.

Both the United States and Antigua and Barbuda appealed. The Appellate Body limited its findings to the three federal laws (holding that the Panel should not have ruled on the eight state laws, because Antigua had not made a *prima facie* case of inconsistency with the GATS). The Appellate Body reversed many of the Panel’s findings, so that in the end the US was compelled to modify only one of the contested federal laws.

The implementation of the decision proved difficult. As the parties failed to agree on what would constitute a reasonable period of time for implementation, Antigua and Barbuda requested that this be determined through binding arbitration pursuant to Article 21.3 of the Dispute Settlement Understanding. The arbitrator determined that the US had to adapt its legislation to the Dispute Settlement Body’s findings by 3 April 2006. After this date had passed, Antigua and Barbuda requested the establishment of another panel (according to Article 21.5 of the DSU) to evaluate the consistency of measures taken by the US to comply with the recommendations of the DSB. The Panel concluded that the US had failed to comply, and Antigua and Barbuda then requested authorization from the DSB (pursuant to Article 22.2 of the DSU) to suspend the application to the United States of concessions and related obligations under the GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). On 23 July 2007, the US objected to the level of suspension of concessions and obligations proposed by Antigua and Barbuda, and the DSB agreed that this matter be referred to arbitration.

Article XVI of the GATS, which concerns market access, requires that each party “shall accord services and service providers of other Parties treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule”. This provision only applies when a State has made a specific commitment in its schedule. This is why it was so important to verify whether the US had made such a commitment in terms of gambling and betting services. The measures that a State must not maintain or adopt under the

market access provision are defined as “limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test”. This means that Article XVI only addresses quantitative, not qualitative, measures.

National regulations deviating from the GATS may be justified by Article XIV and XIV *bis* of the agreement. These exceptions apply to both general obligations and specific commitments. They recognize the right of WTO Member States to deviate from their obligations in order to pursue certain national policies. Article XIV provides that, “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member” of several types of measures, including those that are “necessary to protect public morals or to maintain public order” (Art. XIV(a)). In this case, the US expressed regulatory concerns relating to organized crime, money laundering and fraud in the context of the services from Antigua at issue in this dispute, basing their argument on the public morals exception set forth in Article XIV(a).

2. *Materials and Sources*

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3. *Analysis*

The AB report upheld the Panel's finding that the United States had acted in a manner inconsistent with Article XVI. It reasoned that Article XVI only applies when the State has made a specific commitment, and the AB found that the United States' Schedule did include a commitment to grant full market access in relation to gambling and betting services (AB Report, paras. 162-213). Moreover, the US measures, albeit of a qualitative nature in that they prohibited the "remote" supply of gambling services (by requiring a "face to face" supply), resulted in a quantitative restriction on market entry: therefore, the AB held that "limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2" (AB Report, paras. 238 and 251).

This is a very controversial issue: Article XVI of the GATS prohibits market access restrictions (such as import quotas or limitations of the number of services suppliers); in contrast, domestic regulations (insofar as they provide for qualitative restrictions) are in principle permitted, on condition that they do not discriminate against foreign suppliers of services. Under Article VI:4 (the GATS provision on domestic regulation), the Council for Trade in Services is to develop further disciplines, which should ensure, *inter alia*, that national requirements are no more burdensome than necessary to ensure the quality of the service. To put it differently, the GATS negotiators refused to impose a general necessity test for non-discriminatory domestic regulation in the Agreement itself, leaving it to subsequent negotiations under Article VI.4.

In the *Gambling* case, the Appellate Body adopted a broad interpretation, considering even qualitative national measures as market access restrictions, due to the fact that qualitative measures also have quantitative effects. In this way, it narrowed the scope of national regulatory autonomy: domestic service regulations that were considered to be safe, and subject only to future disciplines as envisaged by Article VI.4, could already be prohibited by the GATS as market access restrictions under Article XVI.

The Appellate Body reversed some of the Panel's findings concerning whether the US measures could be justified under the Article XIV "public morals exception". In particular, it reversed the finding that the US had not shown that the three federal statutes were "necessary" to protect public morals or to maintain public order, within the meaning of Article XIV, while partially upholding the Panel's claim that the US had violated the *chapeau* of Art. XIV, which provides that measures adopted under the exception clause have to be applied in the same way to foreign and domestic suppliers of services alike (i.e. they cannot be discriminatory).

In order to evaluate whether the statutes are necessary to protect public morals or maintain public order, the AB engaged in a "process of weighing and

balancing a series of factors”. Some of the factors taken into account in the weighing process were the contribution of a measure to the goal it was intended to further; the restrictive impact of the measure on international commerce; and a comparison between the challenged measures and possible alternatives (AB Report, paras. 305-308). Moreover, it stated that if the complainant raises a WTO-consistent alternative measure that it believes the other party should have taken, the respondent must demonstrate why the proposed alternative is not available (paras. 310-311).

4. *Issues: Global Procedural Requirements for National Administrations*

What limits does GATS impose upon national regulatory autonomy over trade in services? What kinds of procedural requirements must States respect? The interpretation of GATS in the *Gambling* case may have much broader consequences than those foreseen by the negotiating parties.

The first consequence is driven by the (mis)interpretation of the distinction between market access and domestic regulation. Considering qualitative measures as market access restrictions effectively subjects them to a discipline that is more burdensome on States, and therefore restricts their sovereignty.

The AB in the *Gambling* case relied upon a very strict interpretation of the public morals exception, through its analysis of the “necessity test”. In setting forth the conditions that a State must respect in order to demonstrate that a measure is necessary to protect public morals, the AB restricted the autonomy of WTO Member States. Compared to the Panel report, however, the AB also took one step back: in arguing that the United States was required to consult or negotiate with Antigua before taking a measure to protect public morals, in order to verify that there were no alternatives available, the Panel had sought to impose a general procedural requirement beyond that which was stipulated in the Agreement.

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3.6. Global Standards, States of Necessity and the Review of Discretionary Power

Paolo Mantino

1. Background

In the late Eighties, a major economic crisis hit Argentina. The Government undertook an important privatization program involving the major State-owned utilities companies, including those in the areas of gas production and transportation. Equity stake acquisition was offered to foreign investors with the goal of promoting the success of the privatization program. Bilateral treaties were concluded that included guarantees concerning the treatment to be accorded to foreign companies. Regulations were also approved in order to allow investing companies to receive reasonable rates of return on their investments. This regulatory system was based on a guaranteed tariff system, which was governed by an independent agency, the *Ente Nacional Regulador del Gas* (ENARGAS), which was also the body responsible for reviewing the tariffs every six months and adjusting them to adjustments in the United States Production Price Index (PPI adjustments). Government permits became licenses; moreover, unilateral modifications of agreements were prohibited. This system was further implemented by Decree No. 2255/92, entitled “Basic Rules of the License”, by which the Argentine Government agreed to indemnify licensees for all losses resulting from changes in the guaranteed tariff system. Finally, Law No. 23928 of 1991 (the “Convertibility Law”) set a fixed exchange rate for the local currency, by pegging it to the US Dollar.

A further slump hit Argentina again at the end of the 1990s. Starting in 2000, the Government entered into two agreements with sectoral companies to postpone all tariff increases. The first agreement, postponing increases for six months, was then followed by an ENARGAS resolution approving all tariffs with no increase, therefore confirming the validity of the existing tariff system. The second agreement, approved by Decree No. 669/00, further postponed all increases until June 2002. Again, in this Decree, the government confirmed that

all privatization regulations had been left unchanged. The worsening economic crisis reached its peak in December 2001: the Gross Domestic Product shrunk by 15% in comparison with the previous year, while unemployment increased exponentially, and many people emptied their bank accounts, fearing the collapse of the whole banking system. In order to prevent a total financial collapse, Argentina passed Law No. 25561, of January 6, 2002, (the “Emergency Law”) which, together with the implementing decrees, profoundly altered the previous regulations by suspending both possible tariff changes and the one-to-one pegging of the Argentine currency and the US dollar, and by forcibly renegotiating all contracts with gas-supplying companies.

LG&E, a US company with an equity stake in one of the privatized gas companies involved, appealed to the Arbitral Tribunal created within the International Centre for Settlement of Investment Disputes. This appeal was filed on the basis of Article VII(2)(i) of the Bilateral Investment Treaty (BIT) signed between Argentina and the United States in 1991, which then entered into force when Argentina joined the Convention on the Settlement of Investment Disputes Between the States and Nationals of other States (the ICSID Convention) in 1994. The petition challenged the measures adopted by the Argentine Government in 2002 as violating many of the obligations undertaken in the BIT, including the duty to respect the “fair and equitable treatment” standard, and the prohibition on discriminatory and arbitrary action against foreign investment.

2. *Materials and Sources*

- LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1)
(http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home);
- ICSID Convention, Regulations and Rules
(<http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>);
- Bilateral Investment Treaty between the US and Argentina
(http://www.unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf);
- Vienna Convention on the Law of Treaties
(http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

3. *Analysis*

This case concerned the enforcement of different regulations contained in the BIT between Argentina and the United States, entered into with the intent of encouraging mutual foreign investment, particularly of US companies in Argentina, which had recently suffered a major economic crisis. The provisions of the BIT are intended to regulate the actions of the host State by subjecting them to specific substantive and procedural standards. In this case, LG&E did not challenge an individual decision for violating these standards, but rather a whole set of legal and administrative acts that sought to create a sectoral policy. Among the relevant BIT provisions was its preamble, which stated that all activities of the Parties had to act in a fair and equitable manner towards foreign investors, in order to preserve a stable and comfortable investment climate. Article II(2)(b) forbade States from adopting arbitrary or discriminatory measures. Finally, the treaty provided that all relationships with companies must respect the transparency principle, which requires that all regulations, administrative procedures and judicial decisions that could have an impact upon investments be publicized.

The decision of the Arbitral Tribunal interpreted the relevant treaty standards and evaluated Argentina's respect for them during its economic crisis.

The Tribunal held that the fair and equitable standard had been breached, thus rejecting the argument of the Argentine Government that this standard represents the international minimum standard of treatment owed to an investor under customary international law, such that it is only violated "when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective" (para. 113).

The Tribunal held instead that the standard had to be interpreted in a dynamic, contextual manner, taking into account the object and purpose of the Parties in concluding the treaty, the actual provisions on fair and equitable treatment that it contains, and the evolution of the standard in the decisions of previous investment treaty arbitrations.

The Tribunal held that the provision of a stable legal and business environment is a crucial element of fair and equitable treatment, as are the justified expectations of companies when deciding to invest in Argentina. The transparency principle was also held to apply to all relationships between companies and the State, implying that the latter must make investors aware of the whole regulatory system in which they will operate.

The Tribunal also stressed that Argentina had discriminated against the predominantly foreign-owned companies operating in the gas production and transportation sector. Its measures, such as the complete freezing of the tariffs

during the crisis period, were targeted specifically at those sectors, and had been adopted as early as two years before the approval of the Emergency Law. Such conduct was held to be discriminatory due to its effects alone, regardless of any discriminatory intent.

Concerning the prohibition against arbitrary action, the Arbitral Tribunal's interpretation of the regulation was strictly procedural. The goal of attracting foreign investments set forth in the BIT preamble was taken as the purpose of the whole treaty. The Tribunal reasoned that attracting foreign investments is only possible if the State fully respects the due process of law. Any measure that might affect investors' interests must therefore be adopted on the basis of a rational decision-making process in which such interests may be balanced against legitimate public aims. The Tribunal also noted that, when the Emergency Law was enacted, Argentina clarified all of the reasons behind the introduction of the different measures. Its main aim was to avoid further economic collapse; by starting negotiations with the companies in order to come to a reasoned judgment, it thus respected the due process of law.

After examining the State's actions in the light of the global standards embodied in the BIT, the Tribunal held that such measures were justified by the economic and social crisis. The determination of a state of necessity, as a condition for being relieved of all responsibility for the infringement of treaty rules, is contained in Article XI of the BIT, which provides that the Treaty does not hinder the enforcement of those measures necessary to maintain public order and protect national security. The Tribunal held that the existence of such "necessity" had to be determined by the Arbitration Tribunal, not by the State itself. As a consequence, the Tribunal examined all of the economic and social events since the appearance of the first crisis signals in 1998, and up to the months following the election of President Kirchner on April 26, 2001. From that date on, there were significant improvements in the economic indicators, leading the Tribunal to conclude that Argentina then began to emerge from the state of necessity. It examined the conditions upon which the Argentine decision to introduce emergency measures had been based, and evaluated the adequacy of such measures to cope with the crisis. It thus concluded that Argentina was excused from its obligations under the BIT until the election of President Kirchner; but that it must be held responsible for violations of those obligations in the period that followed, as the emergency measures had been kept in place, even though those conditions justifying them were no longer present.

4. *Issues: The Limits of the State of Necessity*

The *LG&E* case is typical investment treaty arbitration. Appeal to this kind of arbitration model has increased significantly along with the increased number of

Bilateral Investment Treaties in the last 15 years. Investment treaty arbitration originated with the use of international commercial arbitration. This is used in business relationships among private parties, or in cases in which the State acts as a private party. The incorporation of arbitration mechanisms into treaties modifies the nature of the arbitration itself, turning it into an instrument for controlling the exercise of public authority. These investment treaties enable States to give their general consent to the use of international arbitration tribunals for settling disputes between companies and themselves, and therefore allowing judicial review over a significant proportion of their actions, be they legislative or administrative in nature.

The *LG&E* decision raised important procedural and substantive questions concerning investment treaty arbitration. All of the standards used by such tribunals are fixed by the treaties themselves, meaning that the States have effectively consented to these limits themselves, albeit framed in very flexible terms. All interpretations are issued by arbitration tribunals, making the role and function of these global “judges” very important. The tribunals can even require the losing party to pay for all damages ensuing from the infringement of the treaty’s terms and conditions, as a public law remedy. Such assertive arbitration decisions necessitate a systematic theory of the different standards applicable, which must be studied particularly in relation to the legal limits upon the exercise of power by public authorities. From this perspective, the fair and equitable standard may be considered as an expression of the rule of law principle as determined in those countries with liberal-democratic systems. As highlighted in the *LG&E* decision, requirements such as the stability and predictability of the law of foreign investments arise out of more general principles such as the certainty of law, and the protection of legitimate expectations; as such, they all ultimately fall under the broad category of “rule of law requirements”. National decision-making procedures are therefore limited by the need to respect the rule of law whenever making any changes in sectoral regulations. This gives rise to some important questions. First of all, what are the features of rule of law principles as applied in the global system? What is the role of global “judges” in interpreting these standards? Does the interpretation of the fair and equitable treatment standard always genuinely correspond to the will of States, as expressed in the BITs in question?

Furthermore, the goal of BITs of protecting the legitimate expectations of foreign investors raises another question. Might administrative activities and decisions not strictly pertaining to economic investments, such as those relating to city planning, the environment, public tendering and fiscal policy, also be subject to this kind of judicial review? If so, investment treaty arbitration might simply open up too many possibilities for review, of too great a scope, creating tensions with States. Judicial review of the state of necessity and the adequacy of the particular measures taken can influence the discretionary power enjoyed by

national administrative authorities and by States more generally. In the *LG&E* case, the Tribunal ordered the company in question to prove that Argentina might have taken different measures. The Tribunal moreover held that it had jurisdiction to determine the existence and duration of a state of necessity; and that it need not defer to any such determinations made by States themselves. The Tribunal held the state of necessity must be an exceptional situation. What, then, are the limits upon such review?

5. *Similar Cases*

- CMS Gas Transmission Company v. Argentine Republic, ICSID Case No.ARB/01/8, May 12, 2005
(http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home).

In the *LG&E* decision, the Tribunal required the company in question to demonstrate that Argentina might have taken different measures from those actually adopted. This, of course, was a very difficult task. In a previous decision in the *CMS* case, by contrast, it was the State that bore the burden of proof in establishing that the measures taken were those most appropriate to the situation. In that case, the Tribunal found that the measures adopted did not represent the best way to address the crisis. Furthermore, it also held Argentina responsible for its decisions leading up to the emergency situation. In so doing, the Tribunal's review went to the very core of the State decision-making process. On the basis of such considerations, Argentina's appeal to the state of necessity clause was rejected, even though the Tribunal did not go as far as to suggest itself what other measures might have been taken. The Arbitral Tribunal thus declared itself competent to review directly important elements of the Argentine political system, provoking serious tensions with the State in question. These inconsistencies can, of course, be explained by the fact that different ICSID Arbitration Tribunals are composed of different arbitrators, and that there is no doctrine of binding precedent in respect of previous decisions.

6. *Further Reading*

- a. R. DOLZER, "The Impact of International Investment Treaties on Domestic administrative Law", 37 *Journal of International Law and Politics* 953 (2006);
- b. D. FOSTER, "Necessity Knows no Law: LG&E v. Argentina", 9

- International Arbitration Law Review* 149 (2006);
- c. OECD, “Fair and Equitable Standard in International Investment Law”, 3 *Working Paper on International Investment* (2004);
 - d. A. REINISCH, “Necessity in International Investment Arbitration- An Unnecessary Split of Opinions in Recent ICSID Cases? Comment on CMS and LG&E”, 8 *Journal of World Investment and Trade* 191 (2007);
 - e. S.W. SCHILL, “International Investment Law and the Host State’s Power to Handle Economic Crises, Comment on the ICSID Decision in LG&E v. Argentina”, 37 *Journal of International Arbitration* 265 (2007);
 - f. ID., “Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law”, IILJ Working Paper 2006/6 (Global Administrative Law Series) (2006) (<http://iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf>);
 - g. G. VAN HARTEN, *Investment Treaty Arbitration and Public Law*, Oxford (2007);
 - h. G. VAN HARTEN, M. LOUGHLIN, “Investment Treaty Arbitration as a Species of Global Administrative Law”, 17 *European Journal of International Law* 121 (2006);
 - i. M. WAIBEL, “Two World of Necessity in ICSID Arbitration: CMS and LG&E”, 3 *Leiden Journal of International Law* 637 (2007).

3.7. Transparency and Proportionality: Subsidies and Countervailing

Measures

Sandro Mento

1. Background

The first ruling examined here is that in the *Unites States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* case.

The dispute arose from the privatization of a British State-owned enterprise (the British Steel Corporation, or BSC), which created, in 1986, United Engineering Steels (UES) as a joint venture with a privately-owned company (Guest, Keen and Nettlefolds – GKN) for the production of certain hot-rolled lead and bismuth carbon steel bars. In 1988, BSC was privatized “for fair market

value”, and renamed British Steel plc (BSplc), meaning that both parent companies of UES were now private enterprises. In 1995, BSplc took full control of UES, buying out GKN and renaming the company British Steel Engineering Steels (BSES).

Specifically, the issue was whether certain benefits paid to BSC by the UK Government prior to privatization could be held to have “travelled” from BSC to UES and later to BSES through the various changes in ownership; and if so (taking into consideration the fact that the purchasers had bought the company shares at fair market value, and did not benefit from any “discount” derived from the earlier subsidies) whether these benefits amounted to “countervailable subsidies”. The WTO dispute arose from the 1993 imposition, after an investigation initiated by the US Department of Commerce (USDOC), of countervailing duties on the products of UES and later BSES, which, according to the US Authorities, had benefited from subsidies equivalent to 12.69 % of their import value. These duties were reaffirmed in a series of annual administrative reviews in the US. In January 1999, after failing to reach agreement through consultations, The EC requested the establishment of a panel to review the compatibility of the countervailing duties with WTO law.

After a careful review of the facts (including the doctrine of State subsidies), the WTO Panel and Appellate Body concluded that “the ‘financial contributions’ bestowed on BSC between 1977 and 1986 could not be deemed to confer a “benefit” on UES and BSplc/BSES (AB Report, para. 68).

The second ruling concerns the 1993 US imposition of countervailing duties on the import of carbon steel from Germany. The measure was adopted following an investigation initiated by the USDOC, which suspected that certain German producers were benefiting from subsidies (equivalent to about 0.60 % of the production value) from five subsidy programs. On September 1, 1999, USDOC automatically initiated a “sunset review” of these countervailing duties. In the course of this review, USDOC determined that the revocation of the countervailing duties “would be likely to lead to continuation or recurrence of a countervailable subsidy” with respect to carbon steel, and transmitted this finding to the United States International Trade Commission (USITC). Based on its finding that two of the original five subsidy programs had been terminated, the likely rate of the continuation or recurrence of such countervailable subsidies was determined by USDOC to be 0.54 percent *ad valorem*. Following an affirmative determination of the likelihood of the continuation or recurrence of injury by USITC, USDOC published a notice of the continuation of the countervailing duties on 15 December 2000.

The Panel Report of 3 July 2002 found that (a) the US law imposing countervailing duties was consistent with Articles 10, 21.1 and 21.3 of the SCM Agreement in respect of the application of evidentiary standards to the self-

initiation of sunset reviews; (b) the law imposing countervailing duties was, however, inconsistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 per cent *de minimis* standard to sunset reviews, and therefore violated Article 32.5 of the SCM Agreement and, consequently, also Article XVI.4 of the WTO Agreement; (c) the United States, in applying a 0.5 per cent *de minimis* standard to the instant sunset review, acted in violation of Article 21.3 of the SCM Agreement; (d) the law imposing countervailing duties was consistent with Article 21(3) of the SCM Agreement in respect of the obligation to determine the likelihood of continuation or recurrence of subsidization in sunset reviews; (e) and that the US, in failing to properly determine the likelihood of continuation or recurrence of subsidization in the sunset review on carbon steel, acted in violation of Article 21(3) of the SCM Agreement.

The Appellate Body reversed the Panel's finding that, in not applying a less than 1 percent *de minimis* standard in sunset reviews, the US law was inconsistent with Article 21.3 and, therefore, with Article 32.5 of the SCM Agreement, and consequently was also inconsistent with Article XVI of the WTO Agreement. It upheld the findings that US law was consistent with Articles 10, 21.1 and 21.3, of the SCM Agreement, and that it was not inconsistent with the obligation contained in Article 21.3 of the SCM Agreement to determine the likelihood of continuation or recurrence of subsidization in sunset reviews.

2. *Materials*

- United States-Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (WT/DS138/AB/R)
(http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds138_e.htm);
- United States-Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (WT/DS213/AB/R)
(http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds213_e.htm).

3. *Analysis and Issues: Requiring Transparency of National Administrations*

The first ruling is of great interest to global law because it establishes that, in the national administrative procedures that impose or review countervailing duties, “the investigating authority must address those issues that have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues which warranted the examination” (AB Report, para. 63).

Furthermore, in review procedures, the Authorities must decide, on the basis of the information presented to them by the interested parties, “whether there is a continuing need for the application of countervailing duties”. The Authorities, in this instance, cannot ignore the any element of fact or law upon which the request for review is based (“[t]he investigating authority is not free to ignore such information. If it were free to ignore this information, the review mechanism under Article 21.2 would have no purpose”, para. 61). Reasons must be given for any refusal to revoke the countervailing measures. Such requirements not only promote the transparency of public decisions and the clarification of government actions, but they also allow the WTO to verify the legitimacy of national measures.

The WTO generally allows Member States to react to the provision of benefits by other States to their domestic industries through the imposition of tariffs to countervail their subsidizing effects. This issue is regulated by Article XIX of GATT 1994 and by the WTO law relating to safeguard measures. These measures require that the tariffs introduced to counterbalance the subsidies be justified by giving reasons to the importers, exporters, and to the other interested parties, which can include foreign governments. As already stated, Member States have the obligation to give reasons for their decisions; they must also allow access to the proceedings for interested parties. This ruling reinforces and clarifies the substance of the transparency principle, which must be respected by the States when adopting measures that produce an effect on the movement of goods. As noted above, the regime regulating the imposition of countervailing duties establishes global principles to which national procedures should conform. How should States enforce these principles in their national law? Should global standards modify national decision-making?

For example, Article 23 of the SCM Agreement states that “such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question” (of the need to impose countervailing duties). This Article is particularly interesting for the purposes of our investigation. It requires Member States to have an independent judicial system. The WTO thus contributes to the spread of the rule of law and principles of democracy. Within the field of global administrative law, this phenomenon has recently been described as the “circulation of legal institutions” in the global and national legal systems.

The second ruling points out that the right to initiate an investigation and establish countervailing measures requires, according to Article 11.2 of the SCM Agreement, sufficient evidence (to be provided by the authority seeking to impose the measures) of the existence of “three substantive conditions (subsidization, injury, and a causal link between the two) and on compliance with its procedural and substantive rules, notably the requirement that the

countervailing duty cannot exceed the amount of the subsidy” (para. 73).

This ruling is of a great interest because it examines the SCM Agreement, paying particular attention to the public notice obligations that must be adopted by Member States in order to enable the participation of the interested parties in the adoption of the trade countermeasure procedures. This refers in particular to Article 22 of the Agreement: “Article 22.1 imposes notification and public notice obligations upon Members that have decided, in accordance with all the requirements of Article 11, that the initiation of a countervailing duty investigation is justified. Article 22.1 does not itself establish any evidentiary rule, but only refers to a standard established in Article 11.9” (para. 111).

The Appellate Body also took Article 11 of the SCM Agreement into account because it “sets forth the evidentiary standards that apply to the initiation by authorities of a countervailing duty investigation” (para. 113). According to the AB, the rules in part V of the SCM Agreement (Arts. 10-23, which regulate the countervailing measures) provide “the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so” (para. 74). Member States’ obligations mainly consist in respect for procedural standards. To promote the requirement of sufficient evidence, Article 11 SCM sets forth the contributions that governments and the other parties involved in the dispute might give to the State authorities.

It should be noted that in the proceeding for the adoption of countervailing measures, prior public notification of the initiation of the investigation increases the transparency and the accountability of the public administration, which is also required to provide substantial reasons (should it adopt a measure). The Appellate Body also asserted that any eventual countermeasures should respect the proportionality principle. The obligation to provide reasons not only promotes the transparency of public decisions, it also allows the WTO judicial body to review the legitimacy of national choices (WTO Appellate Body, WT/DS 248, 249, 250, 251, 252, 253, 254, 258, 259/AB/R).

A number of open questions remain. How can we ensure, in practice, the enforcement of the decisions of the WTO? What institutional tools would we need to develop in order to do so?

4. *Further Reading*

On the first ruling:

- a. A.E. APPLETON, “Amicus curiae submissions in the Carbon Steel case: another rabbit from the appellate body’s hat?”, 3 *Journal of International Economic Law* 691 (2000);

- b. L. BARTELS, “The Separation of Powers in the WTO: How to Avoid Judicial Activism”, 53 *International and Comparative Law Quarterly* 861 (2004);
- c. J. DUNNE, “Delverde and The WTO’s British Steel Decision Foreshadow More Conflict Where The WTO Subsidies Agreement, Privatization, and United States Countervailing Duty Law Intersect”, 17 *American University International Law Review* 79 (2001);
- d. C.D. EHLERMANN, M. GOYETTE, “The Interface between EU State Aid Control and the WTO Disciplines on Subsidies”, 4 *European State Aid Law Quarterly*, 695 (2006).

On the second ruling:

- a. D. PRUZIN, “WTO Appellate Body Overturns Ruling Against U.S. Sunset Review on Steel Duties”, 19 *Int’l Trade Rep. (BNA)* 2098 (2002);
- b. R.H. STEINBERG, “Judicial lawmaking at the WTO: Discursive, Constitutional, and Political Constraints”, 98 *The American Journal of International Law* 247 (2004).

4. DUE PROCESS IN THE GLOBAL LEGAL ORDER

4.1. The War on Terror and the Rule of Law

Mario Savino

1. *Background: The Global and European Regimes for the Freezing of Terrorists' Assets*

The main international legal tool currently used to combat terrorism is the freezing of the assets of suspected terrorists. The Sanctions Committee, an auxiliary body of the UN Security Council, administers this mechanism. Established by UN Security Council Resolution 1267 (1999), the Sanctions Committee is made up of representatives of all the Security Council Member States. Its task is to draft and update the list of persons and organizations suspected of funding terrorist activities (the “global black list”). Once a person is included in the list, all UN Member States are obliged to freeze his assets. The listing process is triggered on the initiative of a Member State (the “designating government”) and requires the unanimous approval of the Sanctions Committee. If objections are raised, the UN Security Council takes the final decision.

The global regime does not provide for procedural safeguards or judicial remedies to protect the affected party, and thus infringes upon fundamental rights such as the right to property, the right to administrative due process and the right to an effective judicial review. The listed person may only petition the UN Security Council directly (by means of the newly established procedure establishing a UN “focal point”), or his government of residence or citizenship to request review of the case, providing justification for the delisting application. If after one month, no Committee member recommends delisting, it shall be deemed rejected (see UN Security Council Resolutions 1730 and 1735 (2006) and Art. 8 of Guidelines of the 1267 Committee for the Conduct of its Work, as amended in February 2008).

The European law on terrorist asset freezing is set forth in Council common

position 2001/931/CFSP. According to Article 1(2) of the common position, the EU Council may include a private party on the “European black list” on two different grounds: a) on the basis of precise information or material indicating that a decision of investigation, prosecution or condemnation for a terrorist act has been taken by a competent authority and that the decision is “based on serious and credible evidence or clues”; b) on the basis of a UN Security Council Resolution, in which the listing of the concerned party is confirmed. In both cases, the EU Council adopts the listing decision by consensus. The European regime does not explicitly provide the concerned parties with any meaningful protection.

Furthermore, we can observe the gradual growth of a complex UN system for dealing with terrorism-related issues. In addition to involving Member States as implementing authorities, the system includes different international actors: international organizations, such as the Financial Action Task Force (FATF, on money-laundering), Interpol, and the International Civil Aviation Organization (UN Res. 1617/05), together with regional organizations (UN Res. 1526/04).

Accordingly, a global structure is emerging, composed of several transgovernmental bodies: the Counter Terrorism Committee; the Committee established by UN Security Council Resolution 1540/2004; the Monitoring Group; the Sanctions Enforcement Support Team; the Analytical Support and Sanctions Monitoring Team; and the above-mentioned Sanctions Committee, which is at the center of this composite network, made up of States and regional and international organizations.

2. *Materials*

Main case:

- European Court of First Instance (Second Chamber), *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, Case T-228/02, 12 December 2006
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:331:0028:0028:EN:PDF>).

UN Documents:

- Resolution 1267 (1999), on measures against the Taliban (setting up the Sanction Committee)
(<http://daccessdds.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement>);
- Resolution 1373 (2001), on international cooperation to combat threats to

international peace and security caused by terrorist acts (setting up the Counter-terrorism Committee)

(<http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>);

- Resolution 1730 (2006), on general issues relating to sanctions
(<http://daccessdds.un.org/doc/UNDOC/GEN/N06/671/31/PDF/N0667131.pdf?OpenElement>);
- Resolution 1735 (2006), on threats to international peace and security caused by terrorist acts
(<http://daccessdds.un.org/doc/UNDOC/GEN/N06/680/14/PDF/N0668014.pdf?OpenElement>);
- Guidelines of the 1267 Committee for the Conduct of its Work, adopted on 7 November 2002, as amended on 10 April 2003 and revised on 21 December 2005, 29 November 2006 and 12 February 2007
(http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf).

European and Community Measures:

- Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>);
- Council Common Position 2003/651/CFSP of 12 September 2003 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2003/482/CFSP
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003E0651:EN:HTML>);
- Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R2580:EN:HTML>);
- Commission Regulation (EC) No 745/2003 of 28 April 2003 amending Council Regulation (EC) No 2580/2001 on specific measures directed against certain persons and entities with a view to combating terrorism
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:106:0022:0023:EN:PDF>);
- Council Decision 2002/460/EC of 17 June 2002, implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and

repealing Decision 2002/334/EC

(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0460:EN:HTML>).

Other European cases on the same issue:

- European Court of First Instance (Second Chamber, extended composition), *Abmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, Case T-306/01, 21 September 2005, ECR 2005 p. II-3533
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0306:EN:HTML>);
- European Court of First Instance (Second Chamber, extended composition), *Yassin Abdullah Kadi v Council and Commission*, Case T-315/01, 21 September 2005, ECR 2005 p. II-3649
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0315:EN:HTML>);
- European Court of First Instance (Second Chamber), *Faraj Hassan v Council and Commission*, Case T-49/04, 12 July 2006, ECR 2006 p. II-52
(<http://curia.europa.eu/en/content/juris/index.htm>);
- European Court of First Instance (Second Chamber), *Chafiq Ayadi v Council*, Case T-253/02, 12 July 2006, ECR 2006 p. II-2139
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0253:EN:HTML>);
- European Court of First Instance (Second Chamber), *Jose Maria Sison v Council*, Case T-47/03, 11 July 2007
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:199:0027:0027:EN:PDF>);
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3. *Analysis: The OMPI Case*

The Organisation des Modjahedines du peuple d'Iran (OMPI), founded in France in 1965, aimed to replace the Shah of Iran, and then the Mullahs, with a democracy. The OMPI originally had an armed branch operating inside Iran, but since June 2001 it has expressly renounced all military activity. A few months earlier, however, the UK Secretary of State for the Home Department had listed the OMPI as an organization to be banned under the 2000 Terrorism Act. The OMPI brought two cases against the Home Secretary's order, both of which were dismissed. As a consequence, the EU Council included the OMPI in the European black list (Council common position 2002/340/FCSP and Council decision 2002/334/EC). The OMPI challenged these EU decisions before the European Court of First Instance (CFI), maintaining that it violated its right to a fair hearing, the obligation to state reasons provided for in Article 253 EC, and the right to effective judicial protection. The CFI upheld the action brought by the OMPI and annulled the EU Council decision.

The CFI judgment is important for two reasons. Firstly, it is the first time that a European Court has agreed to review a listing measure for compliance with EU legal standards and principles. The previous cases (*Yussuf, Kadi, Hassan and Ayadi*: see *infra*, Ch. 3.5) had rejected that possibility. Here, however, the European measure in dispute had been adopted in application of a UN Security Council resolution and thus was a non-discretionary act. According to the Court of First Instance in those cases, it would have been inappropriate to carry out a scrutiny of that international measure under European law. The Court, therefore, reviewed the contested measures with exclusive reference to *jus cogens* obligations, and found it to be consistent with these. In the *OMPI* case, on the contrary, the European measure was not obliged by any international decision. It was, rather, a discretionary Council measure, based on a national (British) judicial order. As such, the measure had to be consistent with Community law and the European Convention on Human Rights.

This judgment is also important because it provides a comprehensive framework of the due process guarantees in place to protect suspected terrorists:

the right of defense, the duty to state reasons and the right to an effective judicial protection are carefully balanced against (and reconciled with) public security demands.

As far as the right of defense is concerned, the CFI acknowledged that *ex ante* (that is, prior to the adoption of the initial decision to freeze funds) notification of the evidence and a hearing for the parties concerned would jeopardize the effectiveness of the sanction, as it would forfeit the element of surprise. However, it also held the alternative cannot be the complete absence of such protections. In order to preserve the effectiveness of the sanction it is sufficient – according to the Court – that notification of the evidence and the hearing take place not before, but either simultaneously with or as soon as possible after the adoption of the *initial* decision to freeze the funds of the individual or organization in question. The same caution does not apply to *subsequent* decisions to confirm the freezing measure after re-examination of the case: in such cases, the funds are already frozen and it is accordingly no longer necessary to ensure a surprise effect (paras. 127-132). A more general limit arises when “overriding considerations concerning the security... or the conduct of... international relations” are at stake: that being the case, similar considerations “may preclude the communication to the parties concerned of *certain evidence* adduced against them and, in consequence, the hearing of those parties *with regard to such evidence*, during the administrative procedure” (para. 133, emphasis added).

Turning to the duty to state reasons, the CFI found that, in order to prevent the circumvention of defense rights based upon vague security concerns, it could not accept a statement of reasons merely consisting of a “general, stereotypical formulation”. On the contrary, “the grounds for such a measure must... indicate the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned” (para. 143). It is clear that considerations of public interest and the legitimate interests of the parties in question may prevent the public disclosure of specific reasons. However in such cases an exceptional, yet balanced, solution would consist in a “two-level” statement of reasons: a general one, together with the operative part of the decision, must appear in the published version of the measure, while an actual and specific statement of reasons for the decision may be brought to the knowledge of just the parties concerned (para. 147).

Finally, as far as the right to an effective judicial protection is concerned, here again the main restriction stems from security considerations that often induce the Council to raise objections that the relevant evidence and information is secret or confidential. The CFI softened this restriction, on the basis that an effective judicial protection “is all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights”; and, “since the restrictions imposed by the Council on the right of the parties

concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial”, it follows that “the Community Courts must be able to review the lawfulness and merits of the measures to freeze funds *without it being possible to raise objections that the evidence and information used by the Council is secret or confidential*” (para. 155, emphasis added).

Therefore, the *OMPI* judgment marks a shift in the CFI jurisprudence on terrorism-related issues towards a more promising approach, whereby security concerns are balanced against countervailing individual rights. It thus re-establishes the centrality of the rule of law, together with the power-checking mission of (European) administrative law.

4. *The European Case-Law on the Issue*

The CFI judgments can be divided into two strands. The first concerns European measures implementing global decisions to freeze assets. Since the content of such European measures is determined by UN decisions, the CFI limits itself to reviewing their legitimacy according to *jus cogens*, “understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible” (T-306/01, *Yusuf*, para. 277). Due to the lack of due process guarantees within *jus cogens*, it inevitably follows that the CFI declined to improve the standards of protection (see T-306/01, *Yusuf* and T-315/01, *Kadi*). The subsequent *Hassan* (T-49/04) and *Ayady* (T-253/02) cases followed the same basic path, but suggested a more proactive stance towards individual protections. Here the CFI, having regard to the fact that individuals are not entitled to be heard in person by the Sanctions Committee, required the government in question “to act promptly to ensure that such persons’ cases are presented without delay and fairly and impartially to the Committee, with a view to their re-examination”, and to provide the concerned parties with judicial review “against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination” (*Hassan*, para. 120).

The second strand concerns “autonomous” European measures, i.e. decisions that are not bound by previous UN Resolutions, but rather based upon judicial decisions adopted at the Member State level. In this context, the relevant legal parameter is not *jus cogens* obligations, but Community law and the ECHR. As a consequence, the CFI fully applies transparency and due process standards to such cases, balanced against the inevitable exigencies and time constraints imposed by security concerns. This different approach, first adopted in the *OMPI* case, has been relied on again more recently, both in the *Al Aqsa* case (T-327/03), in which a Council decision was annulled for insufficient statement of the reasons behind it, and in the *Sison* case (T-47/03), in which the CFI held that

“the breach of the applicant’s rights of defence is sufficiently serious for the Community to incur liability” (para. 240).

The European Court of Justice (ECJ) has thus far only dealt with issues indirectly related to terrorism. The most relevant case is *Ocalan* (C-229/05), where the ECJ confirmed its traditional restrictive understanding of the individual right to challenge European decisions (Article 230.4 EC Treaty). In the *Sison* case (C-266/05 P), the ECJ upheld the Council decision to prevent an individual from accessing the documents upon which her listing as a suspect terrorist was based. Finally, in the *Gestoras* and *Segi* cases (C-354/04 P and C-355/04 P) the ECJ affirmed that, due to its lack of jurisdiction over the second pillar (Common Foreign and Security Policy), it could not rule on EC liability for Council listing decisions.

However, new important developments have been announced. The *Kadi* case, in fact, was appealed before ECJ (C-402/05 P) and Advocate General Poiares Maduro delivered his opinion in the case on 16 January 2008. At least two points of this opinion need to be stressed. Firstly, *jus cogens* is questioned as the appropriate standard for reviewing the legality of European measures implementing UN Resolutions: according to the Advocate General, “the relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community” (para. 34). Secondly, while applying European standards to decisions concerning security matters, there is no reason – according to Maduro – for the Court to depart from its usual interpretation of due process and fundamental rights: “The fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law. In doing so, rather than trespassing into the domain of politics, the Court is reaffirming the limits that the law imposes on certain political decisions” (para. 45).

5. *Issues: Due Process and the Security Council*

In the *OMPI* case, the CFI re-established the reach of the rule of law and the due process principle over the asset freezing measures adopted by the EU, despite the fact that, in all of the previous cases, the same court did not apply those principles and protections to similar European measures implementing UN decisions (see the abovementioned *Yussuf*, *Kadi*, *Hassan* and *Ayady* cases). Does the *OMPI* case amount to a *révirement* of the Court of First Instance?

The answer is negative, for the simple reason that the *OMPI* standard still does not apply to European measures implementing UN decisions. Its reach is limited to autonomous European acts, i.e. EU Council measures that are not

bound by pre-existing UN listing Resolutions. Why should the EU – which is not a UN member – recognize the primacy of UN law over EU law? Why should a European Court review a European regulation implementing a UN rule according to international *jus cogens* norms alone?

The final outcome of this double standard raises doubts. The distinction between discretionary and non-discretionary European measures has the perverse consequence that suspected terrorists whose assets are first frozen by an EU decision enjoy rights and protections that those listed by the UN do not. In brief, the level of legal protection varies considerably depending on how efficient the EU decision-making process is, compared to that of the UN (as a rule, EU Member States send their listing proposals at the same time – as soon as they gather the relevant information – to both the competent European and UN institutions).

Four sets of questions are in order. First, is this bifurcated case law, which upholds or denies fundamental rights according to the discretionary or non-discretionary character of the EU measure at stake, acceptable? Is this double standard based upon a reasonable diversity of situations? Second, UN institutions are, of course, aware of the need to fill the accountability gaps existing in the UN listing procedure, and they are also aware of the need to reform the system in order to prevent the risk of an adverse court decision (see, for instance, *UN Second Report of the Analytical Support and Sanctions Monitoring Team*, S/2005/83, para. 54, and Annex I to the *Sixth Report of the Analytical Support and Sanctions Monitoring Team*, S/2007/132). Yet, is the 2006 revision of the UN delisting procedure (UN Res. 1730 and 1735) satisfactory, given that the procedure remains diplomatic in character? What if the ECJ upholds Maduro's Opinion, and decides to protect fundamental rights against UN-bound European measures? What would this imply for the domestic implementation of UN resolutions? Third, what happens beyond Europe? Do suspected terrorists enjoy the same "double standard", provided that some domestic measures are autonomous while others are UN-bound? Lastly, taking for granted that the only satisfactory remedy in this context must be global, is there any room for global administrative law to expand in this regard? Given that such a remedy would require a globalized due process and rule of law, how quickly can it emerge? And will it be the result of a top-down international political initiative, or the bottom-up rebellion of a domestic court, or both?

6. *Further Reading*

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4.2. The Organization for Prohibition of Chemical Weapons: The *Bustani*

Case

Bruno Carotti

1. *Background*

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction was signed in Geneva on September 3, 1992. It was opened for signature in January 1993 and entered into force on April 29, 1997. 182 States, representing 98% of the world’s population, are parties to the Convention.

The Convention established the Organization for Prohibition of Chemical Weapons (OPCW, Art. VIII of the Convention), based in the Hague, whose goal is to aid States in preventing the production of new chemical weapons and facilitating the destruction of existing ones within stipulated deadlines (although

this latter objective is conditional upon a specific declaration of the Member State). The Organization conducts inspections of suspected civil and military sites, provides assistance to States threatened by third parties and fosters the study of chemistry for peaceful uses. The Convention promotes cooperation between States, requires them to adopt the necessary implementation measures (e.g., impose sanctions for the construction of new weapons) and compels them to designate an authority responsible for the fulfillment of the objectives in this field. In ten years of activity, various programs have been established in order to achieve the Convention's goals; almost 3,000 inspections have been conducted; and it is estimated that, since the establishment of the OPCW, around 30% of the world's chemical weapons have been eliminated. The annual budget of the Organization is around 75 million Euros.

The bodies of the OPCW are the Conference of the State Parties, the Executive Committee and the Technical Secretariat. The Conference includes all of the Member States (Art. VIII, para. 9), and is the main body of the Organization, entrusted with the most important matters addressed by the treaty, on which it can make decisions and recommendations. The Executive Committee is charged with the implementation of the Convention. Composed of 41 members, it performs the functions provided for in the Convention, and those delegated to it by the Conference (Art. VIII, para. 30). The Technical Secretariat provides administrative support to the Conference and the Committee (Art. VIII, para. 23 et seq.).

The Organization is headed by a Director-General, who is elected by the Conference and holds office for a four-year term, which can be renewed once. The first Director was J.M. Bustani, a Brazilian citizen elected in 1997. In 2000, his mandate was renewed until 2005.

The United States is the Organization's main financier. Considering Bustani's leadership to be unsatisfactory, it presented a no-confidence motion to the Executive Committee in March 2002. The motion was rejected. The US then brought the motion to the Conference, which adopted it on April 22, 2002. Bustani was then removed from office and replaced by the Argentinean Rogelio Pfirter.

On 19 July 2002, Bustani appealed his removal to the Administrative Tribunal of the International Labour Organization, which has jurisdiction to hear claims brought by staff members against a number of international organizations, including the OPCW.

2. *Materials and Sources*

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- Statute of the Administrative Tribunal of the International Labour Organization adopted by the International Labour Conference on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992 and 16 June 1998 (<http://www.ilo.org/public/english/tribunal/stateng.htm>).

3. *Analysis*

Bustani argued that the decision terminating his contract was illegal. He asked for material damages and compensation for the “enormous pain, anguish and suffering” that the decision caused him. He intended to donate his winnings to the Organization, in order to fund activities of the Programme of International Cooperation (Technical Assistance to Developing Countries).

This case raised a preliminary question relating to the jurisdiction of the ILO Tribunal. The Convention requires that, before a dispute can be referred to the Tribunal, there be a previous examination by the Appeals Council, which is competent to hear appeals by staff members against administrative decisions concerning them. This procedure was unavailable in the Bustani case, as the impugned decision was adopted by the Organization’s highest authority. The Tribunal thus held that Bustani could appeal to it directly, since the decision was administrative in nature, final, and directly affected his interests.

On the merits, Bustani made a number of arguments. First, he asserted a procedural prejudice: the special session of the Conference that fired him was not convened according to the Convention (Art. VIII, paras. 19-21), and that its decision ought therefore to be annulled. Second, he claimed that the Conference had exceeded its powers: the norms establish the procedure for the selection of the Director-General, including the possibility to renew his mandate; nothing, on the contrary, is said about his removal. Removal is possible, in any event, only as a result of criminal or quasi-criminal behavior, which was not alleged in this case.

Third, he claimed the Conference was not competent to review the decisions of the Committee. Fourth, he argued that there was a breach of procedural protections and a violation of the principles of due process and natural justice: the Director-General was not informed of the charges against him, and neither was he allowed to contest them or to defend his interests. Finally, he argued that the Conference had not acted in the interest of the Organization, giving in instead to political pressure.

The Organization asserted that the loss of confidence in the Director-General was an exceptional event, justifying his removal (see part C of the decision of the Administrative Tribunal). It also argued that the Director-General should have pursued other remedies (such as negotiations, good offices or arbitration) before presenting his claim to the ILO Tribunal; furthermore, it affirmed the political and not administrative nature of its decision, and thus challenged the Tribunal's jurisdiction over the matter.

The Tribunal affirmed its jurisdiction over the case, holding itself competent to decide controversies relating to both the staff and the officials of international organizations, according to the Organization's declaration accepting the jurisdiction of the ILO Administrative Tribunal and Article VIII, paragraph 46 of the Convention.

The Tribunal reasoned that no other remedies were available, other than the Tribunal: the Appeal Council, internal to the Organization, operates under the authority and the control of the Director-General, so it was inconceivable that, once removed, he could have brought a claim before that body. In addition, the Appeal Council cannot review a decision of the Conference. It thus held it proper to affirm its own jurisdiction in this situation, in order to guarantee the fundamental right of judicial protection.

The Tribunal stressed the importance of ensuring the independence of international civil servants. This serves not only their own individual interests, but also the "proper functioning" of international organizations. The Tribunal thus recognized the potential conflict between the interests of the Organization and the very States that created it.

When the specialized organs of international organizations are in conflict with each other, their functional stability becomes more important: the Director-General's removal suggests, on the other hand, the vulnerability of even top international civil servants to external pressures. The Tribunal concluded that an officer with a fixed term cannot be removed on the basis of political evaluations, because these are highly discretionary. Objective reasons must instead be given (e.g., a serious breach of his duties) and respect for due process, through transparent procedures granting the right to defense, must be ensured.

4. *Issues: Due Process in the Internal Affairs of International Organizations*

The *Bustani* case highlights the importance of adopting an administrative law methodology in the international arena (here concerning the relationship between an international officer and an international organization).

This case also illustrates the common principle that international officers ought to be independent in the performance of their duties. In particular, their own government must not try to influence them. Only in this way can international administrations carry out their tasks autonomously and impartially. The European Commission provides a specific example of this principle in a different context (Art. 213 of the EC Treaty). In the *Bustani* case, however, different nuances begin to emerge. The Director-General's removal raised questions about the role of the specialized organs of an international organization, and the protection of the persons performing their functions from political influence. There is a clear difference between the officer-organization relationship, on the one hand, and the relationship between the executive bodies of an organization and political authority (e.g. States) on the other. A trace of this distinction can be found in the opinion of the Tribunal, in which it states, in response to the defendant's claim that it has no jurisdiction over a *political* act, that "a decision terminating the appointment of an international civil servant prior to the expiry of his/her term of office is an administrative decision, even if it is based on political considerations" (para. 10). Thus, the same issue discussed in national legal systems appears in the global arena: what are the boundaries between political and administrative power? Can the risk of undue influence be avoided by invoking the concept of a "political act"?

The *Bustani* case thus seems to affirm an important principle: political decisions should not influence the administrative functioning of an international organization. There must be a fiduciary relationship between political and administrative bodies, but this relationship ought not to jeopardize the regular exercise of the supranational administration's functions.

The case leaves us with the following question: is there a nascent principle of separation between politics and administration in the global legal order?

5. *Further Reading*

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4.3. The International Tribunal for the Law of the Sea (ITLOS): The *Juno Trader* Case

Diego Agus and Martina Conticelli

1. *Background*

A refrigerated cargo vessel (the *Juno Trader*), flying the flag of Saint Vincent and the Grenadines, was boarded by maritime officers of Guinea-Bissau.

According to the Guinean administration, the vessel was caught fishing unlawfully inside the exclusive economic zone of Guinea-Bissau. St. Vincent and the Grenadines asked the International Tribunal for the Law of the Sea (ITLOS) to review Guinea’s decision providing for the detention of the vessel and the confiscation of its cargo, and to declare whether the provisions of the United Nations Convention for the Law of the Sea (UNCLOS) governing this type of proceeding had been breached. The ITLOS ruled that the Guinean maritime administration had violated Article 73(2) of the Convention, which provides that arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security, as well as principles such as due process of law and reasonableness which, according to the Tribunal, were implicit in the provisions of Article 73.

The dispute originated from the alleged violation by the *Juno Trader* of the Guinean fishing legislation, which provides for the detention of the vessel and the confiscation of the cargo (Articles 56-58 of Decree-Law No. 6-A/2000 concerning Fisheries Resources and Fishing Rights in the Maritime Waters of Guinea-Bissau).

The normative ground of this case was the UNCLOS, which entered into force in November 1994 and which lays down a comprehensive legal regime for the world's oceans and seas, establishing the rules governing all uses of the oceans and their resources. Article 73 of the Convention provides that the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with its laws.

In seeking to settle any dispute concerning the interpretation or application of the Convention, each Member State is free to choose one or more of the following bodies: the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and two different arbitral tribunals.

The ITLOS is an independent judicial body composed of 21 members elected (by secret ballot) by States Parties to the Convention. Under Article 292 of the Convention, the Tribunal has jurisdiction over disputes between Member States concerning the prompt release of vessels and crews.

The dispute in this case involved two States, both Parties to the Convention: Saint Vincent and the Grenadines, and Guinea-Bissau. A private party, the owner of the *Juno Trader* (registered in Saint Vincent and the Grenadines and authorized to transport refrigerated dry products), intervened in the dispute, as did other governmental bodies of Guinea-Bissau: the Fisheries Inspection Service (which carried out the first inspection on board the *Juno Trader*); the Centre for Applied Fisheries Research (formed at the request of the National Fisheries Inspection and Control Service (FISCAP), which inspected the cargo on board the *Juno Trader* in the port of Bissau for the second time); the Fisheries Control Technical Committee (a technical body that met to consider both the serious fishing infraction and the inspection reports concerning the arrest of the *Juno Trader*); the Interministerial Maritime Control Commission (IMCC – the body charged with determining the amount of fines and other incidental remedies); and the Regional Court of Bissau (which decided on the ship owner's application for the release of vessel and crew, and that any procedure aimed at selling the fish and fishmeal found on board the vessel should be annulled pending judgment in the case).

2. *Materials and Sources*

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(http://www.itlos.org/case_documents/2004/document_en_257.doc);
 - United Nations Convention on the Law of the Sea of 10 December 1982
(http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm).

3. *Analysis*

St. Vincent and the Grenadines argued that Guinea's decisions ordering the detention of the vessel, the confiscation of its cargo and setting of a bond for its release were unlawful, as no breach of the national Guinean fisheries legislation by the *Juno Trader* had been proven. Notwithstanding the Guinean national court's jurisdiction to rule on the legality of these two national administrative acts, St. Vincent and the Grenadines claimed the right to bring the case before a global judicial body, the ITLOS, asking for the judicial review of those acts under the UNCLOS.

St. Vincent and the Grenadines thus asked the Tribunal to declare a breach of Article 73(2) of the UNCLOS, and to order the immediate release of the vessel and its cargo, either removing entirely the bond requirement, or at least setting this at a reasonable level. Guinea-Bissau responded that the ITLOS had no jurisdiction over the case, as the dispute concerned a national administrative procedure.

After affirming its jurisdiction over the case and declaring the admissibility of the claim, the ITLOS found there to have been a breach of Article 73(2), which, it argued, must be read in the context of Article 73 as a whole. According to the Tribunal, the Guinean administration failed to respect the elementary considerations of humanity and due process of law inherent in the obligation to

promptly release both vessels and crew; and the principles of fairness and reasonableness in setting the level of bond required. These principles do not appear explicitly in Article 73; they are, however, implied by the purposes of that provision. Finally, the Tribunal stressed the fact that between the time of the arrest of the vessel and the time of the application to the Tribunal, all national procedures in the case had been *inaudita altera parte*. In conclusion, the confiscation had been made in violation of due process and fines had been imposed without the requisite procedural guarantees.

4. *Issues: Global Bodies Reviewing National Administrative Decisions*

The case raises important questions concerning the role and power of global judicial bodies in reviewing national administrative acts. The limits of judicial review and the principles applicable by global courts to national administrative decisions require further analysis. In the particular context of the *Juno Trader* case, the issue was whether the ITLOS should have made reference only to UNCLOS principles or to other principles as well.

A second group of problems arises from the specific features of global administrative law. It is interesting to highlight the global function of traditionally national principles of administrative procedure, such as participation, due process and reasonableness.

A last group of questions concerns the interaction between global and national norms, emerging from the implementation of global decisions by national administrations. It is useful to compare the different levels of protection afforded by the global and national systems, and to examine the effects of their reciprocal interpenetration.

5. *Similar Cases*

On July 6, 2007, two applications were submitted to the ITLOS under Article 292 of the UNCLOS, relating to the release of two fishing vessels, flying the Japanese flag, boarded by the Russian coastguard patrol board while fishing in the Russian exclusive economic zone: the first application concerned the release of the 88th *Hosbinmaru* and of 17 members of its crew; while the second concerned the release of the 53rd *Tomimaru*. On August 6, 2007, the ITLOS ordered release of both vessels upon the posting of a bond.

About these events, see the following links:

- ITLOS, Press release, ITLOS/Press 110, 6 July 2007 (http://www.itlos.org/news/press_release/2007/press_release_110_en.doc);

- ITLOS, Press release, ITLOS/Press 112/113, 6 August 2007
(http://www.itlos.org/news/press_release/2007/press_release_112_en.doc)
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6. *Further Reading*

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- e. S. ROSENNE, *Provisional Measures in International Law: the International Court of Justice and the International Tribunal for the Law of the Sea*, Oxford (2005);
- f. J. SEYMOUR, “The International Tribunal for the Law of the Sea: A Great Mistake?”, 13 *Indiana Journal of Global Legal Studies* 1 (2006);
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- i. ID., “Le Tribunal international du droit de la mer et la multiplication des juridictions internationales”, 3 *Rivista di diritto internazionale* 726 (2000).

4.4. The World Bank Inspection Panel: The *Indian Mumbai Urban Transport Project Case*

Mariarita Cinci

1. *Background*

The World Bank Inspection Panel is a forum established in 1993 by a joint resolution of the two organizations that together constitute the World Bank (WB): the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The Panel was established to evaluate requests for inspections by private citizens claiming that their interests have been, or could be, adversely affected by World Bank-financed projects, carried out in violation of internal Bank procedures.

The Mumbai Urban Transport Project case concerns a project financed in part by the IBRD (US\$ 463 million) and in part by the IDA (US\$ 79 million), making a total WB commitment of US\$ 542 million and a total project cost (including funding from Bank and non-Bank sources) of US\$ 945 million. The project, the third most costly ever for the WB in India, and the 6th most costly worldwide (in the transportation sector), was approved by the WB Board on June 18, 2002, and was intended to create substantial improvements in the Mumbai (India) transport system. It included the demolition of several homes and shops, and the transfer of 77,000 residents to other areas. It was due to be completed by June 30, 2008.

2. *Materials and Sources*

- World Bank Inspection Panel (www.inspectionpanel.org);
- India: Mumbai Urban Transport Project (2004) (<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20223785~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>);
- Panel Operating Procedures; World Bank Policies and Procedures; Resolution Establishing the Panel (September 23 1993) (<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173262~menuPK:64129254~pagePK:64129751~>

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- 1996 Review of the Resolution
(<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1996ReviewResolution.pdf>);
 - 1999 Clarification of the Second Review
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 - WB Policy on Involuntary Resettlement
(<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTENVIRONMENTNATRESLAW/0,,contentMDK:20675447~menuPK:1737138~pagePK:148956~piPK:216618~theSitePK:1001743,00.html>);
 - Press Release on WB Board discussion on Inspection Panel Investigation of Mumbai Urban Transport Project
(<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/MUTPPressRelease.pdf>).

3. *Analysis*

The Panel received four requests for inspection (on April 28, June 24, November 29 and December 23, 2004) by non-governmental organizations (NGOs) representing local businesses and residents.

The Panel processed all of the requests jointly, due to their common subject matter. The 6 km Santa Cruz-Chembur Link Road was the subject of the first three requests, and the fourth request addressed the other Mumbai east-west road link (Jogeshwari-Vikhroli). The Requestors alleged violations of Operational Bank Policies and Procedures, in particular regarding the Project Resettlement and Rehabilitation scheme under which they were entitled to an area of 225 square meters, regardless of the size of the actual area on which the buildings scheduled for demolition stood. Some of the Requestors objected to the classification of their particular area as a slum, and to the decision to be moved to a resettlement site, called Mankhurd, located near the main municipal dump, alleging that it was one of the most polluted areas in Mumbai.

Considering the violations alleged in the requests, the two WB Management reports on the first two requests (May 27 and July 28, 2004) and a provisional inspection of the affected area (June 22-27, 2004), the Panel submitted a report to the WB Board of Executive Directors (September 3, 2004). The Panel declared the requests to be admissible, and requested authorization to carry out an inspection. The Board approved the requests on September 24, 2004.

Following an inspection, during which the Panel also verified the

admissibility of the third and fourth requests, it issued an *Investigation Report*, and submitted it to the WB Board on December 21, 2005. The Panel made three significant observations. First, it acknowledged the project's lack of compliance with the WB's policies, particularly with regard to policy OD 4.30 – Involuntary Resettlements, in view of the fact that the WB had failed to consult with parties affected by the relocation. Second, the Panel observed that the project did not allow the people affected to appeal in the event of disagreement. Lastly, the Panel also noted that almost all responsibility for the relocation process had been delegated by the Government to NGOs, which were unable to handle the enormous task. On February, 27 2006, the WB Management submitted its own Report and Recommendations to the Board in response to the Panel's observations, in which it recognized the claims put forth by the Panel (lack of opportunity to appeal, inappropriate delegation of responsibility to NGOs) and proposed an Action Plan to render the project compliant with the procedures of the Bank.

The Board decided to suspend funding as an initial precautionary measure (March 1, 2006); to approve the Management's Action Plan and the Panel's Investigation Report (March, 28 2006), defining how the project would be monitored (a progress report of the WB Management to be submitted within 6 months of the Board meeting, followed by a report from the Panel on the progress of the project); and to continue funding the project until June 29, 2006. With regard to the monitoring of the project, on March 1, 2007, the Management submitted its Progress Report to the Board of Executive Directors, which stated that progress had been made on many of the measures contained in the Action Plan, and that the implementation of rehabilitation and resettlement measures had improved. In its progress report, the Panel recognized the Management's efforts since March 2006, noting, however, that a number of issues still needed to be resolved, and that many of the targets listed in the Management's Action Plan had not been met.

4. *Issues: The Participation of Citizens in Global Administrative Proceedings*

The above case provides an example of procedures that grant citizens the right to participate in global administrative proceedings. In the initial stage, participatory rights are granted by the WB and national authorities, and the parties affected by the project in question are informed. Another chance to participate arises at the inspection phase. Part VII of the Panel's Operating Procedures grants broad participation in inspections to the interested parties (the Panel hears the injured parties who have forwarded the request, the relevant WB officials, governmental representatives of the country benefiting from the loan, and the interested local NGOs; moreover, all of these parties can submit documents on their own

initiative), as well as to “any member of the public able to provide information considered relevant in assessing the request”.

In this case, the Eligibility Report and the requests for information offer indirect evidence of how the procedures in the initial stage of participation function; the Investigation Report instead concerns the second stage. They are particularly useful in helping us assess whether the operative relationship is only bilateral (private party – international organization) or perhaps rather trilateral (private party – country benefiting from the loan – international organization) in nature. In other words, they help us to better understand whether the activity scrutinized by the inspection must be attributed solely to the global actor (WB staff and institutions), or also to the State involved.

This case also provides us with an insight into other, more general matters tied to the functioning and nature of the Panel.

Considering that the Panel does not actually take decisions, but rather carries out inspections and makes recommendations, one might wonder whether the legal function of the body is to resolve disputes or to review the decisions of other bodies. To answer this, we must examine the Establishing Resolution and Operating Procedures, in order to first address some preliminary questions: what conditions trigger a Panel intervention? Who sits on the Panel? Is the Panel a genuinely third party review mechanism? Can its decisions be appealed? And finally, even if it cannot be defined as a mature dispute resolution body, can it at least be considered an embryonic one, given its protection of the participation rights of interested parties?

5. *Further Reading*

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4.5. Participation of Indigenous People: The Guatemala Marlin Gold Mine

Gianluca Squeo

1. *Background*

Guatemala is a Latin American country in which social injustices toward the indigenous community are widespread. Indigenous people make up more than 50% of the total population, and are excluded from political life. Local, non-indigenous elites hold the economic and social power. This situation persists despite constitutional protection for the local cultural patrimony and ethnic minorities, and the Agreement on Identity and Rights of Indigenous Peoples that the Guatemalan Government signed in 1995 with the *Unidad Revolucionaria Nacional Guatemalteca*.

Implementing neo-liberal policies aimed at attracting foreign capital, the Guatemalan Government in 1996 hired *Montana exploradora SA* to undertake mining explorations in San Marcos County. Mining exploration is considered an activity of public interest by Article 125 of the Guatemalan Constitution. The relevant feasibility studies were concluded in June 2003, focusing on the possibility of expanding gold and silver strip mines near the villages of Sipacapa and San Miguel Ixtahuacan.

On November 27, 2003, the Government issued the excavation concession. Glamis Ltd. (a local branch of *Montana exploradora SA*) sought financing from the International Finance Corporation (IFC). The involvement of IFC in the project was considered necessary in order to avoid the political risks of unprecedented large-scale excavation activities in Guatemala. In June 2004, the IFC granted 45 million dollars in financing.

In January 2005, the Colectivo ecologista Madreselva (CEM), an NGO fighting for indigenous peoples' rights, made an official complaint to the Compliance Advisor Ombudsman (CAO), the independent recourse mechanism for the private sector arms of the World Bank Group. The NGO cited the negative impact of the project on the environment and the inadequate procedures for consulting with the indigenous people. On June 12, 2006, after a follow-up report from the CAO, a coalition of NGOs (including the Bank Information Center, Halifax Initiative Coalition, Friends of the Earth and Oxfam America) lodged another complaint.

In March 2005, the CAO upheld the claim. On September 8, 2005, it prepared an assessment report containing some suggestions for promoting the participation of all of the parties involved. The CAO then prepared two follow-ups: the first one after a mission of October 8, 2005; the second one after a mission that took place from January 23 to February 2, 2006.

In the meantime, on June 18, 2005, the Guatemalan Government did organize a public consultation in order to seek the opinion of the Sipakapa population concerning the mining activities. Eleven out of thirteen voting districts voted against the continuation of the mining activities, one abstained and only one voted in favor. *Montana exploradora* asked the Constitutional Court to invalidate this vote. Instead, the Court affirmed the results of the public consultation in a decision of April 6, 2006.

2. *Materials*

- International Labour Organization, Indigenous and Tribal People Convention n. 169/1989 (<http://www.wwda.org.au/indig1.pdf>);

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- Montana Exploradora de Guatemala S.A., 2004 Land acquisition procedures submitted to IFC
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- CAO, 2005 Assessment Report to Complaint
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- CAO, 2005 Assessment Report to Complaint (supporting tables)
(<http://www.cao-ombudsman.org/pdfs/CAO-Marlin-assessment-English-7Sep05.pdf>);
- IFC, Response to CAO 2005 Assessment Report
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3. *Analysis*

The main issue regarded the participation of indigenous peoples in the decisions of the central Government. The NGOs involved criticized the violation of the rules requiring the Government to establish suitable consultation procedures in order to protect the rights of indigenous populations. One of these rules is embodied in Resolution n. 169 of the International Labour Organization, which requires local governments to guarantee the participation of indigenous peoples in decisions affecting their interests. It specifies that “effective participation” implies procedures that give populations a real opportunity to express their opinion.

In general, the NGOs asserted a lack of transparency in all the procedures used to obtain mining exploration rights, acquire land and begin excavations: furthermore, the consequences for the local environment were hidden from public opinion. The importance of transparency in mining activities is affirmed in Article 81 et seq. of the G8 Agenda for Growth and Responsibility in the World Economy for 2007.

In the view of the NGOs, the lack of transparent procedures and participation of the indigenous people could be explained by the intention of the Government and the mining company to hide the environmental consequences of the mining activities. The planned use of cyanide (a chemical compound used during the processes of mining) to extract gold and silver would have inflicted irreversible damage on the environment, including on the supply of clean water.

Goldcorp Inc. (which acquired Glamis Gold Ltd. in 2002) denied all of these claims, arguing instead that the indigenous peoples’ rights had been respected, as foreseen by the local government and by company policies. As a consequence, it maintained that the participation rights of affected parties had been respected, and that all the necessary measures had been taken to avoid harm to the local environment. For example, the company asserted that all the relevant information regarding the land acquisition procedures had been publicized in the main newspapers and in the broadcast media. Furthermore, *Montana exploradora* demonstrated that funds had been periodically granted to the local NGOs in order to promote trade and employment and to improve the economy. In the

end, the company maintained that the local population had been consulted periodically and that its requests had been considered.

The CAO examined every aspect of this controversy. It held the concerns regarding the water pollution to be unfounded, and also found that the measures taken to reduce the social and economic risks to be adequate. The CAO also held, however, that the consultation proceedings had been inadequate. The public disclosures had been written up in a technical language, inaccessible to the uninitiated. Moreover, an insufficient understanding of the local culture and traditions was a key cause of the many unfruitful attempts at constructive dialogue. In other words, the CAO found that, in spite of the numerous consultations with the indigenous people, these had not represented effective participation.

4. *Issues: Participatory Rights within the Global Order*

The main problem in this case was the degree of effective participation. According to the IFC, the original guarantees provided by the Government of Guatemala and the mining company were inadequate. As a consequence, the IFC required the adoption of more effective measures to promote the participation of the indigenous peoples, as a condition of financing. These measures were considered adequate by the CAO.

Therefore, we can conclude that the appropriate degree of participation is variable. At least three factors have to be considered: the level of the government (national or supranational) in which the participation is granted; the transparency of proceedings; and the issue of which institution evaluates the level of access to participation. The first and the last factors are directly related, as we can see from the CAO's attempt at conciliation. On first impression, this attempt seems unsatisfactory, for two reasons. First of all, the mining company opposed it and the *Colectivo Madreselva* thought that it was inadequate (because it did not consider the environmental damages). Secondly, it failed to set up a constructive dialogue between the parties involved. But it is possible to say (even if such a conclusion is not entirely grounded in the documents) that CAO involvement helped to launch a public consultation that helped to resolve the issue in question. Therefore, the participatory rights that were denied the national level and then evaluated at a global level were finally reconsidered at the national level.

There is also a direct relationship between participation and transparency. In this case, there was a conflict over the level of the information provided to the indigenous people. Both parties agreed that the level of transparency of the procedures at the beginning had influenced the manner in which the participatory rights had been exercised. But they disagreed over the adequacy of the information provided: Goldcorp and the Guatemalan Government argued that it

was adequate, while the NGOs argued that it was not, due to the lack of transparency.

Finally, there are at least three other contingent factors influencing participation. The first is related to the limits upon participation that are imposed in the proceedings. One example is the time limit within which every party has to send its views to its counterpart. The second factor is related to the forms of participation. The methods adopted by the *Montana exploradora* to consult the indigenous people do seem formally adequate, but in this case they proved quite inadequate in practice. The manner in which information was provided, in using highly technical language, ignored the needs of the consulted party and in fact became itself an obstacle to a full understanding of the issues involved, thus producing a distorted result.

The third and last factor is related to the parties. The Montana case involved private parties (indigenous peoples), the national NGOs that appealed to a supranational institution, a multinational company, and a supranational institution. Each party had a different concept of participation.

In conclusion, this case is important because it underscores the connections between national and global law. The right to participate in public decisions intersects with both of these levels. This intersection does, however, generate tensions, which are only increased by the different concepts of procedural protection in play and the importance of the interests at stake.

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5. JUDICIAL GLOBALIZATION

5.1. The Rise of International Administrative Tribunals: The *Mendaro*

Affair

Mariangela Benedetti

1. *Background*

A civil or public servant is a civilian career public sector employee working for a government department or agency. An international civil servant is a civilian career public sector employee working for an international organization. It is essential that international organizations be able to control their own personnel, because this allows them to accomplish their mandate and to express their own opinions, independently of the individual Member States. The international civil service should be unaffected by competing national policies. Because staff members are recruited from all over the world, the choice of a particular municipal law in regulating them would be arbitrary. Allowing an international civil servant to use his or her municipal law would subject the organization to pressure from national governments. Furthermore, multinational personnel are expected to act only in the interests of their organizations and not of their national States. International civil servants are therefore generally governed by the internal authority of their organization, rather than by the municipal law of the Member States.

International organizations enjoy certain privileges and immunities under the laws of their Member States, much as do the governments of foreign States. One such immunity is immunity from suit in the national courts of the Member States. For example, under Article 104 of the UN Charter, the UN shall enjoy in the territory of its members such legal capacity “*as may be necessary for the exercise of its function and the fulfillment of its purpose*”. Under Article 105, the UN shall enjoy in the territory of each of its members all *privileges and immunities* as are necessary for the

fulfillment of its purposes. These articles were implemented in the United States by the International Organizations Immunity Act (IOIA).

The IOIA provides that international organizations shall enjoy the “same immunity” as is enjoyed by foreign governments, except to the extent that they waive it. The US Federal Court of the DC Circuit has interpreted this provision to apply not only to waivers that are made in the context of a specific case or contract, but also to more general waivers that may be found in an organization’s charter agreement. Thus, it has found that organizations have waived their statutory immunity where the immunity provisions of their charter agreements contemplate more limited protections from suit than the IOIA provides.

The *Mendaro* case involved a claim against the World Bank by a former employee, who alleged that she was subjected to a pattern of sexual harassment and discrimination in the course of her employment. While conceding that an employment dispute would ordinarily be immune from judicial scrutiny, nevertheless she argued that in this case the World Bank could be brought before a national judge. Interpreting the World Bank’s broad waiver narrowly, the Circuit Court disagreed, noting that it was well established under international law that an international organization is entitled to such immunity from the jurisdiction of a Member State as is necessary to fulfill its organizational purposes. It therefore argued that the “unclear” scope of the waiver provision should be interpreted so as to advance the objectives of the institution. Thus, a waiver that would enable the organization to pursue its goals more effectively should be liberally construed, while a waiver that would subject the organization to suits that could frustrate its efforts are “inherently less likely to have been intended,” and should be carefully scrutinized.

Reading the Bank’s waiver provision in the context of the objectives set out in the Articles of Agreement, the Court concluded that waiving immunity from suits arising out of its internal administrative affairs would not advance the Bank’s organizational objectives, and would in fact be likely to impede them. For the Court, judicial scrutiny of the Bank’s employment practices would yield little in terms of improving the Organization’s ability to recruit and retain qualified staff, as it already had an administrative grievance mechanism in place. Such scrutiny could impose onerous administrative costs, by obliging the Organization to adhere to a patchwork of potentially conflicting national employment laws. The Court therefore concluded that claims arising out of internal administrative or employment disputes did not fall under the general waiver of immunity.

2. *Materials*

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- Statute of the Administrative Tribunal of the Asian Development Bank
(http://www.adb.org/ADBT/ADBT_Statutes.pdf);
- Statute of Administrative Tribunal of International Labour Organization
(<http://www.ilo.org/public/english/tribunal/stateng.htm>);
- International Organization Immunities Act, United States, 1945
(<http://www.yale.edu/lawweb/avalon/decade/decad034.htm>);
- Civil Rights Act, PL 88-352, 88th Congress, H. R. 7152, 8 July 1964
(<http://usinfo.state.gov/usa/infousa/laws/majorlaw/civilr19.htm>).

3. *Analysis*

Ms. Mendaro claimed that, during her employment in the International Bank for Reconstruction and Development, she had been the victim of sexual harassment and discrimination by other Bank employees. She further contended that the Bank refused to promote her to the position of consultant, although she already performed some of the duties of consultant. She complained to the Bank about these problems through the normal administrative channels, but it did not investigate her complaint effectively. Some time after Ms. Mendaro made these complaints, the Bank fired her.

After the termination of her employment, she filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging discrimination and retaliatory termination on the basis of sex, in violation of Title VII of the Civil Rights Act of 1946. The EEOC area office dismissed the complaint for lack of jurisdiction, finding the World Bank immune as an international organization. Ms Mendaro decided to sue the Bank before the United States District Court for the District of Columbia. The Bank sought dismissal of the case, claiming immunity from the jurisdiction of Member States in suits arising out of its

internal administrative affairs. The District Court dismissed the complaint for lack of jurisdiction.

Ms. Mendaro appealed to the Court of Appeals for the DC Circuit. She argued that, while the World Bank clearly enjoyed the immunity granted to international organizations, its charter contained an effective waiver of immunity from national suit by stipulating the conditions under which actions may be brought.

The Court of Appeals held that immunity from suit fully applied to the Bank's employment contracts and its relations with its own staff members.

On April 30, 1980, the WB Board of Governors had approved the establishment of the World Bank Administrative Tribunal. The Tribunal was created to give employees legal recourse against institutional actions, which are alleged to violate their legal rights. On December 27, 1983, Mendaro filed an application before the WB Administrative Tribunal.

In determining the nature of Mendaro's complaint, the Tribunal examined whether it had jurisdiction over sexual harassment and discrimination. Article II, section 1 of the Administrative Tribunal Statute confers authority on the Tribunal to hear an employee's grievances "upon any application by which a member of the staff of the Bank alleges non-observance of the contract of employment or terms of appointment of such staff members". The Tribunal held that, although the employment contract constitutes the chief statement of the rights and duties of the Bank *vis-à-vis* its employees, it is not an exhaustive statement. The contract is just one of many elements, which collectively establish the conditions of employment operative between the Bank and its staff members. Therefore, in deciding Mendaro's case, the Tribunal had to decide whether freedom from sexual discrimination and harassment was an implied provision of a WB employment contract. This question it answered affirmatively, acknowledging that otherwise Bank employees would have no legal means for enforcing such rights.

The second issue analyzed by Tribunal was the question of respect for time limits. Because all of the pertinent events giving rise to the application took place prior to July 1, 1980, the application, in order to be timely, had to meet the conditions set forth in Article XVII, which requires that the cause of complaint must have arisen after January 1, 1979, and that the application must have been "filed within 90 days after the entry into force of the present Statute," that is, by September 29, 1980.

Mendaro sought to bring her case within Article II by invoking the decision of the United States Court of Appeals of September 27, 1983, and the filing of her application with the Tribunal within ninety days thereafter.

The Tribunal did not accept this argument. The decision of the Court of Appeals could not be regarded as "the occurrence of the event giving rise to the application" mentioned in paragraph 2(ii)(a) of Article II, because this language

refers to the allegedly wrongful action taken by the Bank. Nor could the US court's decision be regarded as representing an exhaustion of the "remedies available within the Bank Group" mentioned in paragraph 2(ii)(b) of the same Article.

As an exception to the general principle laid down in Article II, which "reflects a desire to bring cases to the Tribunal without delay", Article XVII cannot be construed so as to "render the time limits of the Statute almost ineffective".

In 1985, the Tribunal dismissed Mendaro's claim due to the expiration of the statutory time for filing it.

4. *Issues: The Jurisdiction of International Administrative Tribunals*

The particular nature of employment in international organizations necessitates the development of a *corpus juris* unique to each, because these organizations are established under, and governed by, their own constitutions or statutes.

International law has generally recognized international organizations' immunity from suit in national courts. This immunity is traditionally meant to be limited to what is necessary for the organization to function. Where the immunity is not necessary to the functioning of the organization or even gets in the way, the organization can waive it. The *Mendaro* court faced the question of whether immunity from suit by an employee is necessary to the functioning of the World Bank. In finding immunity necessary, the court saw the need for the international civil service to be unaffected by competing national policies. Because staff members are recruited from all over the world, a choice of a particular municipal law would be arbitrary.

The nature of Mendaro's complaint involves an important right. The tribunal examined whether freedom from sexual harassment and discrimination is an implied provision of a contract with the Bank. If sexual harassment and discrimination are viewed as breach of contract, then the Tribunal would have subject-matter jurisdiction over Mendaro's complaint. If, on the other hand, freedom from sexual discrimination is not an implied provision of an employee contract with the Bank, then Bank employees have no legal means for enforcing such rights.

The *Mendaro* case offered the Tribunal the opportunity to affirm the possibility, alluded to in the Administrative Tribunal Statute, of extending its jurisdiction over a broader range of staff complaints, if and when necessary. Under the Administrative Tribunal's Statute, the nature of claims and remedies available to staff members of the World Bank appear to be very limited. In the same manner, the prior case law interpreting the Statute did not seek to expand or broaden the Tribunal's jurisdiction. The issue in this case was whether the

Tribunal would assert broader jurisdiction over this complaint or interpret the statute narrowly, thereby leaving Mendaro without legal redress. The decision was significant in that it interpreted the Administrative Tribunal's jurisdiction *ratione materiae* fairly liberally.

International administrative tribunals guarantee an effective remedy for the decisions made by supervisors and officials in managing the workforce of a given international organizations. Employees may obtain a final, binding determination of their workplace claims or grievances

Why did international administrative tribunals come into existence? The reason is that, when an administrative power harms the rights of its employees, only judicial review can accord due process to the aggrieved party. Where international organizations do not offer internal legal mechanisms to their employees for resolving staff grievances, national courts appear increasingly prepared to assert jurisdiction, thereby interfering with the efficiency of the organizations and creating the risk of conflicting employment regulations applying within the same organization, as each nation seeks to apply its own laws.

5. *Similar Cases*

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(<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/EXTTRIBUNAL/0,,contentMDK:20579858~menuPK:64214668~pagePK:64214693~piPK:64214661~theSitePK:570681,00.html>);
- De Merode, WBAT Decision no. 1 (1981)
(<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/EXTTRIBUNAL/0,,contentMDK:20579851~menuPK:64214668~pagePK:64214693~piPK:64214661~theSitePK:570681,00.html>);
- Administrative Tribunal of the Asian Development Bank, Amora, ADBAT Decision no. 24 (1997)
(<http://www.adb.org/Documents/Reports/ADBT/ADBT0024.asp>);
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(<http://www.adb.org/Documents/Reports/ADBT/ADBT0035.asp>).

6. *Further Reading*

- a. C.F. AMERASINGHE, "The World Bank Administrative Tribunal", 31 *International and Comparative Law Quarterly* 748 (1982);

- b. M. AKEHURST, *The Law Governing Employment in International Organizations*, Cambridge Studies in International and Comparative Law, Cambridge (1967);
- c. J. R. BULKELEY, “Depoliticizing United Nation Recruitment: Establishing a Genuinely International Civil Service”, 22 *New York University Journal International Law and Politics* 749 (1990);
- d. G.H. GLEEN, M.M. KEARNEY, D.J. PADILLA, “Immunities of International Organizations”, 22 *Virginia Journal of International Law* 247 (1982);
- e. J. GOMULA, “The International Court of Justice and Administrative Tribunals of International Organizations”, 13 *Michigan Journal of International Law* 83 (1991);
- f. R.A. GORMAN, “The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank”, 25 *Development of Int’L. Employment Law* 423 (2005)
(http://www.law.uiuc.edu/publications/cil&pj/archive/vol_25/issue_3/GormanArticle25-3.pdf);
- g. E. JIMÉNEZ DE ARÈCHAGA, “The World Bank Administrative Tribunal”, 14 *International Law and Politics* 895 (1982);
- h. T. MERON, B. ELDER, “The New Administrative Tribunal of the World Bank”, 14 *New York University Journal of International Law and Politics* 1 (1981);
- i. F. WRIGHT HENDERSON, “How Much Immunity for International Organisations?: *Mendaro v. World Bank*”, 10 *North Carolina Journal of International Law & Commercial Regulation* 487 (1985).

5.2. Settling Global Disputes: The Southern Bluefin Tuna Case

Bruno Carotti and Martina Conticelli

1. Background

In 1999, New Zealand and Australia reported a breach of the Convention for the Conservation of the Southern Bluefin Tuna (CCSBT) by Japan, which had exceeded the total allowable catch established by the Commission for the Conservation of Southern Bluefin Tuna.

When negotiations failed, Australia and New Zealand brought a claim before

an UNCLOS Arbitral Tribunal, constituted in accordance with Article 286 and Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). Before the award was rendered, both States appealed to the International Tribunal for the Law of the Sea (ITLOS), to request provisional measures.

Questions arose concerning the applicable law in, and the jurisdiction of, both Tribunals, because the States parties to this dispute are members of both the CCSBT and the UNCLOS (see *supra*, Ch. 4.2). The former, signed in 1993, includes only Japan, New Zealand and Australia, and is addressed to the protection of a single species of tuna. The latter, which entered into force in 1994, involves 157 states and is a general convention (one of the most important achievements of the United Nations). Both Conventions provide for their own dispute resolution mechanisms.

In addition to the States, the Commission for the Conservation of Southern Bluefin Tuna was also involved. This is a global administrative body responsible for the enforcement of the CCSBT by Member States; it has the power to adopt restrictive measures addressed not only to States, but also to private actors (the official text refers to “fishing entities”), as well as to third States that are not party to the Convention at all.

Two tribunals thus had potential jurisdiction in this case, an Arbitral Tribunal and the ITLOS. Both tribunals are judicial organs established under the provisions of UNCLOS. Japan challenged the ITLOS’s jurisdiction, arguing that the CCSBT provided for a specific dispute resolution mechanism of its own, different from that established by the UNCLOS.

2. *Materials*

- International Tribunal for the Law of the Sea, Southern Bluefin Tuna Cases, August 27, 1999, n. 3 and 4
(http://www.itlos.org/case_documents/2001/document_en_116.pdf);
- Arbitral Tribunal constituted 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
(<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=%3Ca%20href=javascript:goHome%3EPublications%3C/a%3E%3E%20%3Ca%20href=/ICSID/ICSID/ViewNewsReleases.jsp%3ENews%20Releases%3C/a%3E&pageName=Archive%20Announcement7>);
- Convention for the Conservation of Southern Bluefin Tuna
(http://www.ccsbt.org/docs/pdf/about_the_commission/convention.pdf);
- United Nations Convention for the Law of the Sea (UNCLOS), art. 64; art.

116-119; art. 286-296; Annex VI

(http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf);

- ITLOS, Rules of the Tribunal
(www.itlos.org/documents_publications/documents/Itlos.8.E.27.04.05.pdf);
- Rules of Procedure of the Commission for the Conservation of the Southern Bluefin Tuna (CCSBT)
(http://www.ccsbt.org/docs/pdf/about_the_commission/rules_of_procedure_of_the_commission.pdf);
- Resolution to Establish an Extended Commission and an Extended Scientific Committee and Rules of Procedure of the Extended Commission for the Conservation of Southern Bluefin Tuna
(http://www.ccsbt.org/docs/pdf/about_the_commission/the_Extended_commission.pdf);
- CCSBT, 2000 Action Plan
(http://www.ccsbt.org/docs/pdf/about_the_commission/action_plan.pdf);
- CCSBT, Resolutions pursuant to the 2000 Action Plan
(http://www.ccsbt.org/docs/pdf/about_the_commission/resolutions_on_the_action_plan.pdf);
- CCSBT, Sbt Statistical Document Program, November 2006
(www.ccsbt.org/docs/pdf/about_the_commission/trade_information_scheme.pdf);
- Terms of References for Subsidiary Bodies
(http://www.ccsbt.org/docs/pdf/about_the_commission/terms_of_reference_for_subsidary_bodies.pdf).

3. *Analysis*

Australia and New Zealand claimed that the dispute should be heard by the ITLOS, on the ground that there had been a violation of the UNCLOS. Through the unilateral adoption of some experimental fishing programs, Japan had breached Articles 64, 116 and 119 (Art. 64 provides that Member States of the UNCLOS shall cooperate directly or through appropriate international organizations to ensure the conservation of highly migratory species; Art. 116 et seq. provide for the right of Member States to engage in fishing). Australia and New Zealand asked for precautionary measures to force Japan to immediately cease its experimental fishing programs. Japan argued that the jurisdiction of ITLOS was limited to disputes closely related to the interpretation of UNCLOS, and could not be extended to controversies arising out of special conventions.

Each tribunal resolved the question of the applicable law differently, though both recognized the existence of a plurality of norms. The ITLOS gave prevalence to the provisions of the Montego Bay Convention, to which the CCSBT is complementary (in accordance with Articles 64, 116 and 119 of UNCLOS). The UNCLOS Arbitral Tribunal, by contrast, based its decision on Article 16 of the CCSBT and its Annex, which set out the rules for the arbitration of disputes arising under the Convention. It stated that this norm constituted a *lex specialis*, which trumped the competing UNCLOS provisions. It thus denied its own jurisdiction over the dispute, and left it to the parties to negotiate a solution between themselves.

4. *Issues: Global Judicial Review*

The case raises a number of different general questions. The first group relates to the legality of global administrative decisions and to the system of judicial review. Do global administrative decisions exist? If such decisions provoke a conflict between States, can an external, global judicial body intervene? What shall the applicable law be? What are the criteria for this decision?

A second group of questions addresses the relationships between different global regulatory regimes. Among the multiple regimes, who ultimately prevails, and who decides this?

5. *Further Reading*

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- b. D.J. DEVINE, "Compulsory Dispute Settlement in UNCLOS Undermined?", 25 *South African Yearbook of International Law* 97 (2000);
- c. C.E. FOSTER, "The «Real Dispute» in the Southern Bluefin Tuna Case", 16 *International Journal of Marine and Coastal Law* 571 (2001);
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- e. J. PEEL, "A Paper Umbrella which Dissolves in the Rain", 3 *Melbourne Journal of International Law* 53 (2002);
- f. V. RÖBEN, "The Southern Bluefin Tuna Cases: Re-Regionalization of the Settlement of Law of the Sea Disputes?", 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 61 (2002);

- g. C. ROMANO, "The Southern Bluefin Tuna Dispute: Hints of a World to Come... Like It or Not", 32 *Ocean Development and International Law* 313 (2001);
- h. L. STURTZ, "Southern Bluefin Tuna Case", 28 *Ecology Law Quarterly* 455 (2001);
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5.3. The International Centre for Settlement of Investment Disputes: The *Tokios Tokelès Case*

Hilde Caroli Casavola

1. *Background*

In 1989, a business enterprise named Tokios Tokelès was incorporated under the law of Lithuania. It was engaged primarily in advertising, publishing and printing, both in Lithuania and beyond. Ukrainian nationals own ninety-nine percent of the outstanding shares of Tokios Tokelès and comprise two-thirds of its management. In 1994, Tokios Tokelès created Taki Spravy, a wholly-owned subsidiary established under the law of Ukraine. From 1994 to 2002, Tokios Tokelès invested more than \$6.5 million in Taki Spravy. A bilateral investment treaty (BIT) between Ukraine and Lithuania was signed on February 8, 1994 and entered into force on February 27, 1995. By 2004, more than six thousand Lithuanian enterprises were wholly or partially owned by foreign investors, mainly Russian, German and Ukrainian.

On August 14, 2002, Tokios Tokelès and Taki Spravy submitted a Request for Arbitration (RFA) to the International Centre for Settlement of Investment Disputes (ICSID), claiming that the Ukrainian authorities had violated the BIT. On October 15, 2002, the ICSID notified the requesting parties that the dispute had not been subject to negotiation for a period of six months, as required by Article 8 of the Treaty. On October 17, 2002, the requesting parties withdrew their RFA until such time as it "may be renewed and resubmitted for consideration to the Centre". The RFA was reinstated by Tokios Tokelès (and Taki Spravy) on November 22, 2002. On December 20, 2002, the Secretary-General of ICSID registered the RFA. Tokios Tokelès contended that, beginning

in February 2002, the Ukraine had engaged in a series of unreasonable and unjustified actions against Taki Spravy that adversely affected its investment. Tokios Tokelès argued that the governmental authorities took these actions in response to the publication of a book by Taki Spravy in January 2002 that favorably portrayed a leading Ukrainian opposition politician.

The dispute mainly focused on the issue of ICSID jurisdiction. The ICSID was established by the Washington Convention of 1965, to address two problems raised by the remarkable development of international economic relations: first, to provide guarantees to foreign investors against the economic, legislative and political policies of national public authorities; and second, to create the necessary conditions for increased financial and technical support of foreign enterprises. The ICSID Convention set up an arbitration and conciliation mechanism for resolving disputes between states and foreign investors. Many national laws and bilateral treaties refer to the ICSID system. The Convention establishes that States Parties shall apply the dispute settlement procedure and shall execute the decisions adopted by the Center, which shall be binding on both the contractors and the States.

In reaching its decision on jurisdiction, the Tribunal was guided by Article 25 of the ICSID Convention, as well as Articles 1 and 8 of the Ukraine-Lithuania BIT.

2. *Materials*

- International Centre for Settlement of Investment Disputes, Tokios Tokelès v. Ukraine, ICSID case n. ARB/02/18 (case n. 40) (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home);
- Decision on Jurisdiction of April 29, 2004, published in 20 *ICSID Rev.—FILJ* 205 (2005);
- Dissenting Opinion – Prosper Weil of April 29, 2004, published in 20 *ICSID Rev.—FILJ* 245 (2005);
- Procedural Order No. 3 of January 18, 2005.

3. *Analysis*

In this dispute, the resolution of the preliminary issue of ICSID's jurisdiction depended upon certain substantive elements.

Tokios Tokelès and Taki Spravy (the Claimant) initiated the ICSID proceeding, alleging that various actions by Ukrainian governmental authorities in

2002 constituted violations of the Ukraine-Lithuania BIT. The Ukraine raised objections to ICSID's jurisdiction, and requested that the proceeding be bifurcated so that jurisdiction could be addressed first, separately from the merits of the case.

The Claimant opposed this request, arguing that the four objective criteria provided by Article 25 of the Convention had been met: first, Tokios Tokelès was an investor of one Contracting Party to the ICSID Convention, namely Lithuania; second, that company had invested in the territory of another Contracting Party, creating the company Taki Spravy under Ukrainian law; third, the dispute arose between the two Contracting Parties in connection with that investment; and fourth, the Parties had agreed to submit the case to ICSID jurisdiction.

The Ukrainian Government argued instead that ICSID had no jurisdiction over the matter, claiming, firstly, that Tokios Tokelès, although incorporated under Lithuanian law, was in reality a Ukrainian company, very largely owned and run by Ukrainian nationals, and with no substantial business activities in Lithuania. In essence, the claim was that Tokios Tokelès was effectively a Ukrainian investor in Lithuania, not a Lithuanian investor in Ukraine. Secondly, it claimed that, even if this argument was rejected, the investment made by Tokios Tokelès in Taki Spravy was not made in accordance with Ukrainian law, and hence fell outwith the scope of the BIT.

The main issue related to the nationality of Tokios Tokelès, and the formal and substantive consequences that flowed from that. The Ukrainian authorities argued that the corporation was not a "genuine entity" of Lithuania, and asked the Tribunal to "pierce the corporate veil" by determining its nationality according to that of its controlling shareholders and managers. Such a "control-test" had, it argued, been relied upon by the ICJ in the *Barcelona Traction* case, was recognized by ICSID jurisprudence in certain contexts at least, and is explicitly endorsed in numerous BITs (but not, however, in the Treaty in question in this case).

The majority of the ICSID Tribunal took a formalistic position, based largely on the language of the BIT, and concluded that "the Claimant is an 'investor' of Lithuania under Article 1(2)(b) of the BIT and 'a national of another Contracting State' under Article 25 of the Convention". The decision also stated that "the origin of the capital is not relevant to the existence of an investment" (Tribunal decision, paras. 80 and 82).

In his dissenting opinion, the President of the Tribunal stressed that disputes between States and their own nationals may not be settled by this particular international judicial body (Dissenting Opinion, para. 5). He also argued that "[t]he ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing nationals of a State Party to the ICSID Convention to use a foreign corporation, whether preexistent or created for that purpose, as a

means of evading the jurisdiction of their domestic courts and the application of their national law” (Dissenting Opinion, para. 30).

4. *Issues: Determining the Jurisdiction of International Tribunals*

This arbitration case provides a paradigmatic example of a decision of a global judicial body in a conflict between public and private entities, belonging to different Contracting States to the ICSID, regulated by a BIT.

The key issue it raised was how the jurisdiction of the ICSID Tribunal can be determined. Its jurisdiction is based mainly on a *ratione personae* requirement, meaning that one of the parties in the arbitration must be a Contracting State of the ICSID Convention, and that the other must be a national of another Contracting State. Therefore, the requirement that actors from more than one State be involved in a dispute, and the rules for determining when this is the case, is important both for the establishment of supranational jurisdiction, and the subsequent application of global rules. The assessment of the nationality of the disputing parties in an ICSID arbitration procedure must be carried out in a cautious manner, in order to minimize the risk that recourse to ICSID becomes simply a means for national companies to evade the application of national rules and jurisdiction of domestic courts. Such a claim would be beyond of the scope of the Convention.

The second problem deals with the control test: to determine the nationality of a private entity (such as a corporation), and the limits of the applicability of the ICSID Convention can a control test be used only when it is explicitly provided for in the BIT in question? Or is it always necessary to do so, on the basis of a teleological and systematic interpretation of the Convention as aimed at promoting only private foreign (international) investments? In its decision, the ICSID Tribunal declined to use a control test as a means of restricting the meaning of the term “investor” in the application of the BIT. The decision provided an interpretation of the legal text based strictly on the language of the Treaty in question. The jurisdictional question, which was raised in Tokios Tokelès for the first time before the ICSID, split the Tribunal on the extent to which the international tribunals can rely upon the aim and purpose of global norms in interpreting and applying them.

The third issue is related to the effects of the ICSID Convention on the national administrative regulations of the Contracting States, and to the limits it establishes on the power of domestic administrative authorities. The dispute involved a foreign private entity (the investor company, subject to the law of one Contracting State) and the authorities of the host state; not, however, the Contracting State to which the claimant belonged. The BIT also contained provisions limiting the subjection of foreign investors to national administrative

regulations by host States. In seeking to apply the BIT and the ICSID Convention, the ICSID Tribunal and the Ukrainian Government came to incompatible interpretations of the relevant norms. The arbitral decision in effect protected the foreign investors against the interpretation and application of the bilateral rules by national authorities, and gave particular emphasis to their right to a fair and impartial judicial review of the decisions of state agencies. In this way, the evolving “jurisprudence” of ICSID Tribunals at once reflects and constitutes an emerging transnational regime for foreign investments. This emerging regime binds national administrations to the findings of hybrid public/private procedures and bodies. Private investors play a key role in the arbitral proceedings, in choosing the arbiters and bringing claims directly against the host State, without the need for any previous consultation with the other Contracting State of the BIT. It follows that the emerging global investment regime and the right of foreign investors to sue the host state before the ICSID Tribunal can conflict with the administrative discretion and the review bodies of the State that formulated the rules contained in the BIT in the first place (and from which, in this case at least, most or indeed all of the capital invested in fact comes), when the private investor involved is a national of another Contracting State.

5. *Further Reading*

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- b. D.A. GANTZ, “Investor-State Arbitration Under ICSID. The ICSID Additional Facility and the UNCTAD Arbitral Rules” (http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf);
- c. A. GIARDINA, “La legge regolatrice dei contratti di investimento nel sistema ICSID”, *Riv. dir. intern. priv. process.* 677 (1982);
- d. M.R. MAURO, *Gli accordi bilaterali sulla promozione e la protezione degli investimenti*, Turin (2003);
- e. M. POLASEK, “Tokios Tokeles v. Ukraine. Introductory Note”, 20 *Foreign Investment Law Journal* 1 (2005);
- f. G. SACERDOTI, “La Convenzione di Washington del 1965: bilancio di un ventennio dell’ICSID”, *Riv. dir. intern. priv. process.* 13 (1987);
- g. T. WEILER, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London, (2005);
- h. A.S. ZANNA, “Incorporation or Control? Contested Determinants of

Corporate Nationality in “Tokios Tokelès v. Ukraine”, 6 *Griffin’s View on International and Comparative Law* 64 (2005).

5.4. Alternative Dispute Resolution: The ICANN’s Uniform Dispute Resolution Policy (UDRP)

Bruno Carotti

1. Background

The registration of domain names (see also *supra*, Ch. 2.1) is carried out by both *registries* and *registrars*. The registries – either public or private bodies – ensure the proper functioning of a specific top-level domain name (gTLDs), such as “.edu”, or country-code top level domain names (ccTLDs), such as “.it”; the registrars – nearly always private bodies – are responsible for assigning a particular second-level domain name (such as “.nyu” or “.uniroma1”) to those who request it. On occasion the same body fulfils both functions.

The ICANN, a private non-profit Californian corporation, was established in 1998 to supervise internet regulation (see *supra*, par. 2.1). It was created in order to address the legal problems related to the protection of intellectual property rights on the internet. Many doubts had previously been raised about the legal nature of domain names, and the most appropriate analogy had been drawn from trademark law. National courts often offered different solutions. This led to the attempt to create a new mechanism, based on a unique, globally valid legal foundation: in 1999, ICANN adopted the Uniform Dispute Resolution Policy (UDRP), a private dispute resolution system based on a report of the World Intellectual Property Organization (WIPO). Under this Policy, both service providers and WIPO can perform dispute resolution functions, to resolve cases of cybersquatting (i.e. registering a domain name with bad faith in order to profit from the goodwill of a trademark belonging to someone else) or domain grabbing (i.e. registering a domain name likely to be desired by another, with the sole intent of selling it for profit). Service providers can, however, do so only after signing an accreditation agreement with ICANN.

The system set up by the UDRP has some special features: its primary normative source is the body of rules adopted by the ICANN; supplemental rules can be added by the different service providers; decisions are binding upon the

parties; users can directly appeal to global quasi-judicial bodies in the form of arbitral proceedings; and the right to go before a national court is expressly acknowledged, thus ensuring judicial review even where the UDRP provider has stated otherwise.

These characteristics raise two questions. First, what is the significance of this kind of fragmented system for dispute resolution? In the absence of norms coordinating the UDRP and national procedures, conflicting decisions can arise. This is a particular risk when the same controversy is decided first by a dispute resolution service provider and then by a national court.

The second question concerns the effects of such decisions, insofar as they are applied to the registries. Particularly when country code top-level domain names (see *supra*, Ch. 2.1) are at stake, public authorities are likely to be involved. The registries of this kind of domain name might belong to national agencies. This embodies an important aspect of administrative law: the decision of a global quasi-judicial organ has direct consequences upon national public bodies.

2. *Materials and Sources*

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- Administrative Panel Decision, *Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com Inc.*, Case No. D2000-0505 (<http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0505.html>);
- United States Court Of Appeals For The Fourth Circuit, *Barcelona.com Inc. v. Excelentísimo Ayuntamiento de Barcelona*, No. 02-1396 (<http://pacer.ca4.uscourts.gov/opinion.pdf/021396.P.pdf>);
- Administrative Panel Decision, 22 July 2003 *Casio Keisanki Kabushki Kaisha, Casio Computer Co., Ltd v. Fulvii Mihai Fodoreanu*, Case No. DRO2003-0002 (<http://arbiter.wipo.int/domains/decisions/html/2003/dro2003-0002.html>);
- Administrative Panel Decision, December 28, 2004 *Austrian Airlines Österreichische Luftverkehrs AG contre Laurent Nunenthal*, Litige No DFR2004-0003 (<http://arbiter.wipo.int/domains/decisions/html/2004/dfr2004-0003.html>);
- Uniform Dispute Resolution Policy (UDRP) (<http://www.icann.org/dndr/udrp/policy.htm>);
- ICANN Rules (<http://www.icann.org/dndr/udrp/uniform-rules.htm>);

- Convention Establishing the World Intellectual Property Organization, WIPO (July 14, 1967, as amended on September 28, 1979) (http://www.wipo.int/treaties/en/convention/pdf/trtdocs_wo029.pdf);
- WIPO supplemental Rules for Uniform Domain Name Dispute Resolution Policy (<http://www.arbiter.wipo.int/domains/rules/supplemental/index.html>);
- Anticybersquatting Consumer Protection Act (ACPA), Pub. L. No 106-113, § 3001 et seq., 113 Stat. 1501A-545 (codified in scattered sections of 15 U.S.C.), section 1114(2)(D)(v) (<http://copywrite.org/2006/10/13/the-anticybersquatting-consumer-protection-act-of-1999>).

3. *Analysis*

The *Ayuntamiento de Barcelona* case concerned the registration of the domain name “barcelona.com”. This was a dispute between an American tourism company, Bcom Inc. (incorporated in Delaware, but operating in Spain) and the Municipality of Barcelona. The controversy was brought before a WIPO panel, which held that Bcom’s registration of the domain name violated the trademarks owned by the Municipality of Barcelona. Furthermore, the Panel found that Bcom did not have a legitimate interest in using the contested name; on the contrary, the company had registered it in bad faith (it later tried to resell the name back to Barcelona).

The American company filed suit in the District Court for the Eastern District of Virginia (see also Art. 4 (k), of the UDRP).

Applying both the UDRP and Spanish law (in a manner highlighting the influence of the WIPO Panel decision on a national court), the trial court rejected Bcom’s complaint.

However, the Court of Appeals for the Fourth Circuit ruled that national judges are not compelled by decisions based on the UDRP. National courts must be able to review such decisions (only in one case, involving the domain name “corinthians.com”, did a national court decline jurisdiction, on the grounds that the dispute had already been resolved by a WIPO panel; again, however, the Court of Appeals reversed this).

The Court of Appeals then had to determine the applicable law. The Municipality of Barcelona argued that ICANN policy and Spanish law must be applied: *ratione personae et materiae*, the WIPO Panel’s decision must be recognized [15 U.S.C. § 1114(2)(D)(v)]. The appellant, on the contrary, invoked the jurisdiction of the national courts and the applicability of American law.

The Court sided with Bcom. First of all, it grounded its jurisdiction in the

administrative nature of the WIPO procedure (an adjudicatory proceeding). The possibility of a judicial appeal must be open to parties in an administrative proceeding: “this process is not intended to interfere with or modify any ‘independent resolution’ by a court of competent jurisdiction” (p. 8). The Anticybersquatting Consumer Protection Act (ACPA) of 1999, which amended the 1946 Lanham Act on trademarks, does not establish a form of deference to the UDRP: “[...] any decision made by a panel under the UDRP is no more than an agreed-upon administration that is not given any deference under the ACPA. To the contrary, because a UDRP decision is susceptible of being grounded on principles foreign or hostile to American law, the ACPA authorizes reversing a panel decision if such a result is called for by application of the Lanham Act” (p. 12).

The Court of Appeal, furthermore, affirmed the applicability of national law: “ACPA explicitly requires application of the Lanham Act, not foreign law” (p. 14). According to §1114(2)(D)(v) of that statute, a trademark registration based on a mere “geographically descriptive” name is not valid: therefore, the Court held that the domain name assignment to the American company was not precluded by the Municipality of Barcelona’s putative trademark claim.

Two additional cases illustrate the effects of WIPO panel decisions and the nature of the actors involved. In the *Casio.ro* and *Austrian-Airlines.fr* cases, two disputes were resolved through the UDRP procedure. There was, however, an important difference between them: in the *Austrian-Airlines* case, the decision was addressed to a private actor, while *Casio* concerned a public body (a branch of the central government administration); in the latter case, then, the UDRP also had important effects upon national public administration.

4. *Issues: The Effectiveness of Alternative Dispute Resolution Mechanisms*

Several issues emerge from these cases.

First, when a global technical resource such as the domain name system is at issue, what legal instruments can be used? Is it necessary to provide for solely judicial review? Is it necessary to create new rules or institutions? Alternative Dispute Resolution (ADR) mechanisms are highly effective, fast and inexpensive, and are based on private law. But do they ensure an effective and impartial review? Or ought protection to rely on public law instruments instead? In the case of non-compliance with a panel decision, what is the competent body to enforce it? Must national courts be appealed to? This would mean a shift away from private-international law instruments to public-national ones. In other words, this would mean a return to a reliance on sovereign States.

Second, it is necessary to examine the influence of this mechanism on the right to judicial protection. From this point of view, the impartiality of the panel

is the key issue, as scholars have often argued. This makes it important, generally speaking, to define the role of global judicial or quasi-judicial bodies and their relationship to national courts.

Third, there is a difference between this regime and international law: generally, international law requires the exhaustion of local remedies before international bodies can be appealed to. The UDRP has no such requirement and its arbitration panels can be resorted to immediately.

Fourth, there is a mixed-structure here, characterized by the presence of private and public actors interacting at both the global and national levels. In particular, it is worth examining the mechanisms that allow for the influence of ICANN and UDRP on national administrative authorities. In this perspective, it should be stressed that the UDRP is mandatory only in the cases of general top-level domain names. In the case of country code top-level domain names, by contrast, the procedure is not immediately binding: to be mandatory, an explicit demonstration of consent is required (for example, the UDRP applies to ESNIC, which manages the “.es” country code, but not to the Italian Registration Authority, which operates the “.it” one). This difference can be explained by considering the strong influence of national governments upon the registries of the ccTLDs. ICANN rules cannot be imposed directly upon these registries, as to do so would mean that they prevail over the conflicting laws of national public authorities. And this is the reason why a system based on dialogue and consensual measures has been sought, rather than a hierarchical one. States can still condition the scope of global norms (as they try to establish a universal and uniform regulation). But how great a role must still be accorded to national sovereignty in the construction of the global legal order?

5. *Similar Cases*

- WIPO Arbitration and Mediation Center, Administrative Panel Decision, *Corinthians Licenciamentos LTDA v. David Sallen, Sallen Enterprises, and J. D. Sallen Enterprises*, Case No. D2000-0461 (<http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0461.html>);
- United States Court of Appeals for the First Circuit, No. 01-1197, *Jay D. Sallen d/b/a J.D.S. Enterprises, Plaintiff, Appellant, v. Corinthians Licenciamentos Ltda and Desportos Licenciamentos Ltda, Defendants, Appellees*, of December 5, 2001 (<http://www.ca1.uscourts.gov/pdf.opinions/01-1197-01A.pdf>).

6. *Further Reading*

- a. A. D'ARCANGELI, "Il dibattito sui *domain name* e la prima sentenza di merito", *Rivista di diritto civile* 497 (2004);
- b. Z. EFRONI, "A Barcelona.com Analysis: Toward a Better Model for Adjudication of International Domain Name Disputes", 14 *Fordham Intellectual Property, Media and Entertainment Law Journal* 29 (2003);
- c. ID., "The Anticybersquatting Consumer Protection Act and the Uniform Dispute Resolution Policy: New Opportunities for International Forum Shopping?", 26 *Columbia Journal of Law and Arts* 335 (2003);
- d. M. FROMKIN, "Icann's 'Uniform Dispute Resolution Policy' – Causes and (Partial) Cures", 27 *Brooklyn Law Review* 605 (2002);
- e. M. GEIST, "Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP", 27 *Brooklyn Journal of International Law* 903 (2002);
- f. L.R. HELFER, "Whither the UDRP: Autonomous, Americanized, or Cosmopolitan?", 12 *Cardozo Journal of International and Comparative Law*, 493 (2004);
- g. L.R. HELFER, G. B. DINWOODIE, "Designing Non-National Systems: the Case of Uniform Domain Name Dispute Resolution Policy", 43 *William and Mary Law Review*, 141 (2001);
- h. R. OWENS, "Domain-Name Dispute-Resolution after *Sallen v. Corinthians Licenciamentos & Barcelona.Com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*", 18 *Berkeley Technology Law Journal* 257 (2003);
- i. L.M. SHARROCK, "The Future of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions from within the Udrp Framework", 51 *Duke Law Journal* 817 (2001).

5.5. New Protection Mechanisms: The ICANN's Reconsideration

Committee and the *Verio* case

Bruno Carotti

1. *Background*

One of the competences of the ICANN Board (see *supra*, Ch. 2.1) is the adoption of specific policies for establishing the general rules for the sector of domain names. These rules, once adopted, are binding upon the operators.

The *Verio* case arose out of a policy on the use of personal data, specifically, the "Whois service". This service was created in order to avoid illegal domain name registration, as it publicizes the data of persons registering a new domain name. This was highly controversial, giving rise to issues of both privacy protection and regulatory differences (the EU, for instance, requires operators in its jurisdiction to respect European privacy laws).

The ICANN policy on the use of personal data was aimed at preventing the collection of bulk personal data, in order to prevent spam. It was approved pursuant to a notice and comment procedure, in which every interested subject was allowed to participate (Bylaws, Art. III).

ICANN's decisions can be challenged through different instruments, provided for in its statute: the Reconsideration Committee, the Ombudsman and the Independent Review Panel. The Reconsideration Committee and Ombudsman are internal to the corporation, while the Independent Review Panel is external. The Reconsideration Committee was set up by Article IV of the Bylaws. Its function is to re-examine the decisions of ICANN, in particular the effects of the Board or staff actions or inaction, if any person has been adversely affected (Bylaws, Art. IV, Sect. 2.1). The Reconsideration Committee consists of three directors, who decide on the admissibility of claims; conduct factual investigations and request information from the parties, staff or third parties; and hold meetings with the parties involved (Art. IV, Sect. 2.11 et seq.). It makes its recommendations on the merits of the request to the Board (Art. IV, Sect. 2.3). The Board is not bound by the Reconsideration report, but its final decision shall be made public (Art. IV, Sects. 2.17 and 2.18).

2. *Materials*

- Committee on Reconsideration, Reconsideration Request 01-4, *Verio*, Recommendation of the Committee, January 11, 2002 (<http://www.icann.org/committees/reconsideration/rc01-4.htm>);
- United States Court of Appeals for the Second Circuit, January 23, 2004, Docket No. 00-9596 11, *Register.Com, Inc., Plaintiff-Appellee, v. Verio, Inc., Defendant-Appellant* (<http://www.icann.org/registrars/register.com-verio/decision-23jan04.pdf>).

3. *Analysis*

In order to implement the new policy on the use of personal data, contractual arrangements with the operators had to be modified (in order to act in the domain name “market”, everyone had to conclude an Accreditation Agreement with the ICANN). The contracts with operators providing services to consumers (the “registrars”: for this distinction, see *supra*, Ch. 5.4) had to be modified. One of these operators was Register.com; its database was used by Verio. Inc, a corporation using bulk data for advertising purposes.

In accordance with the new anti-bulk data policy, Register forbade access to its database. As Verio did not comply with the new usage rules, Register asked the District Court for the Southern District of New York for an injunction against Verio, to prevent it from accessing Register’s database (the injunction was later upheld by the Court of Appeals for the 2nd District). ICANN was not party to the process and intervened only as an *amicus curiae*.

Verio then appealed to the ICANN Reconsideration Committee, arguing that the adoption of the new policy did not respect the Bylaws and that therefore could not be used as a basis for modifying the contract regulating access to Register database.

The Committee held that the procedure had been open and transparent: the decision was legal and the new policy could modify the contracts with the operators. Thus, Verio could not claim the application of its previous contract with Register, and could not make use of the data. The Committee also addressed some specific problems relating to linguistic difficulties, but held that it was not the proper body to evaluate this question: the merits of the decision had to be discussed in the competent forum, the Domain Name Supporting Organization (DNSO). For these reasons, it recommended that the decision be remanded to the DNSO; meanwhile, it suggested that the contracts in question should not be modified until the DNSO had made its assessment.

There are several interesting issues to consider.

First, there were two bodies discussing the same controversy: a State judicial body and a quasi-judicial committee of a global institution. With specific attention to the latter, the presence of both internal and external accountability mechanisms (the latter provided by the national legal system, and the former by the global internet governance regime) is worth highlighting. The procedure before the Committee runs in parallel to that before the national courts, in that the Committee's decision comes after the decision of the trial court, but before the appeal. These bodies decide in an independent manner and could theoretically come to conflicting resolutions, although that did not happen in this case.

Second, the new ICANN policy concerned not only Verio, but all domain names operators (registries and registrars), as well as third parties.

Third, a notice and comment procedure was used to enable participation, the implementation of which was overseen by ICANN's Reconsideration Committee.

Fourth, the procedural protection afforded by ICANN is not general (the Reconsideration Committee can only be resorted to by the person or entity that has been adversely affected by one or more actions or inactions of the ICANN Board, taken or refused to be taken without consideration of material information: Art. IV, section 2.2, Bylaws); moreover, it leads to a non-binding decision.

Fifth, the Committee admitted an appeal that was not properly formulated, affirming the flexible scope of its protection.

4. *Issues: New Protection Mechanisms within the Global Administrative Space?*

This case seems to provide an example of the configuration of new protective mechanisms in the global administrative space. The activity of a global institution like the ICANN needs adequate accountability measures, suitable to the regulatory regime in question and to ongoing technological progress. As technical norms require great flexibility and methods for adopting them become ever more efficient, the need for accountability measures that respond adequately to the needs of consumers, operators and the authorities increases.

There are some doubts over efficacy of the Committee's decision, as it does not ultimately bind the Board, resulting, perhaps, in a form of partial protection. Other instruments are also available: the Ombudsman and the Independent Review Panel (which has never been used); but the most effective protection is still the potential resort to national courts (see *supra*, Ch. 5.4).

These different protective mechanisms also promote greater institutional legitimacy: the first method of addressing this concern, as has been explained

earlier (*supra*, Ch. 2.1), is the adoption of a multilateral agreement. But other administrative law-type mechanisms can also be used, such as notice and comment or the Reconsideration Committee proceeding (which is very similar to the Italian “*ricorso in opposizione*”). The mechanisms internal to the ICANN complement those provided by national law.

Finally, the principle of participation is also beginning to emerge in this sector. What kind of participation is provided by Article III of the Bylaws? Does the right to participation apply in rulemaking or adjudication procedures, or both? The law has an undoubtedly limited sectoral relevance, in that it is confined to domain names governance; on the other hand, however, it involves, potentially at least, actors from every part of the world (for example, every interested person can participate in the notice and comment procedure accompanying the adoption of a new policy).

In conclusion, it could be interesting to examine whether the development of these mechanisms in the global legal system might contribute to the evolution of national law, such as in Italy, where participation in rulemaking procedures is less widely granted.

5. *Further Reading*

In addition to the works cited *supra*, Ch. 2.1, it may be worthwhile to read the following documents:

- a. ICANN Reconsideration Committee Annual Report
(<http://www.icann.org/committees/reconsideration/rc-annualreport-06dec06.htm>);
- b. ICANN Ombudsman Annual Report
(<http://www.icann.org/ombudsman/documents/annual-report-2006-english-15nov06.pdf>);
- c. ICANN Accountability and Transparency - Draft Frameworks and Principles, of 23 June 2007
(<http://www.icann.org/transparency/acct-trans-frameworks-principles-23jun07.htm>).

5.6. The Impact of Human Rights Law on Supranational Regimes: The

Bosphorus Case

Marco Pacini

1. *Background*

With a view to addressing the armed conflict and severe human rights violations in the former Federal Republic of Yugoslavia, the United Nations Security Council (UNSC) adopted Resolution 820 (1993), which imposed on the Member States the obligation to impound all aircrafts in their territories in which a majority or controlling interest was held by a person or undertaking in, or operating from, the Federal Republic of Yugoslavia (Serbia and Montenegro). The Resolution was implemented in Europe by Council Regulation (EEC) No 990/93, of 26 April 1993, according to which the aircrafts were to be impounded by national authorities. The Irish government designated the Department of Transport, Energy and Communications (hereinafter Department of Transport) as the national authority in charge, with the powers conferred by the Regulation.

Pursuant to the UNSC Resolution and the Council Regulation, the Department of Transport stopped and impounded an aircraft owned by Yugoslav Airlines, and leased to a Turkish company. Upon request from the Turkish Embassy, the case was referred to the United Nations Sanctions Committee, which confirmed the validity of the impoundment. Following a renewed rejection from the Department of Transport, the Turkish company applied to the Irish High Court, which dismissed the Sanctions Committee's opinion, declaring the Regulation inapplicable and ordering the impoundment to be lifted. The Irish government appealed to the Irish Supreme Court, which referred the interpretation of the Regulation to the European Court of Justice (ECJ). Meanwhile, the aircraft was impounded anew.

The Advocate General of the ECJ argued that the Regulation was applicable to the aircraft, that the impoundment pursued the legitimate aim of counteracting a devastating civil war and that the losses suffered by the company were not wholly unreasonable in the light of the aim pursued. Therefore, a fair balance had been struck between demands of the general interest and the requirements of the protection of fundamental rights of private parties. Joining the Advocate General's opinion, the ECJ confirmed the legality of the aircraft's impoundment. Given the ECJ's ruling, the Irish Supreme Court quashed the previous High

Court's decision, without granting the company any compensation. Meanwhile, the aircraft was released and returned to Yugoslav Airlines. The case was appealed to the European Court of Human Rights

Article 8 of the implementing Council Regulation reads as follows: "All vessels, freight vehicles, rolling stocks and aircrafts in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States".

Article 1 of Protocol no. 1 to the European Convention on Human Rights (ECHR) reads as follows: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

2. *Materials*

- UN Security Council, 3200th Meeting, Resolution S/RES/820, April 17, 1993
(<http://www.nato.int/ifor/un/u930417a.htm>);
- Council Regulation (EEC) No 990/93 of 26 April 1993, concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), in *Official Journal* L 102, 28/04/1993 at p. 14 – 16
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993R0990:EN:HTML>);
- ECJ, Judgment of 30 July 1996, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, Case C-84/95, European Court Reports 1996 p. I-03953
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995J0084:EN:HTML>);
- First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20.III.1952
(<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>);
- ECtHR, Grand Chamber, Judgment of 30 June 2005, Application no.

45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=777884&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>).

3. *Analysis*

The European Court of Human Rights (ECtHR) held that there had been no violation of Article 1 of the First Protocol to the ECHR. First, it held that it had jurisdiction to hear the claim: although EC regulations are not subject judicial review by the ECtHR, as the EC is not a Party to the ECHR, the aircraft was impounded by national authorities, on territory the territory of a Member State, and as a result of the Department of Transport's decision. Second, the impoundment had its legal basis directly in the Regulation. The Regulation has direct effect in the State, and leaves national authorities no margin of appreciation as to the legal requirements implementing its provisions. Third, the Regulation's provisions were drafted in a sufficiently clear manner. Fourth, the impoundment pursued a legitimate aim, which was to comply with the legal obligations flowing from membership in the EC. It remained, therefore, to be established whether there was a reasonable relationship of proportionality between the Department of Transport's decision and the legitimate aim pursued. In order to respond to this question, the ECtHR reasoned as follows.

The ECHR does not prohibit Contracting Parties from transferring sovereign power to supranational organizations. That being the case, these organizations are not held responsible under the ECHR, as they are not Contracting Parties. Member States retain their responsibilities under the ECHR, regardless of whether their acts are a consequence of domestic law or international legal obligations. Thus, national acts taken in compliance with international legal obligations are justified, as long as the relevant organization protects fundamental rights, in terms of both the substantive guarantees offered and the mechanisms for ensuring that they are observed, in a manner that can be considered at least equivalent to or comparable with that provided by the Convention. However, any such finding of equivalence could not be final and would be subject to review in the light of any relevant change in fundamental rights protection. If it is found that such equivalent protection is provided by the organization in question, the presumption will be that a State has not departed from its obligations under the ECHR when it does no more than implement legal obligations flowing from its membership in that organization. However, any such presumption can be rebutted if, in the circumstances of a particular case, the protection of Convention rights was manifestly deficient.

The EC treaty did not originally contain provisions for the protection of

fundamental rights. The ECJ subsequently recognized that such rights were enshrined in the general principles of Community law, and that the ECHR had a “special significance” as a source of such rights. These developments were reflected in certain treaty amendments, as well as in the Treaty of Amsterdam of 1997 and the Charter of Fundamental Rights of the EU. However, the effectiveness of such substantive guarantees depends on the mechanisms of review in place to ensure that they are respected, in particular the possibility of appeal to the ECJ. Although the right individual access to the ECJ in annulment actions is limited, actions brought before the ECJ by Community institutions or Member States constitute an important means of review of compliance with Community norms; and individuals can bring an action for damages before the ECJ with respect to the non-contractual liability of Community institutions. Moreover, it is essentially through the national courts that the Community system provides a remedy to individuals against a Member State or another individual for a breach of EC law. Certain EC Treaty mechanisms, such as the doctrine of direct effect and the preliminary reference procedure, have given national courts a complementary role in reviewing Community law from the outset.

Further, the ECJ’s development of the supremacy of EC law, direct effect, indirect effect and State liability has greatly enlarged the role of national courts in the enforcement of Community law and its fundamental rights’ guarantees. The ECJ can review the application of EC law – including fundamental rights – by national courts, through the preliminary reference procedure, wherein the ECJ’s response will often be dispositive in national proceedings. The parties to national proceedings have the right to put their case to the ECJ during the preliminary reference process. National courts, moreover, usually operate in legal systems in which the ECHR has been incorporated, albeit to differing degrees. In such circumstances, the protection of fundamental rights by EC law can be considered to be “equivalent” to that of the ECHR system. Finally, in the circumstances of this case, no dysfunction was detected in the mechanisms for review of the observance of ECHR rights within the Community legal system. Therefore, it cannot be said that the protection of the applicant’s rights was manifestly deficient. Thus, the ECtHR held that the relevant presumption of ECHR compliance by the respondent State had not been rebutted.

4. *Issues: Supranational Review of National Decisions*

This judgment deals with a wide range of questions: does a case involving a national administrative decision implementing a supranational norm fall within the jurisdiction of the ECtHR? If so, what kind of control can the ECtHR exercise over such a decision – or even over the supranational regime more generally? And what legal effects might follow from the fact that either the

normative act or the supranational regime in general are incompatible with the ECHR? These questions arise for a purely technical reason, connected to the legal requirements for acceding to the ECHR: it can be acceded to only by States which are Contracting Parties of the Council of Europe. The possibility of a supranational organization acceding to the ECHR has, thus far, only been discussed only with reference to the EU, but this has not yet taken place. Therefore, for the time being at least, supranational organizations do not have *locus standi* before the ECtHR, and cannot be held responsible by that Court for any decisions potentially incompatible with the ECHR.

The judgment sets out three general findings. First of all, if the subject matter of a case is a national decision, then the ECtHR always has jurisdiction, even when that decision is adopted with a view to achieving a Community aim. Moreover, if the national decision directly executes Community instruments, rather than any the national legislation implementing it, then the ECtHR may verify the legality of that decision with respect to Community instruments. This finding has two important consequences. Firstly, the ECtHR is prepared to utilize Community norms as an intermediate law for reviewing the compatibility of national decisions with the ECHR. Secondly, with a view to ascertaining the legality of the national decision with respect to Community law, the ECtHR evaluates the predictability and clarity required by the Community instruments themselves. In other words, while Community law is not formally subject to judicial review under the ECHR, the ECtHR relies upon it in order to verify the legality of the implementing national decisions, and submits it to an autonomous evaluation as to its predictability and clarity.

Finally, if the national decision limits itself to implementing Community instruments, and these instruments afford no margin of appreciation to the competent authorities, then the ECtHR may extend its judicial review even as far as to effectively review Community law in particular cases. As explained in depth by the Court, judicial review over Community law takes place in two stages, separated by a rebuttable presumption. According to that mechanism, the national decision is compatible with the ECHR only if Community law ensures a level of human rights protection at least equivalent to that afforded by that Convention, and if the protection of the rights at stake does not prove to be manifestly deficient. Thus, the first stage of review consists in evaluating the level of human rights protection afforded by Community law. This type of evaluation is general in character, as its object is not merely a single subject, but rather Community law as a whole. It is carried out *in abstracto*, as it does not take the circumstances of the particular case in question into consideration. It is an extensive review, as reference is made to the ECHR in its entirety and not to single rights. The second stage of review implies evaluating the measures adopted by the Community institutions in the case at hand. By that, the ECtHR seeks to satisfy itself that human rights protection is not manifestly deficient to the

detriment of the applicants in the particular case. However, this type of evaluation does not seem to entail an in-depth scrutiny, as the ECtHR limits itself to reviewing only whether the acts of the Community institutions acts are manifestly illogical or unreasonable.

5. *Similar Cases*

- ECtHR, decision of 23 May 2002, applications no. 6422/02 and no. 9916/02, *Segi e Gestoras Pro-Amnistia and Others v. Germany and others*;
- ECtHR, decision of 10 March 2004, application no. 56672/00, *Senator Lines GmbH v. Austria and others*;
- ECommHR, decision of 9 February 1990, application no. 13258/87, *M. & Co v. Federal Republic of Germany*;
- ECommHR, decision of 10 January 1994, application no. 21090/92, *Heinz v. the Contracting States Party to the European Patent Convention insofar as they are High Contracting Parties to the ECHR*;
- ECtHR, Judgement 28 August 1996, application no. 17862/91, *Cantoni v. France*;
- ECtHR, Judgement 18 February 1999, application no. 24833/94, *Matthews v. the United Kingdom*;
- ECtHR, Judgement 2 May 2007, applications no. 71412/01 and no. 78166/01, *Behrami e Behrami v. France and Saramati v. France, Germany and Norway*.

6. *Further Reading*

- a. I. CAMERON, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Council of Europe publications, 2006
(http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/Texts_& Documents/2006/I.%20Cameron%20Report%2006.pdf);
- b. I. CANOR, “Primus inter pares’. Who Is the Ultimate Guardian of Fundamental Rights in Europe?”, 25 *European Law Review* 3 (2000);
- c. S. DOUGLAS-SCOTT, “A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis”, 43 *Common Market Law Review* 629 (2006);
- d. L. SCHEEK, “The Relationship between the European Courts and Integration

through Human Rights”, 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 837 (2005);

- e. J.H.H. WEILER, “Fundamental Rights and Fundamental Boundaries: on the Conflict of Standards and Values in the Protection of Human rights in the European Legal Space”, in ID., *The Constitution of Europe. “Do the new clothes have an emperor?” and other essays on European integration*, Cambridge (1999), pp. 102 et seq.

6. THE ENFORCEMENT OF GLOBAL DECISIONS

6.1. The Domestic Implementation of International Regulatory Norms:

Department of Transportation v. Public Citizen

Marco Macchia

1. *Background*

The *Department of Transportation v. Public Citizen* case was triggered by a 1982 US law suspending new licenses for Mexican motor carriers operating within the US, in response to the discriminatory treatment of American motor carriers by Mexico. This moratorium was extended until 1995 by a succession of presidential orders. Later, Congress authorized the President to extend, lift or modify the moratorium.

The signature of the North American Free Trade Agreement (NAFTA) between the two States involved in 1994 was not sufficient to make the American authorities review this prohibition. Only after a decision by a NAFTA international arbitration panel did the US President express his intention to lift the moratorium, upon condition that the Federal Motor Carrier Safety Administration (FMCSA) adopted new regulations. The President's policy met with harsh domestic criticism from environmental associations, who feared the pollution that would be generated by the increased levels of road traffic. As is the case for all federal agencies, proposals for new regulations must be preceded by an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), and they must comply with the Clean Air Act (CAA).

In December 2001, Congress passed Section 350, prohibiting the FMCSA from granting new operating licenses to Mexican motor carriers until it promulgated new regulations for such carriers. The new regulations would have to include stricter safety requirements, such as insurance checks and regular inspections, thus meeting the demands of the environmental groups. In order to

comply with the NEPA, the FMCSA issued an EIS, which concluded with a Finding of No Significant Impact (FONSI), rendering a statement of compliance with the CAA unnecessary. However, the EIS issued by the FMCSA took only the new regulations into consideration, and not the impact that might be caused by the increased presence of Mexican trucks within the US. This latter impact would be an effect not of the new regulations themselves, but of the lifting of the moratorium on Mexican motor carriers, which was solely for the President to decide. In November 2002, President Bush lifted the moratorium.

The Public Citizen group immediately challenged the FMCSA's EIS before the Ninth Circuit Court of Appeals and then before the Supreme Court, claiming that the provisions of the NEPA and CAA had been violated, given that the opening of the borders to Mexican motor carriers was a "reasonably foreseeable" effect of the new FMCSA regulations. Therefore, the FMCSA should have considered all of the effects connected to the lifting of the moratorium in its EIS. The Department of Transportation – representing the FMCSA – argued in contrast that the FMCSA could not make the outcome of an EIS conditional upon a decision over which it had no authority, since it depended entirely on the will of the President. Had it done so, the EIS procedure would have served "no purpose" in light of the NEPA regulatory scheme, as it could have no impact on the final Presidential decision.

The Court of Appeals upheld Public Citizen's claim, stating that an administrative agency was required to consider all of the consequences of rule-making in the EIS, even if only potential, and even if dependent on the actions of third parties not bound by the NEPA. However, the judge specified that she did not intend to subject the actions of the President to a review on the basis of the parameters established in the NEPA and CAA.

The Supreme Court overturned the Appellate Court decision, endorsing instead the Agency's conduct on the ground that the FMCSA did not have the authority to prevent the environmental effect that might be caused by the new regulatory framework. In fact, although FMCSA's action was a pre-requisite for the entry of Mexican motor carriers into the US, the resulting environmental impact – and hence its consideration in the decision – had to be seen as an indirect effect, given FMCSA's inability to countermand the President's lifting of the moratorium.

2. *Materials and Sources*

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- Environmental Impact Statements (EISs) (<http://cfpub.epa.gov/compliance/nepa/current>);
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- North American Free Trade Agreement (<http://www.nafta-sec-alena.org/en/view.aspx?x=343>);
- National Environmental Policy Act (NEPA), 42 U. S. C. §§4321-4375;
- Council of Environmental Quality (CEQ), §1515;
- Federal Motor Carrier Safety Administration (FMCSA), 49 U. S. C. §113.

3. *Analysis and Issues: Judicial Review and Foreign Policy*

The issue underlying the *Department of Transportation v. Public Citizen* case concerns the relationship between judicial review and the decisions taken by executives at a supranational or international level.

It is known that US citizens are generally entitled to the judicial review of federal administrative acts under the US legal system. However, this does not seem to apply to decisions affecting national administrations taken at an international level, according to the Supreme Court's reasoning in this case. Is the President's discretion subject to judicial review? Is judicial review admissible over foreign policy decisions, in which the President "speak(s) for the nation with one voice"?

Moreover, when the government adopts measures in non-domestic forums, the interests of its citizens receive much less protection than they would otherwise, even though they have inevitable administrative implications. And yet, such measures are not preceded by a dialogue with the private parties concerned, and nor is their any right to request access to relevant documents, the normal procedural protections that would accompany a similar decision in a domestic forum. When a government representative undertakes commitments binding upon national administrative bodies in an international or supranational forum, such as NAFTA, the regular procedural limitations upon the exercise of power do not apply, leaving the rights and interests of private parties unprotected.

Judicial review of such decisions thus seems even more important, because it can counteract the absence of a normal administrative relationship between public powers and citizens.

In contrast, the *Department of Transportation v. Public Citizen* decision shows

how administrative agencies can adapt to international commitments. Therefore, domestic administrative decisions applying international obligations are treated differently from measures that are of only domestic relevance. According to the United States Supreme Court in this case, the regime cannot be the same, or the credibility of the executive power in international negotiations would be compromised.

To what extent, therefore, can an agency be rendered unable to exercise its competences as a result of an international obligation? In other words, to what extent are the decisions taken in global forums immune from the type of judicial review that would otherwise apply to exclusively domestic acts?

4. *Further Reading*

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(http://www.iilj.org/GAL/documents/10120510_Benvenisti.pdf);
- b. J. MILLER, “United States Department of Transportation v. Public Citizen”, 28 *Harvard Environmental Law Review* 594 (2004)
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6.2. Incomplete Domestic Enforcement: The *Metalclad Corporation* Case

Chiara Mari

1. *Background*

The case *United Mexican States v. Metalclad Corporation* provides an interesting example of national courts' involvement in reviewing the decisions of global institutions. The dispute arose out of the construction of a landfill in the central Mexican State of San Louis Potosi by a private business (Coterin), owned and operated by the Metalclad Corporation (an American company). Metalclad obtained permission from both federal and State authorities to construct the landfill. Demonstrations took place at the inauguration of the landfill, which prevented it from opening. Metalclad reached an agreement with federal environmental agencies, setting forth the conditions under which

the landfill would operate. The local government, however, obtained an injunction against the operation of the landfill. The Governor of San Luis Potosi, moreover, issued an Ecological Decree in which he mandated that the land on which the landfill site was located would become a permanent ecological preserve, without awarding any compensation to Metalclad. The Corporation then filed an arbitration claim with the International Centre for Settlement of Investment Dispute (ICSID), complaining of a breach by Mexico of the obligation to grant fair and equitable treatment in investment matters under Chapter Eleven of the North American Free Trade Agreement (NAFTA). The Arbitral Tribunal awarded damages against Mexico to Metalclad for two reasons: first, the breach of the standard of fair and equitable treatment (NAFTA, Art. 1105); and second, it found that the Mexican measures amounted to an expropriation of Metalclad's investment (NAFTA, Art. 1110). In determining the compensation owed to the corporation, the Arbitral Tribunal did not take expected future profit into account because the landfill had never been operative. Mexico sought permission to appeal the award to the Supreme Court of British Columbia (Canada), invoking the provisions of both the Commercial Arbitration Act and the International Commercial Arbitration Act. The Court set aside the part of the arbitral award determining the calculation of interest.

2. *Materials and Sources*

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- The Supreme Court of British Columbia, Supplementary Reason for Judgment, October 31, 2001, *The United Mexican States v. Metalclad Corporation* (2001 BCSC 1529) (<http://ita.law.uvic.ca/Metaclad-BCSCAdditionalReasons.htm>);
- International Centre for settlement of Investment Disputes (ICSID), Award of the Tribunal, August 30, 2000, *The United Mexican States v. Metalclad Corporation*, case n. ARB (AF) 97/1 (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home);
- North American Free Trade Agreement (NAFTA), Chapter 11 (<http://www.nafta-sec-alena.org/en/view.aspx?x=343>);
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- International Commercial Arbitration Act (International CAA), R.S.B.C. 1996-*British Columbia* (http://www.qp.gov.bc.ca/statreg/stat/I/96233_01.htm).

3. *Analysis*

In *The United Mexican States v. Metalclad Corporation* case, the ICSID Arbitral Tribunal awarded damages to Metalclad against Mexico for a breach of the NAFTA rules on investments.

The Arbitral Tribunal award concerned the interpretation of NAFTA Articles 1105 and 1110, and the calculation of damages.

The Tribunal found that the principle of fair and equitable treatment, set forth in NAFTA Article 1105, had not been applied to Metalclad in accordance with international law, because Mexican policy had not been transparent. This conclusion was based on the rules of interpretation of the Vienna Convention of the Law of Treaties. According to these rules, fair and equitable treatment has to be interpreted in light of the NAFTA's object, which is to increase investment by means of greater transparency. The Mexican government had not acted in a transparent manner with Metalclad, because the state and federal authorities had given permission to construct the landfill, but the local government prevented its operation. There was, therefore, a conflict between state, federal and local measures and a consequent breach of the principle of fair and equitable treatment.

The Tribunal found, moreover, that Metalclad's investment in Mexico had been expropriated, and that NAFTA Article 1110 thus required that compensation be paid for measures that directly or indirectly expropriated the investment. In this case, there was an expropriation for two reasons. The first related to the obscure municipal permit granting process. The corporation had been led by federal officials to believe that it did not require a municipal construction permit that was in fact required, and then later refused, by the local government.

The second reason stems from the Ecological Decree, approved at the last minute by the local government, which prevented the operation of the landfill. This Decree established a protected natural area that incorporated the landfill site. The Tribunal awarded damages, but the compensation did not include lost profits because the landfill was never operational.

The Supreme Court of British Columbia upheld the award and set aside only the part regarding the calculation of interest. According to the Court, the compensation did not have to include interest from the date of the local government injunction to the date of the Ecological Decree because there had not been a violation before that Decree.

4. *Issues: The Relationship between National and Supranational Judicial Bodies*

In the *Metalclad* case, a Canadian court, the Supreme Court of British Columbia, reviewed the award of an international court, an Arbitral Tribunal constituted under ICSID rules. The case raises many questions about the relationship between national and global judicial bodies: can national courts really review the decisions of global courts? Is such review legitimate? What is the scope of these judgments? How wide is the involvement of national courts in checking the decisions of global institutions? Does this kind of check promote or obstruct the development of global law?

A second problem is the relationship between transparency and fair and equitable treatment under NAFTA Chapter Eleven. In the view of the Arbitral Tribunal, the policies of the Mexican Government were not clearly communicated to Metalclad, resulting in a lack of transparency and a consequent breach of the fair and equitable treatment standard. The Tribunal considered the denial of a municipal construction permit to be improper, because the corporation had already obtained permission from federal and State authorities. Such non-transparent policies create confusion in business planning and investment. But what is the relationship between fair and equitable treatment and transparency? Do the two principles coincide in investment matters? If an agreement does not contain a transparency provision, can the duty to make information publicly available be implied from a fair and equitable treatment clause?

Another problem arises out of the liberal interpretation of the word “expropriation” of NAFTA Chapter Eleven. According to the Arbitral Tribunal, the injunction against the operation of the landfill was a form of expropriation. Do this broad interpretation of the word “expropriation”, and the consequent award of damages, promote corporate interests over the public interest?

5. *Further Reading*

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6.3. The WTO “Science-Fest”: *Japanese Measures Affecting the Importation of Apples*

Antonella Albanesi

1. *Background*

In 1971, Japan officially opened its markets to apple imports. However, it did not allow the import of apples from the US, in order to avoid the spread of fruit diseases, such as “codling moth” and “fire blight”. This policy was based on a 1950 law setting out restrictive measures for the importation of apples, the Plant Protection Law Enforcement Regulations (Art. 9 and the Annexed List to Table 2). Under this law, apple imports from the US had to meet certain requirements. The orchard from which such apples originated had to a) be designated by the US Department of Agriculture (USDA) as free of plants infected with fire blight; b) be surrounded by a 500-meter buffer zone; c) be inspected at least three times annually and disinfected by a chlorine treatment.

The first requirement regarding fruits infected with fire blight was met with a demonstration by the US growers that any such bacteria are killed during the required cold storage period (apples are kept in a dark room at near freezing temperatures with almost no oxygen).

The question, therefore, shifted to the second requirement, providing for a buffer zone in order to prevent the spread of the fire blight disease. To meet this requirement, the 4,000 US orchard owners exporting to Japan had to isolate 3,200 acres of apples, keeping them at least 500 meters from pear trees and other plants. However, in 1997, US growers presented published scientific research showing that mature, symptomless apples are not carriers of fire blight. The

USDA thus designated the orchards in the States of Washington and Oregon to be fire blight-free (Washington alone produces 100 million boxes of apples a year, of which 9% are exported to Asia, with a gross value of \$393 million).

Despite the adoption of these measures and the scientific evidence presented, the Japanese Government maintained its restrictive measures against US apple imports, triggering a yearly loss of \$75 million and a dispute before the WTO.

In this dispute, the following provisions were relevant.

Firstly, there is Article XI of General Agreement on Tariffs and Trade (GATT), which requires the general elimination of quantitative restrictions on the export and import of any products between Member States. In this case, the Japanese measures effectively restricted the quantity of US apple imports, thereby discriminating against a Member State.

Secondly, there is Article 5.1 of the Sanitary and Phytosanitary (SPS) Agreement, which requires Members to ensure that their sanitary or phytosanitary measures are based on an assessment of the risks to human, animal or plant life or health. The WTO Appellate Body asserted in the *Australia – Salmon* dispute (see section 5) that the risk assessment has to: a) identify the diseases and the potential biological and economic consequences; b) evaluate the likelihood of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and c) evaluate this likelihood in the light of the different SPS measures which might be applied.

Thirdly, there is Article 2.2 SPS, which requires Members to adopt sanitary or phytosanitary measures based on scientific principles and to maintain them only when supported by sufficient scientific evidence.

In exception to this rule, finally, Article 5.7 establishes the precautionary principle: if there is insufficient scientific evidence demonstrating the total absence of risk, a Member may provisionally adopt sanitary or phytosanitary measures for health protection. Where this principle is applied, the measure must be adopted on the basis of the relevant information available, and Members must seek to obtain the additional information necessary for a more objective assessment of risk, and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

In this dispute, therefore, Japan could have adopted restrictive measures in two cases: according to Article 2.2, it could have done so by providing sufficient scientific evidence regarding the existence of risks to life; or according to Article 5.7, by proving that the scientific evidence submitted by the United States is insufficient to demonstrate that mature, symptomless apples could not disseminate the disease.

Members of the WTO may thus adopt sanitary or phytosanitary measures if founded on sufficient scientific evidence and on an appropriate risk assessment. The SPS Agreement seeks to limit the negative effects that these measures could have on free trade. Legitimate SPS measures must impact upon one of the

following risks: an indirect food-borne risk to human and animal (though not plant) health, or the direct risk of epidemic disease affecting human, animal and plant health. The risk assessment is different in each case. In the case of indirect food-borne risk, it is necessary to evaluate the potential harmful effects from additives, contaminants, toxins or disease-causing organisms in food, beverages or foodstuffs.

In the case of direct risk, it is necessary to evaluate the likelihood of entry, establishment or spread of these diseases in the territory of the Member State, and the associated potential biological and economic consequences. In particular, the evaluation of indirect or food-borne risk concerns the possibility of harmful effects; the direct risk assessment, by contrast, is relevant only if it demonstrates that there is the probable (and not just possible) entry, establishment or spread of these diseases in question.

2. *Materials*

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- Notification of Mutually Agreed Solution, Japan – Measures Affecting the Importation of Apples, WT/DS245/21, 2 September 2005
(http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds245_e.htm);
- Sanitary and Phytosanitary Measures (SPS)
(www.wto.org/english/docs_e/legal_e/15-sps.pdf).

3. *Analysis*

Notwithstanding the USDA designation, Japan maintained its restrictive measures against US apples, holding them necessary to avoid the introduction of fire blight into Japan. On March 1, 2002, the United States requested consultations with Japan, and thereafter the establishment of a WTO dispute resolution panel.

The US claimed that the Japanese measures violated Article 2.2 of the SPS Agreement, because they were not based on sufficient scientific evidence. The Japanese Government argued that, on the contrary, each requirement involved in its the import measures (the Ministry declaration, the necessity of buffer zone, the frequency of inspection and the type of disinfestations required) was reasonably supported by the relevant scientific literature.

The Appellate Body rejected the Japanese claim, finding that the restrictive measures did violate Article 2.2, because there was not sufficient evidence demonstrating the risk of spreading the *E. Amylovora* (fire blight) bacteria to healthy apples and other plants (and, in doing so, upheld the Panel's findings on this point). It reasoned that the term "sufficient" implied a "rational and neutral relation between SPS measures and the scientific evidence", and that no such relation could be found in respect of the Japanese measures. The Japanese measures were also disproportionate with respect to the risk of entry, establishment or spread of fire blight, as identified by the scientific evidence.

The US also claimed that Japan's phytosanitary measures were inconsistent with Article 5.1 of the SPS Agreement, because they were not introduced on the basis of an appropriate assessment of risk. Japan countered that the appropriate assessment of risk had been carried out, based on the General Guidelines for Pest Risk Analysis (PRA), established by the International Standards for Phytosanitary Measures (ISPM).

According to the Appellate Body, Japan's measures were inconsistent with Article 5.1. The Japanese authorities' assessment proved only that the risk of entry, establishment or spread of disease depended on a generic link between host and vector; in consequence, there was not a sufficient detailed assessment of the risk posed by imported US apples in particular to justify the contested measures.

The United States also claimed that Japan's measures were inconsistent with Article 5.7, as they were adopted without a demonstration of the insufficiency of the scientific evidence presented by the US. According to the Appellate Body, the risk of entry, establishment or spread of fire blight by mature and symptomless apples has to be evaluated adequately, using a broad range of appropriate scientific proof. However, Japan did not perform such an evaluation, and therefore did not prove the insufficiency of the US evidence. The Appellate Body

thus found that the Japanese measures were also inconsistent with Article 5.7.

On December 10, 2003, the DSB adopted the conclusions of the Appellate Body, which had reaffirmed the findings of the original Panel in the dispute.

Japan demonstrated its will to comply with the decision and agreed on a reasonable period of time within which to do so. When Japan failed to comply within the time limit, the US requested the establishment of another panel, following the procedure pursuant to Article 21.5 of the Dispute Settlement Understanding (DSU). After the June 23, 2005 publication of the new Panel's Report, Japan and the US reached a further agreement on the execution of that decision on September 2, 2005.

4. *Issues: Global Bodies Interpreting International Obligations*

This case raises several issues.

First of all, were the Japanese measures protectionist? Were they discriminatory or were they justified by SPS norms? To answer those questions, it is necessary to take the following circumstances into account.

Annex A, § 1, of the SPS Agreement defines as "sanitary or phytosanitary" any measure that aims at protecting human, animal, or plant life or health. Second, the average price of Japanese apples is between 3-4 dollars a pound, whereas American apples are only about 1 dollar a pound. Third, the Panel's experts defined the risk of US apples introducing the disease into Japan as negligible. Finally, Japan did not present an adequate record of risk assessment, nor any scientific evidence about the entry, establishment or spread of the disease from US apples.

Japan further failed to demonstrate that the national regulation was intended to protect public health. The Regulation in fact protected Japanese apple producers from American competition, saving them from a considerable economic loss. Therefore, the Japanese measures did indeed discriminate against the US and protect the national market.

Another, more general issue concerns how the Panel and the Appellate Body interpret the SPS Agreement. How does the WTO guarantee free trade in relation to human, animal and plant health?

The Panel and Appellate Body did not only carry out a review of the legitimacy of the challenged measures. In evaluating the proportionality and reasonableness of national measures, the global judges acted like national administrative judges. But why should this be so? Is it correct for global judges to adopt the methods and standards of their national counterparts?

The WTO's goal is to facilitate free trade. This pushes the Panel and the Appellate Body to uphold only those restrictive measures adopted on the basis of a risk assessment, founded on sufficient scientific evidence and aimed at

protecting health. National authorities, however, seek to set their own risk policy, to ensure their citizens what they believe is an appropriate level of health protection. In defining what constitutes an acceptable level of risk, every Member State also makes a social value judgment. In this dispute, the Panel and the Appellate Body defined the risk of entry, establishment or spread of the disease as “unimportant”, thus denying the Japanese authorities the right to formulate their own risk policy. Is it proper for a global body to declare the illegitimacy of a measure adopted by a Member State, based on a social value judgment and risk policy? Is it proper to ignore non-scientific factors, such as consumer concerns, and cultural and moral preferences? If the democratically elected national authority is accountable to the population for the possible harms caused by SPS measures, should a global body, in the face of scientific uncertainty, override this decision in the name of free trade?

How final are the decisions of global judicial bodies? Are they subject to further review? Might the Panel have decided differently if the risk concerned human, rather than plant, health?

5. *Similar Cases*

Since 1995, WTO Panels and the Appellate Body have addressed a number of analogous cases, holding that national measures restrictive of trade in agricultural and food products have not been based on correct scientific risk assessments. An example is the 1997 dispute between Canada and Australia over Australian measures limiting salmon imports, found to have violated the requirements of Articles 5.1 and 2.2 of the SPS Agreement (*Australia – Measures Affecting Importation of Salmon*, Dispute DS18).

Another example is the 1998 dispute between the US and Japan over Japanese measures prohibiting the importation of fresh apricots, cherries, plums, pears, quince, peaches, apples, and walnuts from the continental US, on the grounds that these fruits were potential hosts of the codling moth (*Japan – Measures Affecting Agricultural Products*, Dispute DS76). A final example can be found in the 1998 dispute which arose when the European Community banned the sale of US beef from cattle treated with certain growth hormones (*European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Dispute DS26).

6. *Further Reading*

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6.4. EU Countermeasures against the US Byrd Amendment

Mariangela Benedetti

1. *Background*

The WTO dispute settlement system is a central mechanism for providing security and predictability to the multilateral trading system. In order to ensure that system is not reduced to the status of soft law, there are enforcement procedures. At the heart of this enforcement mechanism is the principle of retaliation: the WTO can impose an economic penalty on states that do not comply with international agreements. This economic penalty has proven to be a fairly reliable enforcement strategy.

When a panel or the Appellate Body finds that a measure adopted by a Member State is inconsistent with its obligations under a covered agreement, it may recommend that the Member in question bring it into conformity with the agreement. Members are normally given a reasonable period of time to implement the final recommendations of the Dispute Settlement Body (DSB).

If, however, within that reasonable period of time, the Member finds it impracticable to comply with the DSB's recommendations, it may choose to provide mutually acceptable compensation to the other party within 20 days after the expiry of the time limit set. If no such mutually acceptable compensation agreement is reached within the 20-day period, the complaining party may make a request to the DSB for authorization to retaliate (i.e., to suspend concessions or other benefits). With the negative consensus rule in the WTO, such a request will be granted unless there is a consensus to reject it. This means that even the requesting Member itself would also have to object. The DSB then has another 10 days (that is, 30 days minus the 20 days which have been consumed by the parties in negotiating possible compensation) to decide whether to accept or reject the request for retaliation. The disputing parties may disagree over the appropriate level of retaliation. Any such disagreement must be resolved by an arbitration established for the purpose within 60 days after the expiry of the reasonable period of time.

The practice of "dumping" can refer to any kind of predatory pricing. In international trade law, this word is generally used to describe the exportation of a product to another country at a price that is either below the price it sells for in its home market or is below its costs of production. Thus, dumping occurs when the price of a good is lower in an export market than in its home market. Although dumping is often inadvertent (due to exchange rate fluctuations or

accounting practices) it may also be intentional.

Dumping is an unfair trade practice, and States usually react against it in order to defend their domestic industries. The WTO sets forth specific policies for how Member States can choose to react to dumping.

In particular, the WTO Agreement allows governments to react against dumping where there is a genuine injury to the competing domestic industry. The government in question thus has to be able to show that dumping is taking place, calculate the extent of dumping (how much lower the export price is compared to the exporter's home market price) and show that the dumping is causing injury to the domestic market, or is threatening to do so. In turn, where excessive anti-dumping duties are imposed by one Member, WTO treaties authorize the victim thereof to charge countervailing duties to compensate for this. The term "countervailing duty" suggests the intention to counteract an imbalance, so the target should be the same industry that is subject to the unfair anti-dumping duties. Only where this is determined to be ineffective are countries allowed to take action against different industries through the principle of cross retaliation.

2. *Materials*

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- Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) (http://www.wto.org/english/docs_e/legal_e/19-adp.doc);
- Agreement on Subsidies and Countervailing measures (http://www.wto.org/english/docs_e/legal_e/24-scm.doc);
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3. *Analysis*

In the 106th Congress of the US, Senator DeWine authored the Continued Dumping and Subsidy Offset Act (CDSOA), which failed to gather support until 2000, when the influential Senator Byrd added a critical amendment. The Byrd Amendment instructed the US Government to pay the proceeds gathered from anti-dumping and anti-subsidy duties to the American steel manufacturing companies that had brought anti-dumping complaints. In order to receive funds under the Byrd Amendment, producers had to be certified as eligible with the Trade Commissioner. On the basis of this certification, the Commissioner distributed all funds received from anti-dumping and countervailing duties assessed in the preceding fiscal year. This meant that US companies that brought anti-dumping cases before the authorities stood to benefit not only from the imposition of anti-dumping and countervailing duties on competing imports, but also from direct payments to them from the US Government when those duties were dispersed.

From 2000 to 2005, a total of 1.26 billion US dollars were paid to a relatively small number of affected US producers (less than ten companies, including Timken, Torrington, Candle.lite, MBP and Zenith Electronics).

In December 2000, eleven WTO Members (Australia, Brazil, Canada, Chile, the EU, India, Indonesia, Japan, Korea, Mexico and Thailand) requested the establishment of a panel to determine the incompatibility of the Byrd Amendment with the WTO regime. The fundamental complaint was that the Byrd Amendment violated requirements of the WTO Anti-dumping and SCM Agreements that prohibit WTO Members from maintaining any specific action against dumping and subsidization, except for action taken in accordance with the General Agreement on Tariffs and Trade and the Anti-dumping (AD) Agreement. The complaining WTO Members also argued that the Byrd

Amendment provided incentives for domestic industry to initiate and maintain anti-dumping claims, in order to collect the proceeds from the duties imposed as a result. The WTO Panel agreed that the Byrd Amendment constituted an impermissible specific action against dumping and subsidization under WTO rules. In September 2002, the Panel suggested that the United States bring the CDSOA into conformity by repealing the Byrd Amendment.

The United States appealed the Panel's decision. The WTO Appellate Body (AB) upheld the Panel's finding that the Byrd Amendment constituted a specific action against dumping and subsidization not permitted under the relevant WTO agreements. The AB found that the "Byrd Amendment has an adverse bearing on, and more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, it is undoubtedly an action against dumping or a subsidy" (para. 255). On January 16, 2003, the AB recommended that the United States bring the Byrd Amendment into conformity with its WTO obligations under the Anti-dumping Agreement and GATT 1994.

Following the ruling of the AB, the United States committed itself to bringing the Byrd Amendment into compliance with its WTO obligations by December 27, 2003. When it failed to do so, the complaining countries returned to the WTO and sought authorization to take action to withdraw concessions from, and implement retaliatory duties against, the United States. The key issue was the amount of retaliation that would be permitted. The United States did not agree with the complaining countries on this amount, and therefore an arbitration proceeding was initiated under Article 21.5 of the Dispute Settlement Understanding.

The arbitration decision, issued on August 31, 2004, limited the complaining parties to suspending concessions based on the trade impact on each country's exports. The arbitrator considered that an appropriate way to assess the trade effect of a law operating in economic terms, such as a domestic subsidy, was to establish an economic model. This model, when applied to the facts of this case, would identify a coefficient that, when multiplied by the amount of disbursement over a given period, would produce a figure corresponding to a trade effect that could reasonably be deemed to correspond to the level of nullification or impairment for that period.

Each party proposed a model to assess the trade effect of the CDSOA disbursements. The arbitrator rejected the United States' model in favor of a modified version of that proposed by the Requesting Parties. This was a hybrid solution, to the extent that it combined a fixed coefficient calculated on the basis of actual disbursement patterns over a particular period of time – in this case 3 years – with variable amounts of future disbursements.

The quantification of the trade impact was based on the amount of Byrd Amendment disbursements for imports from the individual complainant

countries into the United States. However, the authorized amount for the suspension of concessions and the amount of retaliatory duties was not equal to the full amount of Byrd Amendment distributions to US producers; rather, the arbitrator authorized the adoption of countermeasures in respect of only 72% thereof.

The retaliation by the complaining countries played an important role in shaping the political view in the United States of the Byrd Amendment. When the retaliation lists from the complaining countries began to take shape in mid-2005, members of Congress began to pay increasing attention to the possibility of repealing the Amendment. On November 18, 2005, the US House of Representatives voted to repeal it, but the Senate resisted because it had not factored such a course of action into its version of the budget reconciliation bill. In Conference, House and Senate conferees agreed on the inclusion of a Byrd Amendment repeal, but the insistence of a few members of both pushed the effective date of the repeal back to October 1, 2007 (the Senate passed the revised spending bill by a 51-50 vote on December 21, 2005 and the House against passed the repeal on February 1, 2006, by a vote of 216 to 214).

As a result, anti-dumping duties accumulated on goods entering the United States before October 1, 2007 are still subject to distribution pursuant to the Byrd Amendment.

4. *Issues: Enforcement of Global Administrative Regimes*

First, what goals do the WTO rules on countermeasures achieve?

The point of retaliation is to induce the compliance of the violating Member with its WTO obligations. While this purpose is not explicitly stated in the WTO Agreements, it has been deduced from the temporary nature of countermeasures, as provided by Article 22.1 of the DSU, and from Article 3.7 of the DSU whereby “the first objective of the dispute settlement system is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements”. In the Byrd Amendment proceedings, the arbitrators were remarkably reluctant to endorse this objective, arguing that the suspension of concessions or other obligations can be at most only one of several purposes of retaliation.

Second, what purposes does the WTO retaliation system serve?

Retaliation is a trade sanction imposed to induce compliance. This view follows naturally if the system is presumed to be similar to other enforceable rule-based systems, such as penal codes, although it is also compatible in principle with the idea of the WTO rules as an enforceable contract. It also fits naturally into the prisoner’s dilemma used by economic theorists, which assumes that self-interested parties that could benefit from breach must be induced to

comply with the prospect of punitive consequences in response to infractions.

Breaching an agreement, even when the specific costs of compliance are greater than the benefits, can nonetheless do long-term damage to a nation's ability to obtain future agreements. In other words, it could also damage its trade and non-trade relationships with other countries.

Retaliation helps to maintain the balance of concessions negotiated through the WTO. WTO Members are presumed to accept obligations only because they have received rights in return: they have agreed to reduce their own trade barriers and in return have received increased access to other Members' markets.

Third, the Byrd Amendment case shows that WTO retaliatory and countermeasures do not aim at punishing violators. The WTO regime uses the power to impose countermeasures in order to achieve its goal of compliance through the *market instrument* of compensation. The WTO Agreement uses market rules to shape Member behavior, and the market is the only mechanism to check a breach of WTO law. This system is based on the persuasion of power rather than the power of persuasion.

The traditional economic model of trade negotiations, in which compliance depends on the probability and scope of retaliation, is only one aspect of the WTO retaliation system. Other factors are surely important. First, important actors within each country often have an interest in compliance – for example, consumers, exporters, and import distributors. Second, even when Members disagree over a particular case, they comply because they continue to believe that a trading system based on rules will serve their nation's interest overall. Third, officials and others value their reputations as rule-abiding participants because of the interests they have in the current agreement, and their desire to be taken seriously when negotiating new ones. Countries are aware that compliance on their part could influence the probability that other countries will comply in the future. And fourth, countries generally have ongoing relationships in other spheres. Those that depend on the United States for aid and defense, for example, might be more willing to comply with the findings in disputes in which it is involved.

Fourth, retaliation has been applied by WTO Members exclusively as a result of one kind of administrative procedure. This procedure guarantees the legality of the countermeasures because it provides for due process in the assessment work of the arbitrators, for example the right of each party to the dispute to be heard. The WTO legal system uses national administrative principles, such as the proportionality principle and the obligation to give reasons, to influence the national authorities.

5. *Further Reading*

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6.5. Global Bodies Reviewing National Decisions: The *Yellowstone* Case

Benedetto Cimino

1. *Background*

In 1987, the Crown Butte mining company prepared a project for the extraction of precious metals in Montana, on its own property surrounding Yellowstone National Park. The firm estimated the economic value of exploiting its mine at around one billion dollars. The initiative was supported by local authorities, who were interested in the increased jobs promised by the active mine, but opposed by environmental groups, national park managers and the Federal Department of the Interior. Opponents of the mine argued that it risked polluting the groundwater, altering the hydrogeology of the park, affecting the local flora and fauna (which were already threatened by various pre-existing human activities such as tourism, traffic, and construction), spreading diseases and causing the uncontrolled growth of some species.

In 1993, the Environmental Impact Statement procedure began, as required by the National Environmental Policy Act. However, before the conclusion of the national procedure, a global body became involved in the dispute: the UNESCO World Heritage Committee (WHC), as Yellowstone has been a world natural heritage site since 1978.

The WHC was created to implement the World Heritage Convention, a treaty concluded in 1972, under the aegis of the UNESCO General Assembly, which aimed at creating a collective protection framework for important sites of cultural and natural heritage. The agreement contains two main groups of norms: first, it guarantees technical, scientific and financial assistance to the States whose jurisdiction contains properties of universal interest; second, it establishes the procedures through which a monument can be included on the World Heritage List. This is a prerequisite for enjoying the particular status and the special protections provided by the Convention.

The listing procedure was implemented by the Operational Guidelines, a set of documents approved by the WHC on a qualified majority basis. The Guidelines distinguish three different procedures: first, that for inscription in the World Heritage List; second, that for the qualification of a property as “World Heritage in Danger”; third, that for the deletion of a property from the List.

The inscription procedure is triggered upon the initiative of the interested State: every Party can submit an inventory of properties suitable for inclusion on the List, with a brief description of the site and its significance (the Tentative

List); in this phase, States are encouraged to hear all the affected parties (local communities, non-governmental associations, owners of the areas in question, etc.). Every “nomination” is evaluated by an Advisory Body which, based on the complex criteria set forth in the Guidelines, prepares a detailed report and a draft decision to be approved by the WHC. The Committee can grant the inscription, refuse it or ask for a more in-depth assessment or study.

Article 11.4 of the Convention provides for the inclusion of a property in the World Heritage in Danger List, if there is an ascertained or potential threat to the property in question, provided that it is serious and specific. The procedure normally, but not necessarily, commences upon a request for assistance submitted by the Member State responsible for the property. If the Committee finds there to be a real danger, it can modify the status of the property and prepare a corrective action plan, based on the proposal of an Advisory Body established for that purpose, and, if possible, through reaching an understanding with the interested State.

The Convention does not explicitly provide for deletion from the List of World Heritage, but this power is regarded as implicit. In any case, the Guidelines now address this extreme possibility: a property can be deleted if it has lost those qualities that were essential to its qualification. In case of disagreement with the interested State, a specific procedure has been established in order to assess the real conditions of the site.

2. *Materials*

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- World Heritage Committee (WHC), *Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO doc. WHC. 05/2, 2 February 2005 (<http://unesdoc.unesco.org/images/0013/001386/138676e.pdf>);
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3. *Analysis*

The *Yellowstone* case formally commenced in 1994, when the US delegation informed the WHC about “potential threats” from mining speculation; some environmental associations, well supported by the federal Government, had already denounced these threats to the Secretariat. The US did not submit a request for assistance, nor did it officially propose the inscription of the park on the list of endangered properties; it simply committed itself to a continuous monitoring of the problem and to updating the Commission on every development.

Nevertheless, the Bureau (an executive branch of the WHC) decided to inspect the site. The potentially serious environmental impact of the exploitation came to light; furthermore, the inspection revealed a series of existing dangers, resulting from the inadequate management of the park.

In this phase of the global proceeding, the commissioners carried out a three-day public hearing and they received many technical reports from governmental agencies, private associations and Crown Butte. In December 1995, although no decision had yet been made to authorize the mine, the Committee decided to inscribe Yellowstone in the World Heritage in Danger List; consequently, it ordered the US to take all necessary actions to mitigate the threat and to inform UNESCO about its progress.

This is the core of the decision: “even if the State Party did not request action, the Committee still had an independent responsibility to take action based on the information it had gathered”. In truth, this point is not clear at all. First of all, the *travaux préparatoires* clarify the necessity, if not of the request, then at least of the consent of the interested State in order to make such a determination. In the spirit of the Convention, a finding that a threat exists is not intended to

function as a sanction; rather, it only aims to guarantee a surplus of protection to the properties in danger, within a framework of mutual cooperation. Moreover, in previous cases, the WHC acted unilaterally only in circumstances of extraordinary necessity and urgency, in accordance with the general principles of the Convention. Finally, the heavy reputational consequences of decisions under Article 11.4, which often hide an implicit judgment of negligence against the interested State, cannot be ignored, and nor can the consequences in terms of greater commitments, financial and otherwise, imposed upon that State in order to counter the threat.

The decision to overrule the precedents in the *Yellowstone* case was probably encouraged by certain ambiguities in the behavior of the US. Although formal consent was lacking, the US delegation had not declared strong opposition; moreover, it had often declared that it “does not consider action by the Committee to be an intervention in domestic law or policy”. Also, later, the US Government displayed an extremely cooperative attitude. Congress approved a series of financial measures in order to deal with the existing environmental concerns in the park; and the Administration reached a compensation agreement with Crown Butte: the lands surrounding the park would be subjected to a special protection regime (by means of the creation of a buffer zone) and the company, which withdrew the original plan, obtained federal lands worth 65 million dollars.

These facts led to a new decision by the WHC in 2004, which noted the progress and revoked its 1995 decision. The conclusion of the case proved to be particularly complex, in spite of the favorable recommendation of the International Union for Conservation of Nature (IUCN), acting as an advisory body. In fact, after the draft decision was adopted, many environmental organizations submitted technical objections and new information, aiming to demonstrate that further corrective actions had to be taken; moreover, other arguments were presented orally, during the Committee debate. The scientific reliability of these analyses was challenged by the US, but other delegations suggested that the decision be suspended, in order to allow further investigation. A compromise was reached only by means of some amendments to the text: a “conditional” removal of Yellowstone from the List of World Heritage in Danger was approved, meaning that some additional obligations upon the US remained in force.

4. *Issues: The Relations between Global Authorities and Domestic Administrations*

The Yellowstone case highlights three important issues for global administrative law.

First of all, what is the extent of the reasonable involvement of global authorities in the domestic sphere? Private property rights, land use legislation,

and the exploitation of soil and natural resources are traditionally matters reserved to national authorities; they are functions jealously regarded as expressions of a State's sovereignty. External control is usually admitted only where the regulation affects foreign commercial interests (e.g., through "creeping expropriations"), or in the face of injurious extra-territorial effects (e.g., polluting emissions). These limits are consistently reaffirmed in the text of the World Heritage Convention, which provides that it shall not prejudice sovereignty and property rights, as regulated by national law (Art. 6); that the duty of ensuring the identification and protection of properties belongs primarily to the interested State (Art. 4); and that every action of the WHC must aim to support, not to replace or conflict with, national policies. The world heritage regime, however, has evolved in a different way, through the Guidelines and the decisions of the WHC (norms for which ratification and unanimity are not required). In particular, the inscription of a property in the World Heritage in Danger List has come to have a potentially punitive character, with heavy reputational and financial costs for the affected States. Delisting, moreover, is allowed only after a strict scrutiny of the corrective actions taken.

President Ulysses Grant inaugurated Yellowstone in 1872, calling it "a pleasure-ground for the benefit and enjoyment of the people". In a globalized world, where interests intertwine and transcend national borders, are the "people" Grant invoked still just the American people?

The second problem is linked to the first. Considering the quasi-judicial functions of the WHC, do its procedures satisfy the minimum standards of due process? Do they give all interested parties an adequate opportunity to represent their interests?

The fact-finding procedure is characterized by a high degree of informality. In this respect, the *Yellowstone* case is particularly illustrative: new evidence arose after the draft decision had been made (discovery, therefore, was not regulated); and the reliability of the information was not evaluated by means of objective and accurate verifications (the possibility of cross-examination, for example, was not provided for). Moreover, the involvement of the interested parties is rather episodic. The Guidelines require that national authorities hear the landowners and the local communities when preparing their Tentative List, and the Bureau usually makes public enquiries before its decision is finalized. Considering that these decisions can result in the expropriation of private property, are there adequate procedural protections? There is no right to participate in the procedure, in monitoring compliance with the obligation to undertake "mitigating actions", or during the review or revocation of earlier decisions.

A third problem arises from the analysis of the facts that precede the global phase of the dispute. In the national licensing procedure, the opposing parties were the mining company and the authorities of Montana, on the one hand, versus the environmental groups and the Federal Department of Interior on the

other. The *Yellowstone* case is a dispute involving various national interest groups and different levels of government. This is evident in the ambiguous behavior of US delegation within the Committee. Global law was used here to influence a domestic proceeding. Is it reasonable that a global body influence national controversies? And, if so, to what extent?

5. *Similar Cases*

- World Heritage Committee, 22nd session, Kyoto, 30 November – 5 December 1998, *Report on the mission to Kakadu National Park, Australia*, WHC-98/CONF.203/INF. 18, 29 November 1998 (*Kakadu* case) (<http://unesdoc.unesco.org/images/0011/001175/117512e.pdf>);
- World Heritage Committee, 21st session, Report of the Rapporteur, WHC.97/CONF.208/17 (1997) (*Jasper National Park* case) (<http://whc.unesco.org/archive/1997/whc-97-conf208-17e.pdf>).

Like *Yellowstone*, *Kakadu* in Australia, and *Jasper National Park* in Canada were also threatened by mining exploitation. These two cases were brought to the attention of the Committee by environmental groups and local communities.

Because of the strong opposition of the interested States, the procedure expired without a formal inscription of the sites in World Heritage in Danger List; nonetheless, pressure from UNESCO forced Australia and Canada to modify their exploitation policies.

6. *Further Reading*

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- d. D.L. GEBERT, “Sovereignty under the World Heritage Convention: A Questionable Basis for Limiting Federal Land Designation Pursuant to International Agreements”, 7 *Southern California Interdisciplinary Law Journal* 427 (1998);
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7. CONFLICTING JURISDICTIONS

7.1. Relations between Global Law and European Law

Elisa D'Alterio

1. *Background*

What is the relationship between global and European law? Looking at the judgments of the European courts and the WTO Appellate Body, three cases stand out concerning conflicts between European rules and the rules of such global bodies as the UN (United Nations), the WTO (World Trade Organization) and the IOC (International Olympic Committee).

The *Leonid Minim* case concerned the relationship between UN rules (in particular, UN Charter rules and Security Council Resolutions) and EU law. Leonid Minim was an Israeli citizen, found to be in possession of several documents implicating him in arms trafficking, in support of the ex-president of Liberia, Charles Taylor; for this reason, his funds and economic resources in the Community were frozen following the adoption of EC Regulation No. 1149/2004 (executing UN Resolution No. 1532 (2004), which added Minim to the list of those against whom sanctions were to be enforced). These measures were validated by UN Resolution No. 1647(2005) and by EC Regulation No. 874/2005. Leonid Minim subsequently brought an action under the Article 230(4) EC for the annulment of EC Regulation No. 1149/2004 (amending EC Regulation No. 872/2004, concerning further restrictive measures in relation to Liberia) and for the partial annulment of EC Regulation No. 874/2005 (amending EC Regulation No. 872/2004). Minim argued that the Community lacked the competence to adopt the relevant Regulations and that his fundamental rights had been violated.

The *Sardines* case concerned the relationship between WTO and EU law. This dispute was over the name under which certain species of fish may be marketed in the European Communities. In particular, EEC Regulation No. 2136/1989, setting forth common marketing standards for preserved sardines, states that only those fish officially classified as “sardines” may be marketed as such in the European Community; this category does not include the species of *Sardinops Sagax*. Therefore, Peruvian sardine-type products, prepared from the above-mentioned species of sardines, cannot be marketed as sardines within the European Community. However, the Codex Alimentarius, which sets worldwide standards for food security, provides that both preserved sardines and sardine-type products prepared from the species of *Sardinops Sagax* can be marketed under the name “sardines” (Standard 94). Peru asked the WTO Dispute Settlement Body (DSB) for a consultation with the European Union about the inconsistency of the EEC Regulation with Standard 94 of the Codex Alimentarius, Articles 2.4, 2.2 and 2.1 of the Agreement on Technical Barriers to Trade (the TBT Agreement) and Article III:4 of the General Agreement on Tariffs and Trade 1994 (the GATT 1994). In the first instance, the Panel found that the EC Regulation was inconsistent with Article 2.4 of the TBT Agreement, but exercised judicial restraint with respect to Peru's claims under Articles 2.2 and 2.1 of the TBT Agreement and III:4 of the GATT 1994; it recommended that the DSB request the European Community to bring its measure into conformity with its obligations under the TBT Agreement. The European Community appealed to the Appellate Body.

Finally, the *Meca-Medina* case concerned the relationship between IOC rules and EU law (see *supra*, Ch. 2.2). David Meca-Medina and Igor Majcen were two professional long-distance swimmers. After finishing first and second, respectively, at the Swimming World Cup, they tested positive for the steroid Nandrolone; so the International Swimming Federation's (FINA) Doping Panel suspended them. The Court of Arbitration for Sport (CAS) confirmed the suspension more than once. Subsequently, the applicants filed a complaint with the EC Commission (under Article 3 of EEC Regulation No. 17/1962), alleging a breach of Article 81 EC and/or Article 82 EC. In their complaint, the applicants challenged the compatibility of certain regulations adopted by the IOC and implemented by FINA, and certain practices relating to doping control, with the Community rules on competition and freedom to provide services. In particular, they claimed that the application of those rules leads to the infringement of the athletes' economic freedoms, guaranteed *inter alia* by Article 49 EC and, from the point of view of competition law, Articles 81 EC and 82 EC. The Commission rejected the applicants' complaint. They then appealed to the European Court of First Instance; the action was dismissed, but then appealed to the European Court of Justice.

2. Materials

Leonid Minim case:

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- Council Regulation (EC) No. 872/2004, of 29 April 2004, *concerning further restrictive measures in relation to Liberia*, OJ L 162, 2004, pp. 32 et seq.
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- Council Regulation No. 17/1962, of 6 February 1962, *First Regulation implementing Articles [81] and [82] of the Treaty*, OJ English Special Edition, 1959-1962, pp. 87 et seq.
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:HTML>);
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(http://multimedia.olympic.org/pdf/en_report_817.pdf).

3. *Analysis*

Minim's claims were rejected, including his most important one concerning the breach of his fundamental rights. He had alleged that the EC regulations breached his right to property, one of the fundamental rights protected by the EC system and the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Court recognized the relevant EC regulations as Community measures implementing the UN obligation to give effect to the Security Council sanctions against Charles Taylor and his associates. In accordance with the relevant case-law (see, in particular, the *Kadi* case) and Article 103 of the UN Charter, the Court affirmed that UN obligations prevail over the fundamental rights set forth in the EC Treaties and the ECHR, because of the general supremacy of UN law over Community law (para.101). Moreover, the Court recognized the limitations on its judicial review of Community measures implementing the decisions of the Security Council or of its Sanctions Committee, and also the absence of *jus cogens* violations in the act of freezing the funds of the individuals involved (para. 101).

In the *Sardines* case, the Appellate Body confirmed the Panel Report's finding that the EC Regulation in question was incompatible with Article 2.4 of the TBT Agreement. Article 2.4 states that "Members shall use [relevant international standards] as a basis for their technical regulations except when such international standards...would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives". The European Community argued that Standard 94 did not apply to its Regulation, because it was ineffective and unsuitable for EC objectives in the field of alimentary security. Conversely, the Panel and the Appellate Body recognized the global nature of Standard 94 and its applicability to the EC Regulation; this standard, in fact, did not conflict with EC objectives. The EC Regulation violated WTO rules, because it was inconsistent with the Article 2.4. TBT and did not recognize a species of fish expressly included by Standard 94 of the Codex Alimentarius. Moreover, there was no reason for excluding the species of *Sardinops Sagax* from the category "sardines"; on the contrary, the global standard, which includes this species, has the clear goal of ensuring market transparency. Therefore, the Appellate Body recommended that the DSB request the European Community to bring its measure into conformity with its obligations under the TBT Agreement.

In the *Meca-Medina* case, the European Court of Justice set aside the judgment of the Court of First Instance, but dismissed the action for annulment of the Commission's decision. The Court declared that, "in holding that rules could thus be excluded straightaway from the scope of those articles solely on the ground that they were regarded as purely sporting with regard to the application of Articles 39 EC and 49 EC, without any need to determine first whether the rules fulfilled the specific requirements of Articles 81 EC and 82 EC, as set out in paragraph 30 of the present judgment, the Court of First Instance made an error of law" (para. 33); accordingly, the Court recognized that IOC anti-doping rules were subject to Article 49 EC and to EC competition law (para. 34). The Court also stated, however, that the IOC restrictions on professional athletes did not seem to "go beyond what is necessary in order to ensure that sporting events take place and function properly" (para. 54); moreover, "since the appellants have not pleaded that the penalties which were applicable and were imposed in the present case are excessive, it has not been established that the IOC anti-doping rules at issue are disproportionate" (para. 55).

4. *Issues: The Relations between Global Systems and the Role of Supranational Courts*

These cases raise the following three kinds of problems. First, supranational courts resolve conflicts between the rules of different legal systems. At the national level, by contrast, it is usually the legislature that regulates the relations

between different legal sources (particularly in civil law systems); courts address conflicts of law by applying established legal standards. In the light of the increasing judicial involvement in resolving these conflicts, can we say that supranational courts are performing a “constitutional function”? Do supranational courts contribute to the creation of a “global legal order”?

Second, supranational courts do not use a uniform legal standard to regulate and resolve conflicts between conflicting global and EU laws. In fact, in the *Menim* case, the European Court of First Instance recognized that UN law prevails over the EU instruments because of the supremacy of the interest in maintaining international peace and security over the protection of individual fundamental rights. In the *Sardines* case, the Appellate Body declared that EU rules are subject to WTO rules because of the supremacy of the interest in international trade over alimentary security (other judgments of the European courts do, however, hold that WTO rules do not normally constitute a legitimacy benchmark for EC law). Lastly, in the *Meca-Medina* case, the European Court of Justice declared that IOC rules are subordinate to EU law, because of the supremacy of the interest in defending freedom of competition and to provide services over the independence of sport. Therefore, in contrast to national courts, supranational courts do not apply a pre-established hierarchical standard to resolve conflicts of law, but resort to “interests balancing”. Is the lack of a pre-established hierarchical standard a symptom of the inexistence of a “general global law”? Or is this deficiency rather the result of the “reticular”, rather than “pyramidal”, nature of multilevel relations? How can supranational judicial “interests balancing” clash with the emergence of a global legal order?

Third, the relationship between global and EU rules can be considered as a relationship between the rules of different global legal systems. The EU is also a supranational/global legal system, like the UN and WTO: all of these systems are grounded in international treaties and have their own legal institutions and courts. In this sense, the Olympic Movement (OM), to which the above-mentioned Committee and the international sports federations belong, is also a global system including at least 115 Member States. This notwithstanding, there remain some relevant differences between these systems: for example, the UN, WTO and OM systems are “sectoral”, because they protect specific interests (international peace and security, free competition, and sports competition, respectively); the courts of the UN and WTO systems can only be directly accessed by States, and not by private actors, while the OM system provides mainly arbitral courts; and finally, EU Member States are uniquely involved in a process of legal, but also cultural and social integration. Do these differences influence the relationship between the rules? And if so, how? Is there an “inter-exchange” of the different values and principles animating these systems, along with their norms?

5. *Similar Cases*

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(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:281:0017:0018:EN:PDF>);
- European Court of First Instance, *Abmed 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
(<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:281:0017:0017:EN:PDF>);
- European Court of Justice, *Siegfried Aulinger c. Federal Republic of Germany*, 9 March 2006, case 371/03, in Rec., 2006, pp. I-2207
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7.2. The *Conseil d’État* and Schengen

Mariangela Benedetti

1. *Background*

The free movement of persons within the EU gives rise to obvious security considerations. The suppression of EU internal border controls (regardless of the

nationality of persons crossing the borders) corresponds to the reinforcement of external border controls. In this sense, there is an urgent need for an operational common EU visa policy and a coherent EU immigration policy.

The Schengen Agreement allows people who are legally present in one of the European countries party to the Agreement to move freely within the Schengen area, without having to show passports when crossing internal borders.

The movement of third country nationals, and the related issue of cooperation between national police forces, has been limited by the political difficulty in reaching an agreement that would inevitably impact upon sensitive domains of national sovereignty. As a result, the Schengen Agreement had to be an inter-governmental agreement, and was initially signed by Belgium, France, Germany, Luxembourg and the Netherlands. A common feature of this inter-governmental approach was the States' unwillingness to grant supranational judicial review over the interpretation and implementation of the Agreement.

Article 111 of the Schengen Implementing Agreement states that "any person may in the territory of each Contracting Party bring before the courts or the authority competent under national law an action to correct, delete or provide information or obtain compensation in connection with a report concerning him. The Contracting Parties shall undertake amongst themselves to execute final decisions taken by the courts of authorities referred to in paragraph 1 without prejudice to the provisions of article 16".

According to Article 116 of the Schengen Implementing Agreement, "each Contracting Party shall be responsible, in accordance with its national law, for any injury caused to a person through the use of the national data file of the Schengen Information System. This shall also be the case where the injury was caused by the reporting Contracting Party, where the latter included legally or factually inaccurate data. If the Contracting Party against which an action is brought is not the reporting contracting party the latter shall be required to reimburse, on request, sums paid out as compensation, unless the data were used by the requested contracting party in contravention of this Convention".

The Schengen Information System (SIS) is a complex information system that was set up to exchange data on individual identities and descriptions of lost or stolen objects. When an individual's details have been entered into the SIS, due to a national assessment of security risk, that individual encounters difficulties when applying for entry into (or a visa for) another Member State. Specifically, the SIS has a blacklist that allows the participating countries to keep a record of persons they do not wish to enter the Schengen area. Inclusion on this list has serious consequences for the individual concerned. A person on the blacklist may have committed a serious crime, for instance, or may have been expelled or deported and ordered not to re-enter a country for a specific period of time.

2. *Materials and Sources*

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3. *Analysis*

In June 1999, the French *Conseil d'État*, the court of final appeal on administrative matters, handed down judgment in two cases regarding the application of the Schengen Implementing Agreement in France, concerning challenges to the refusal of visas to third country nationals on the basis of notification of the individual's details contained in the SIS.

In the first case, *Madame Hamssaoui*, the visa applicant was a Moroccan national who lived in Morocco. Her daughter was a resident in France, married to a French citizen, with one child. She sought a short-term residence visa at the French consulate to visit her daughter. Her application was rejected because her name had been entered into the SIS. Articles 5 and 15 of the Schengen Agreement state that a visa must not be issued to foreigners who are reported in the SIS for the purpose of being refused entry onto Schengen territory. The Advocate General of the *Conseil d'État* argued that the inability to directly to access information on the SIS violates civil liberties. The fact that Mrs. Hamssaoui could not even get information as to which State reported her (on the SIS) meant that the decision was insufficiently reasoned and therefore ought to be annulled. According to the *Conseil d'État*, the State that wants to prohibit movement in the Schengen area must give a reason for its decision and must guarantee that suitable information be made available to the affected party. The Advocate General also considered Article 8 of European Convention on Human Rights (ECHR), relating to the right to respect for family life. In his view, Article 8 was relevant to a decision to refuse a visa in circumstances such as those of Mrs. Hamssaoui. He noted that Article 15 of the Schengen Implementing Agreement provides “[i]n principle the visa referred to in Article 10 may be issued only if an alien fulfils the entry conditions laid down in Article 5(1)(a), (c), (d) and (e)”. The fact that the 1990 Agreement used the term “in principle” suggests that a margin of discretion is reserved for each Contracting Party in

implementing the Agreement, on the grounds, listed in Article 5(2), of humanitarian considerations, national interests or other international obligations. Accordingly, he argued that the power of the administration to refuse a Schengen visa does not deprive an individual who is reported on the SIS from relying on a right to family life in order to be issued with a short-term visa. Finally he considered the balance that needs to be struck between the right to family life in the form of a visa grant, so that Mrs. Hamssaoui could visit her family in France, against the question of public order; as no information was available as to the public order reasons for reporting Mrs. Hamssaoui on the SIS, no definitive answer could be given to this question. The court followed the Advocate General insofar as it annulled the refusal of the visa on the ground that there was insufficient reasoning as required under national law.

The *Conseil d'État* simultaneously issued a decision in the case of *Madame Forabosco*, a Romanian citizen married to a French man. She applied for a long-term residence visa for family reunification at the French Consulate in Bucharest. The application was refused for having no legal basis in the requirements of Article 5(2) of the Schengen Implementing Agreement, which apply only to short-term visas and are therefore inapplicable to cases involving long-term visas.

The German authorities had reported Mrs. Forabosco to the SIS as a person who had unlawfully remained in Germany when she had been refused asylum, and they did not receive notification that she had left. The two main issues in the case were, firstly, whether a report on the SIS could be a ground for the refusal of a long-term residence visa; and, secondly, whether a French administrative court had the power to remedy a legal error made by a foreign State. In terms of the first issue, the Advocate General rejected the purely formal argument that the Schengen Implementing Agreement does not address long-term residence visas. He noted that the reasons for reporting someone to the SIS are not necessarily different from the reasons for refusing a long-term visa under French national law. A prohibition on short-term entry into the Schengen area means that the question of long-term visas is within the scope of the 1990 Agreement. The Advocate General referred to Article 9(1) of the Agreement which states that “the Contracting Parties undertake to adopt a common policy on the movement of persons and in particular on the arrangements for visas... the Contracting Parties undertake to pursue by common agreement the harmonization of their policies on visas”. Further, he noted that the abolition of internal controls on the movement of persons had consequences for long-term visas. As a long-term visa is normally followed by the issue of a residence permit, the beneficiary of that residence permit has access to the whole of the Schengen area. The *Conseil d'État* agreed with the Advocate General's argument. It held that, in view of the consequences of a long-term visa, the decision of the French Consulate in Bucharest could not be impugned for taking the SIS report into account in refusing the visa.

The Advocate General then noted that having been refused asylum is not a reason for reporting someone on the SIS under Article 96 of the 1990 Agreement. He argued that the German authorities had made a legal error in reporting Mrs. Forabosco on the SIS. While acknowledging that the Court normally refuses to review the legality and consequences of the acts of foreign authorities and international organizations, he nevertheless invited the Court to do so here, arguing that Articles 111 and 116 of the 1990 Agreement did give the French Court jurisdiction to remedy an SIS report which is tainted by legal error, even though it was made by a foreign authority. In his view, the two provisions were designed to allow the correction of information without forcing individuals concerned to commence parallel proceedings in another jurisdiction. The *Conseil d'État* followed the reasoning of the Advocate General. It held that an administrative judge could review the report of a person on the SIS, even when it had been made by a foreign administrative authority.

4. *Issues: National Courts' Review of Foreign Transnational Measures*

Do national courts have the power to remedy legal errors committed by foreign authorities?

National courts usually decline to review the legality and consequences of the acts of both foreign authorities and international organizations. However, Articles 111 and 116 of the Schengen Implementing Agreement do seem to be designed to allow the correction of information without forcing the individuals affected to bring a claim in the other jurisdiction.

The granting of a visa can be considered as a transnational measure. The sensitive nature of a visa – a symbol of the State's right to control the entry of foreigners, an instrument of foreign policy, and an expression of domestic policy objectives on the preservation of international links and domestic security – also drives the flexibility in the common visa policy. Under the current Visa Regulation, the Member States may retain discretion over the visa requirements applicable to a number of special categories of persons. Also, under Schengen rules, the Member States retain a large degree of control as to who can obtain a visa to enter their individual national territories. But the grant of a visa nonetheless remains a transnational measure, insofar as it produces effects in other national legal systems.

These decisions are important for two reasons.

Firstly, they are important because they raise the issue of the nature and the scope of national judicial review of the implementation of an administrative measure concerning the free movement of persons. The *Conseil d'État*, in requiring the authorities to provide reasons for reporting an individual on the SIS by another Member State, expanded its jurisdiction beyond French borders. This

means that judicial review over the SIS must necessarily exceed the national boundaries of the reviewing court. The Court, taking its lead from the legislature, did not allow its national administrative authority to affirm the legality of an act affecting civil liberties on the basis of a foreign administrative determination, without first testing the lawfulness of that latter determination itself. While the Advocate General justified this review on the basis of the margin of appreciation for human rights, the Court did not consider such a reference necessary. The *Conseil d'État* argued instead that the principle of judicial review did not require support from human rights commitments.

Secondly, the French cases send a very clear signal to the European Court of Justice: concerns over civil liberties and individuals' rights of access to the information held on them, and its use to exclude or expel them from the Schengen territory, justify the judicial review of sensitive decisions, and the exercise of strict scrutiny to protect individuals vulnerable to the abuse of State power.

5. *Further Reading*

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7.3. Jurisdiction over Cyberspace: YAHOO! in the French and American Courts

Mariangela Benedetti

1. *Background*

The term “cyberspace” was coined by the science fiction author William Gibson to describe his vision of a global computer network, linking all peoples, machines and sources of information, through which one could move or “navigate” as though in a virtual space.

Cyberspace undermines the significance of physical location in three distinct ways. Firstly, events in cyberspace take place everywhere and thus nowhere in particular; they are not limited by geographical boundaries, indeed they ignore the existence of such boundaries altogether. Secondly, many events and transactions have no recognizable tie to any physical place but take place only in the network itself, which by its very nature is not a localizable phenomenon. Thirdly, the net enables simultaneous transactions between large numbers of people who do not and cannot know the physical location of the other parties.

The consequence of these three features is that that no single law can govern the internet. Online activities that are socially acceptable and legally protected in one locale may not be in another. Unilateral action by any individual country thus threatens the internet’s vitality and freedom.

Among the different problems arising from the nature of the internet, jurisdiction and the enforcement of foreign judgments are gaining importance as global electronic commerce expands. In this framework, when can an individual State exercise personal jurisdiction over an internet defendant? If you are an operator in cyberspace, you may be dragged into court anywhere in the world at any time – if for no other reason than to contest jurisdiction or face default. This is because territorial jurisdiction in the non-territorial realm of cyberspace is highly uncertain.

Applying traditional notions of personal jurisdiction to the internet is difficult at best. In the American federal system, for a court in one state to assert personal jurisdiction, the defendant must have continuous and systematic contacts with the forum state, or at least satisfy the “minimum contacts” test, which allows for jurisdiction over a non-resident, when sufficient contacts exist between the

defendant and the forum State such that maintenance of the suit does not offend “traditional notions of fair play and substantial justice”. The US Supreme Court's minimum contacts test for specific jurisdiction abandons the more formalistic tests that focus on a defendant's presence within the forum State, in favor of a more flexible inquiry into whether a defendant's contacts with the forum make it reasonable to require that the suit be defended in that State.

The operation of a website does not usually generate sufficient minimum contacts with any given forum; it is not enough the citizens in the forum State happen to access the site. However, as demonstrated by the *Yahoo* cases, upon examination of the nature and quality of commercial activity that an entity conducts over the internet, a court may assert jurisdiction if a defendant operates an interactive website.

2. *Materials*

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3. *Analysis*

On May 22, 2000 *La Ligue contre le Racisme et l'Antisemitisme* (LICRA), joined by defendant *L'Union Des Etudiants Juifs De France* (UEJF), accused Yahoo! Inc. and Yahoo! France of violating French law. Yahoo! was accused specifically of violating Section R. 645-1 of the French Penal Code, which prohibits the exhibition of Nazi objects for purposes of sale, and Article 24 *bis* of the 29 July 1881 Act, which makes it illegal to contest the existence of one or more crimes against humanity where these have been recognized as such by a French or an international court.

LICRA and UEJF claimed that Yahoo! violated French law by making accessible to all French Internet users via the Yahoo!France website the auction of thousands of Nazi artifacts, the sale of which would be illegal in France. LICRA initially sent a cease and desist letter to Yahoo! in Santa Clara, California asking that such materials not displayed. When Yahoo! did not bring its US site into full compliance, LICRA filed a complaint against Yahoo! in a French court. The *Tribunal de Grande Instance de Paris* ordered "the Company Yahoo! Inc. to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes". The order subjected Yahoo! and Yahoo!France to a penalty of €100,000 for each day of delay or for each confirmed violation.

Yahoo! subsequently attempted to comply with the French court's order. Specifically, Yahoo! posted the required warnings and banned all displays which violated the French criminal code from the yahoo.fr web site. Notwithstanding these measures, Yahoo! did not prevent access to other web sites which arguably violated French law, because it did not have the technology to block French

citizens from accessing Nazi-related matter on yahoo.com without banning this material altogether. On August 11, 2000, the Court called for a team of experts to examine ways in which French internet users might be blocked from accessing Yahoo's auction site, and whether it was even technically possible. After considering expert testimony, the Court concluded that it was possible to determine the physical location of internet users from their IP addresses, and thus technically possible to block their access. The court and ordered Yahoo! to comply with the order within two months.

A second interim order was issued on November 20, 2000 reaffirming the initial order and requiring Yahoo! to comply within three months. The court noted, however, that Yahoo!France had complied in large measure with the spirit and the letter of the earlier order.

On December 21, 2000, Yahoo! filed suit against LICRA and UEJF in the United States District Court for the Northern District of California, seeking a declaratory judgment that the interim order issued by the French Court was not cognizable or enforceable in the United States because it violates the First Amendment. On June 7, 2001, the District Court found that there were sufficient minimum contacts to establish personal jurisdiction over LICRA and UEJF. The two French associations were found to have such contacts because they had sent a cease and desist letter to Yahoo! headquarters in Santa Clara, had initiated proceedings against Yahoo! in California, and obtained two interim orders from a French court against Yahoo!.

Five months later, the District Court held that enforcing the French decision would be incompatible with Yahoo!'s First Amendment rights and would thus be in violation of US public policy. The French order, prohibiting the sale of Nazi related items, is a content-based restriction that "a United States court constitutionally could not make". As recognized by the Court, "the First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling governmental interest, such as averting a clear and present danger of imminent violence", and such compelling interest was not present in this case. The French order also ran afoul of the First Amendment because it was impermissibly vague, insofar as it directed Yahoo! to "take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes".

LICRA and UEJF appealed judgment in terms of its findings on personal jurisdiction, ripeness (the readiness of the case for litigation) and abstention (the doctrine according to which a court can refuse to hear a claim where to do so would potentially intrude upon the jurisdiction of another court).

On August 23, 2004, the US Court of Appeals for the Ninth Circuit reversed the District Court decision on personal jurisdiction. The Appellate Court held

that LICRA and UEJF were not subject to personal jurisdiction under federal law, which only permits jurisdiction to be exercised over a defendant in an American lawsuit arising out of, or related to, the defendant's contact with the forum in question.

Yahoo! asked that the case be reheard "en banc". On January 12, 2006, an 11-judge panel of the Court of Appeals concluded that the District Court did have personal jurisdiction over the defendants, but that the action should nevertheless have been dismissed for lack of ripeness.

The two French associations appealed to the U.S. Supreme Court, arguing that the ruling left the door open for Yahoo! to use US courts in order to avoid judgments by courts in other countries. Yahoo!, which was not forced to pay the fine, filed no arguments before the Supreme Court. On May 30, 2006, the US Supreme Court denied certiorari. According to one American law firm, the Supreme Court denial leaves open the possibility that Yahoo! could file a counterclaim against the two associations, which could ultimately lead to a state of affairs in which any defendant in foreign lawsuits could file counterclaims in their home jurisdictions.

4. *Issues: The Protection of Fundamental Rights in Transnational Disputes*

Given the global reach of the internet, which enables widely divergent cultures and value systems to intersect, this case presents important and novel issues regarding free speech, constitutional rights and foreign sovereignty. As the internet completely ignores state and national boundaries, it renders our state-centered notions of jurisdiction and applicable law obsolete.

The Yahoo! case illustrates the lack of clear jurisdiction over internet disputes. No international court exists to assert jurisdiction over websites and internet content providers, resulting in a legal tennis match between some or all of the potential forums and parties involved. In this case, the parties' motivations were honorable – France wanted to ensure that its citizens are protected from offensive material, and American companies wanted to ensure they are not subject to liability in a foreign country simply for operating a website. However, neither party could offer any decisive argument as to which forum should have jurisdiction over this controversy.

Although territorial sovereigns do regulate cyberspace, are the transnational conflicts arising out of internet use properly addressed by traditional conflict-of-laws instruments?

The protection of free speech in transnational disputes is also important. Can the American First Amendment right to free speech really be violated by the enforcement of an order made by a French court? What law should apply to the website? Should a website be subject only to the laws of the country in which its

operators are based? Is it possible to find a core of common, global principles and values?

The Yahoo! case demonstrates the existence of an asymmetry between highly permeable national boundaries (a user in France can reach the Yahoo website and vice-versa) and national constitutional and criminal law. While some of these prohibitions would not be permitted by the US Constitution, European societies had ample justification for striking a different balance between human rights and the freedom of expression following World War II. The French rule is also more consistent with international human rights norms than is the US doctrine on the matter. The French prohibition protects citizens through an “effects doctrine” for territorial jurisdiction. French criminal law applies to any crime or felony committed outside French territory by a foreign person when the victim is a French national at the time of the infraction.

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7.4. The Internationalization of Antitrust Policy

Lorenzo Saltari

1. *Background*

The internationalization of antitrust policy is based on three main phenomena. The first concerns the protective effects of some antitrust measures, such as the European Commission's judgment (confirmed by the Court of Justice) against the US firm Microsoft for abuse of dominant position. This strained the relationship between the United States and Europe regarding the application of antitrust laws. The Antitrust Division of the US Department of Justice severely criticized the European Commission's position. This situation is very similar to a previous clash between the US and the EU when the latter denied authorization for the merger between General Electrics and Honeywell. The American antitrust authority criticized the European counterpart for protecting its businesses from the dominant firm in the industry and neglecting its consumers; granting such protection against the dominant firm dissuades others from maximizing their own efficiency. Beyond these different visions of antitrust policy, we can take a political view of the controversy, and of the protectionist goals that the enforcement of antitrust law can serve.

The second phenomenon is international and, more specifically, bilateral. It is based upon the 1991 and 1995 “Positive Comity” agreements, which deal with cooperation on antitrust issues between economic areas such as the European Union and the United States. The agreements have been invoked only once before the European Commission, in the *Sabre/Amadeus* affair, which involved European and US Computerized Reservation Systems (CRSs) used for air travel; in this case, the Commission imposed on the European CRS the obligation to behave in a non discriminatory manner towards its American counterpart. There are, however, two limits to this particular kind of cooperation. Firstly, it does not cover mergers; and secondly, the antitrust authority that acts on behalf of the other does not thereby gain exclusive jurisdiction over the proceedings – the other authority can commence another procedure that overlaps with the original. In the EU, the Commission is the relevant antitrust authority, and so the role played by States is more hidden.

The third phenomenon is international and specifically multilateral. It is based on the international network of the National Competition Authorities (NCAs): the International Competition Network (ICN). It is interesting to observe that the actors in the internationalization process are the NCAs and the World Trade Organization (WTO) (see, in this regard, The Doha Agenda – Interactions between trade and competition policy). In this context, the main goal is to create an international and multilateral framework for antitrust policy, but the main actors, in this case, are the States in their negotiations within the WTO. The 2003 Cancun negotiations on competition issues failed, and as a result, this topic has been excluded from further negotiations.

It is not difficult to understand the reasons behind the internationalization of antitrust policy. It is, however, a little harder to understand why this internationalization does not follow a unitary path, and why the activity of the ICN is the more advanced approach to internationalization.

There is a problem in that international agreements are often ineffective, or do not achieve the desired results (for example, neither the positive comity agreements nor the negotiations in the WTO have proved particularly successful), but the ICN’s creation of global standards, while more effective, remains unaccountable. The ICN is a private association of public authorities working together to produce common rules: their effectiveness depends on implementation at the national level by its members.

2. *Materials*

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3. *Analysis*

An ICN working group wrote an in-depth report on telecommunications. This sector is characterized by a high rate of firm-driven internationalization, though the whole structure of national and supranational legal systems impedes this.

The main contents of the ICN working group report are not specifically normative. They are not even soft law rules, but rather best practices that cannot be imposed on the affiliated authorities.

The report deals with the three most important and most problematic aspects of the public regulation of the telecommunications sector: the criteria for determining the relevant markets and the techniques for verifying the dominant positions; the recognition of asymmetrical rights of access and interconnection, which leads to a situation in which the infrastructure is owned by incumbents and used by third parties; and the relations between regulatory bodies and antitrust authorities. The growing competition in this sector makes the distinction between *ex ante* and *ex post* regulation practices difficult; the two spheres increasingly overlap. It is no coincidence that European law uses antitrust concepts in order to justify regulatory intervention in this field (Directive 2002/21/EC, Art. 15). Future developments in the heavily regulated telecommunications sector will depend on the evolution of the interactions

between regulation and antitrust. It is interesting to observe that national antitrust authorities try to participate in the process in order to influence it through the ICN. This implies the increase of their antitrust powers; and it also helps to internationalize and unify the policy, thanks to the horizontal linkage between national authorities. These authorities commonly determine the legal and regulatory approach to the telecommunications sector.

4. *Issues: The Roles of States and Private Bodies in Antitrust Governance*

States do not favor the internationalization of antitrust policy: they prefer to have global competition regulated by politics rather than by law. Vice versa, the NCAs (which are ontologically dependent on the States, but functionally independent from them) would prefer the legal institutionalization of *fair competition*. This underlines the gap between national public powers and general interests created (or identified) as a result of economic delocalization.

Government positions very often prevail over those of their domestic antitrust authorities, causing many more cases of conflict than coordination. The great relevance of protectionist antitrust measures suggests that antitrust law enforcement is based on the clash between protectionist economic policies. Using them, States seek to maintain hegemonic positions in global competition.

Internationalization is based on the activity of the ICN and on international cooperation, so the consent of NCAs is necessary. The NCAs can integrate with each other despite the orientations of their States, although only if they are insulated to some degree from political pressure. The more the ICN working group deals with individual sectors or problematic areas, the greater the value of the ICN's suggestions. This is clear in the case of telecommunications. The term "best practices" is in fact inaccurate and misleading. The real content of antitrust policy is defined by the NCAs through a continuous series of decisions made on the basis of international criteria. The first step is to frame the general norms; then their specific content must be defined. The ICN can have a role in the second phase. If the national authority agrees with the international criteria, it is likely to use them, even in absence of strong (e.g. "command and control") compliance mechanisms. The ICN contributes to the evolution of the antitrust law, and through the horizontal connection that it fosters between NCAs, it makes corrections of market failures easier. Nevertheless, the ICN decision-making process is based on consensus, which compromises its efficacy.

How is the internationalization process shaped by private bodies? The ICN exercises public power, even although it is an essentially private organization. This gives rise to the issues of whether it is accountable, and whether it allows private actors to participate in the process of identifying best practices. From this point of view, things seem, as they currently stand, to be backwards: it is the

ICN's non-public character that leads us to underestimate its real influence upon the national antitrust authorities that it brings together. For this reason, North American or European "notice and comment" practices, and the consequent participation of private actors in addition to the national authorities, do not as yet form part of the process through which the ICN formulates its recommendations for the market.

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8. GLOBAL SECURITY

8.1. The Regulation of Global Security Operations: The Case of the European Union's *Operation Artemis*

Edoardo Chiti

1. *Background*

Since 1999, an armed conflict between local ethnic groups and foreign backers such as Uganda and Rwanda has ravaged the Ituri region of the Democratic Republic of Congo. In the absence of effective control by the national authority, the conflict has directly involved the civilian population, and ethnic massacres, rape and torture have been documented by the United Nations. In May 2003, following the withdrawal of Ugandan troops from the region, Lendu militias and the Union of Congolese Patriots attempted to maintain control of the town of Bunia, provoking a serious humanitarian crisis.

In response to the crisis, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution N° 1484 on May 30, 2003. This Resolution authorized the temporary deployment of an Interim Emergency Multinational Force in Bunia, “to contribute to the stabilization of the security conditions and the improvement of the humanitarian situation in Bunia, to ensure the protection of the airport, the internally displaced persons in the camps in Bunia and, if the situation requires it, to contribute to the safety of the civilian population, United Nations personnel and the humanitarian presence in the town”. Following contacts with the French President and the EU Secretary-General/High Representative, the Secretary-General of the United Nations asked EU Member States to provide a temporary stabilization force in the Ituri Region in implementation of the mandate provided in Resolution 1484. On June 5, 2003, the Council of the European Union adopted Joint Action 2003/423/CFSP, which provided for and regulated an EU military operation in

the Democratic Republic of Congo, codenamed “Artemis”, in accordance with the mandate set out in Resolution 1484. The European force was made up of 1100 troops. France acted as the “framework nation” of the operation, and was the main contributor of military personnel (800 troops). In addition to France, Sweden and the United Kingdom provided personnel to the force, together with some (at that time at least) non-EU contributors (Brazil, Canada, South Africa and Cyprus; Hungary provided personnel to the operational headquarters in France). The operation ended in September 2003.

The legal framework was laid down by a number of provisions and measures: Articles 39-54 of the Charter of the United Nations; Resolution 1484; Articles 11-28 of the Treaty on the European Union; the EU measures establishing and regulating Operation Artemis, such as EU Council Joint Action 2003/423/CFSP, EU Council Decision 2003/432/CFSP (on the launching of the European Union military operation in the Democratic Republic of Congo), Political and Security Committee Decisions DRC/1/2003, DRC/2/2003, DRC/3/2003 (on the acceptance of third States' contributions to the EU military operation in the Democratic Republic of Congo, and the setting up of the Committee of Contributors).

Several bodies were involved in the operation: the Security Council and the Secretary-General of the United Nations; the European Union bodies competent in the field of European security and defense policy (i.e. the Council of the European Union, the Political and Security Committee, the Military Committee of the European Union, and the Military Staff of the European Union); the European Union bodies set up in connection with the Artemis operation, such as the Operation Commander, the Force Commander, the Committee of Contributors, the multinational force; governments and military administrations of the European Union Member States as well as those of the third countries participating in the operation; and, lastly, the Government of the Democratic Republic of Congo, the Congolese population and the Governments of Uganda and Rwanda, which were involved in the conflict.

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3. *Analysis*

The law governing Operation Artemis stemmed from the combination of a number of different UN, EU and national decisions.

The UN regulation provided the general framework of the operation. Security Council Resolution 1484 (2003) defines the mandate of the multinational force; it assigns the political responsibility for the operation to the Security Council, to be assisted by the Secretary-General; and it confers the strategic, operational and tactical responsibility upon the Member States that have expressed their intention to participate to the operation.

The EU regulation set forth the details of the operation, governing the organization and functioning of the relevant EU bodies and national armed forces. The integration technique used in the operation was centered on the establishment of hierarchical relationships between the various levels of command, from the bodies responsible for the political and strategic assessment (the EU Council, the EU Political and Security Committee, assisted by the EU Military Committee and the EU Military Staff) to the offices responsible for the technical and operative command (the Commander of the operation and the Commandant of the armed force). The Commander of the operation and the Commandant of the armed force are at the top of the command chain of the Rapid Reaction Force, which here took the form of a multinational force made up of all of the States that agreed to contribute at the Force Generation Conference, and whose concrete functioning is regulated by European Council measures (for example, the “operation plan”), the EU Political and Security Committee and the Committee of Contributors.

National law, by contrast, regulated the service relationship between soldiers and national administrations. As a matter of fact, EU law gives EU commanders general powers concerning operational and tactical command and control (i.e. the powers to carry out of the operation). Yet, within the command and control chain, national commanders’ have retain responsibility for, for example, the exercise of disciplinary powers, and other aspects of the soldiers’ service relationship.

Thus, the transnational regulation in this case “leaned” on national law. The latter constituted the only source of regulation of the authoritative powers of national administrations that participated in the Operation. But the exercise of the authoritative powers of national administrations took place within the context

of a regulatory scheme that was defined, at least in its general contours, by transnational regulation. In structural terms, the emerging discipline may be represented as a “binary” regime, in which a common level, established by transnational regulation, coexists with a particular level, characterized by the variety of national regimes. This overall design, however, is complicated by the circumstance that transnational administrative law in this context is itself a “composite” regulatory regime, deriving from the combination of UN and EU law.

4. *Issues: Transnational v. National Administrative Law*

The underlying issue is the relationship between national administrative law and transnational administrative law in an area of the global legal space that had traditionally been reserved to State action.

Considered as a whole, the law resulting from the interconnection between non-State lawmakers, and between them and national lawmakers, could be analyzed according to the traditional interpretative schemes of public international law. This makes sense upon consideration of several features of this interconnection: the combination of national and non-national regulation; the genuinely administrative character of the national regulation, and the function of the non-national regulation as coordinating interstate action; and the use of conventional intergovernmental measures as the primary source of law. Yet is the public international law approach fully satisfactory in this context? Would it not be preferable to analyze this regime instead as a branch of the emergent “global administrative law”, taking into consideration the essentially unitary character of that regime; its reliance on sources other than exclusively conventional ones; and its main function of regulating, by means of administrative tools, the combined action of a plurality of different public powers, both national and non-national, in a specific sector of the global legal order?

What would be the distinguishing features of this emerging branch of global administrative law? The law under examination here reflects a central element of global administrative law, the establishment of executive processes in which national administrations and non-national administrations, far from being separate, engage in a relation of mutual interdependence. But do these executive processes also present any relevant peculiarities? What is the relevance, for example, of the fact that the joint action of national and non-national administrations is achieved through organizational arrangements rather than procedural mechanisms?

Finally, does this institutional design serve to ensure that the polycentric, but interconnected, administration responsible for the execution of this operation will function well and efficiently? Does this design result only from an uneasy

compromise among conflicting exigencies, or might it also serve the ordered exercise of administrative action, in so far as it can exploit the traditional advantages of both national and international administrative law (i.e. the authoritative force of the former and the coordination potentialities of the latter)? Or does this regulatory scheme also present some shortcomings? For example, might the retention of national autonomy over tactical command actually weaken the strategic and operational command, or affect its substantive content? And can one really assume the ability of ultra-state administrative law to effectively accomplish its organizational function?

5. *Similar Cases*

Operation Artemis may be usefully compared with other EU military operations, such as EUFOR – Althea, conducted in Bosnia and Herzegovina, in conformity with United Nations Security Council Resolution 1551 (2004). *Operation Artemis* may also be compared with United Nations peacekeeping operations, such as the UNFICYP mission in Cyprus, in which the multinational force acts under the authority of the Security Council.

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8.2. Unilateral and Universalist Pressures on Global Security: The United Nations, the Occupying Countries, and the Reconstruction of Iraq

Edoardo Chiti

1. Background

On March 20, 2003, a multinational coalition, made up mainly of US and UK forces, invaded Iraq and launched Operation Iraqi Freedom. Following the defeat of the Iraqi forces, the coalition established a transitional government provided with executive, legislative and judicial powers, the Coalition Provisional Authority. This opened a new phase of Operation Iraqi Freedom, in which the coalition sought to promote the political, social and economic development of the country.

On May 22, 2003, the United Nations Security Council, in Resolution 1483 (2003), recognized “the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command”, and laid down a working program for the reconstruction of the country. On October 16 of the same year, in Resolution 1511 (2003), the Security Council affirmed the sovereignty and territorial integrity of Iraq and emphasized that the Coalition Provisional Authority’s powers would expire “when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority”. On June 8, 2004, in Resolution 1546 (2004), the Security Council endorsed the formation of a sovereign Interim Government of Iraq and, upon its formal request, reaffirmed the authorization for the multinational force under unified command. On June 28, 2004, the Coalition Provisional Authority transferred national sovereignty to the Iraqi Interim Government, which began the process towards open elections. In January 2005, direct democratic elections for the Transitional National Assembly took place. The Transitional National Assembly was called to draft a constitution, which was subsequently ratified on October 15, 2005. On December 15, 2005, the first elections for the members of the Iraqi National Assembly were held. In May 2006, the Government of Iraq succeeded the Iraqi Transitional Government.

The legal framework is laid down by the provisions of Articles 39-54 of the Charter of the United Nations and by Security Council Resolutions 1483 (2003), 1500 (2003), 1511 (2003), 1546 (2004), 1551 (2004), 1557 (2004), 1618 (2005),

1619 (2005), 1637 (2005), 1700 (2006), 1723 (2006), 1762 (2007) and 1770 (2007).

Several actors were involved in this phase of the Iraqi conflict: from the United Nations, the Security Council, the Secretary-General, the Special Representative for Iraq appointed by the Secretary-General, and the UN Assistance Mission in Iraq (UNAMI); many other international bodies were also involved, such as the Development Fund for Iraq and its the International Advisory and Monitoring Board; coalition bodies such as the Coalition Provisional Authority and the Multinational Force operating under unified command; and the transitional Government of Iraq, the Government of Iraq and the Iraqi people.

2. *Materials*

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(<http://www.un.org/aboutun/charter/index.html>);
- United Nations, Situation in Iraq
(<http://www.un.org/apps/news/infocusRel.asp?infocusID=50&Body=Iraq&Body=inspect>);
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- United Nations Security Council Resolution 1770 (2007), 10 August 2007 (<http://www.uniraq.org/documents/Resolution1770.pdf>).

3. *Analysis*

The Iraqi transition and its reconstruction after the coalition's military success in April 2003 was the subject of several United Nations Security Council Resolutions.

These Resolutions identify three main objectives of the post-conflict process, closely connected and aimed at guaranteeing the "welfare of the Iraqi people" (Resolution 1483, § 4): (i) the restoration of conditions of security and stability; (ii) the promotion of economic reconstruction, development and prosperity; and (iii) the establishment of a democratic order. The first two objectives are laid down by Resolution 1483 (2003), §§ 4 and 8, and reaffirmed by several subsequent Resolutions. The objective of a democratic order was variously articulated as the right of the people of Iraq to a representative and internationally recognized government, as well as, more generally, the right to carry out free and fair elections (Resolution 1511, § 3); the right of the people of Iraq freely to determine their own political future and take control of their own financial and natural resources (Resolution 1511, § 3); the recognition of the independence, sovereignty, unity, and territorial integrity of Iraq (Resolution 1546, Preamble); and the respect of the rule of law (Resolution 1546, Preamble).

These Security Council resolutions also conferred the responsibility for the achievement of such objectives in the first phase of the transition and reconstruction process on the Coalition Provisional Authority. The Authority had to act under the direction and co-ordination of the Secretary-General and the Special Representative for Iraq. Thus, the Authority had to work with the United Nations, to which it was connected through the organizational relationship envisaged in the Security Council authorizations. In the second phase of the transition and reconstruction process, some of the powers initially conferred on the Coalition Provisional Authority were transferred to the Iraqi Government. The Coalition Provisional Authority had an interim nature, as it was provided

that a representative and internationally recognized Iraqi Government would assume the Authority's responsibilities when it had fulfilled its function.

4. *Issues: The Limits of Global Security*

The United Nations Security Council Resolutions exemplify the tension between the role of the United Nations and the conduct of a coalition of States, as well as the ambiguities of an intervention which is not just a coercive reaction to an illegal national act, but also a peacekeeping and nation-building operation.

Looking more closely at this tension, does the conduct of the occupying forces represent a simple opposition, gradually developed in the 1990's, to the United Nations putatively exclusive role in providing military security to the international community? Or is it a more complex development, at least partially complementary to the UN's functional design, to the extent that security is defined on a global scale and in close connection with the protection of human rights? And what is the United Nations' influence on the activity of the coalition? Did the Security Council's intervention allow the United Nations to take effective control of the coalition and achieve its objectives? To what extent does the Security Council intervention reflect the Anglo-American initiative and to what extent does it express the needs of the UN itself?

Turning to the ambiguities of the intervention, what are the limits in pursuing the goal of global security? Through an increasingly broad interpretation of the notions of a "threat to the peace, breach of the peace or act of aggression", the United Nations has gradually developed a view of global security not only as the interruption of hostilities between fighting parties, but also as the pursuit of further goals, in particular the restoration of international legality and the protection of fundamental rights. Yet does such a broad purpose include the establishment of a democratic order? Is it possible to export democracy by means of military force, or must its development be the result of an internal process? If the former is true, which specific form of democratic order may be exported by military force?

5. *Similar Cases*

Operation Iraqi Freedom may be compared to the United Nations Transitional Administration in East Timor (UNTAET). This mission, launched by the Security Council in October 1999, established a transitional government to pursue, even through the use of military force, political, social and economic objectives, as well as to facilitate the development of an independent State, which was realized in 2002.

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