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International Organizations and Private Subjects:  
A Move Toward A Global Administrative Law?

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*International Organizations and Private Subjects: A Move Toward a Global Administrative Law ?*

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## **ABSTRACT**

*This article examines the relationships between international organizations and private parties. Its purpose is to illustrate the correlation existing between the crisis in the dualism theory and the development of a global administrative law. The emergence of global administrative law is a combination of two connected phenomena. On the one hand, international regulation more directly affects private parties within states. On the other hand, mechanisms of participation and protection of private parties are increasingly provided for in the international settings, directly related to decisions adopted by international organizations. In this way, rules and legal principles of administrative law are drawn from domestic administrative law and are transplanted and adapted to the international context.*

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## Legal Dualism and the Problem of Ultra-State Administrative Law.

"We do not know of an organized community that has the power to pose legal norms upon the State and the individual as its members"<sup>1</sup>. The State and the individual cannot be subjects of the same legal system. This is the conceptual basis of legal dualism. According to it, "there is a domestic law, *of* the States, and an international law, *among* the States. The subjects of domestic law are individuals; the subjects of international law are States and only States "<sup>2</sup>.

Elaborated by Triepel at the end of the nineteenth century, this theory has long influenced legal culture and it continues to do so.

On the basis of this conception, in 1967, the most prominent Italian administrative law scholar, Massimo Severo Giannini, denied the existence of an administrative law of the European Communities. He believed that only states could be subjects with full rights of the European legal system. As a consequence, this system lacked the focal problem point of administrative law. The dimension of conflict between the exercise of public power and the protection of the rights of private subjects was absent<sup>3</sup>. Giannini's thesis can be illustrated following the logic of the Aristotelian syllogism. There is the postulate that administrative law can affirm itself only in legal systems that have private parties as subjects. There is the minor premise that private parties are not subjects of the European legal order. Finally, there is the conclusion that administrative law does not exist in the European legal system.

In reality, it was doubtful that a European administrative law did not exist in 1967. Moreover, it is commonly recognized that it indeed exists today. However, this depends on the fact that, since their origins, the European Communities have distanced themselves from the dualistic paradigm. They have allowed for a system that also includes private parties, other than

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<sup>1</sup> E. Triepel, *Volkerrecht und Landesrecht*, Leipzig, 1899 (citing from the Italian translation by G.C. Buzzati, *Diritto internazionale e diritto interno*, in *Biblioteca di scienze politiche ed amministrative*, edited by A. Brunialti, Torino, 1913, p. 19).

<sup>2</sup> G. Fusinato, *La personalità giuridica dell'Istituto internazionale di agricoltura*, in *Riv. dir. int.*, vol. VIII, p. 149 ss.

<sup>3</sup> M.S. Giannini, *Profili di un diritto amministrativo delle Comunità europee*, Rome, April 14, 1967. The paper, which had remained unpublished, has now been published in *Riv. trim. dir. pubbl.*, 2003, No. 4, p. 979: "Given that the subjects of the (European) order are only collective legal figures such as states, the need (..) to institute dialectic oppositions between the moment of authority and that of liberty is missing ". There lacked therefore the "issue" of a branch of law which was "invented", at the beginning of the eighteenth century, "to regulate the relationships between public authority and the fundamental rights of private parties, between power and private autonomy".

states, among their subjects. Such a legal order, as a consequence, tends to absorb those of member states rather than setting them aside as separate ones. In addition, this characteristic, at the same time native and original, of the European legal order, has become more prominent in time. We have come today, as known, to the near constitutional codification of fundamental rights that the European citizen can enforce as against E.U. institutions and those of member states.

For these reasons, the basis of Giannini's theory paradoxically seems to be validated rather than demolished by the establishment of a European administrative law. After all, such a body of laws was able to develop precisely because the European legal system set itself apart from the dualistic premises that underlie (other) international organizations. The existence of European administrative law, in other words, breaks down the minor premise of the syllogism: private parties *are* in fact subjects in the European legal order. In this way, however, it also validates the fundamental postulate that legal dualism and ultra-state administrative law are incompatible.

Global public governance today seems to offer a new and promising testing ground for such a postulate. From this perspective, this writing examines the relationships between international organizations (with a universal vocation) and private parties. Its object is the correlation existing between the crisis in the dualism theory and the establishment of a global administrative law<sup>4</sup>.

From this standpoint, the history of relations between international organizations and private parties can be broken down into three phases which correspond to just as many models or conceptions of ultra-state administrative law. It is important to distinguish these notions that are often generally equated with the same term: international administrative law.

There was initially a first phase dominated by legal dualism. During this phase, ultra-state administrative law took shape as *international administrative law*. This is a type of law that belongs to the genus of international law because it is produced by states and is enforceable in their reciprocal relations. It is however a species of it because the reciprocal obligations between States deal with administrative matters and therefore affect national administrative laws.

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<sup>4</sup> On the general subject more extensively, S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, Milano, Giuffr , 2003.

There followed a period during which changes in political and legal affairs required a revisiting and refining of traditional dualistic schemes. In this phase, *administrative international law* gained footing alongside international administrative law. This is a type of law that belongs to the genus of administrative law because it regulates relationships between administrations and private parties. It is distinct from the species of state administrative law, however, because it is a law that is internal to the order of an international organization.

A new phase is now dawning in which the evolution of the system of international organizations appears in many respects to renounce its legal representation in dualistic terms. In this phase, we are witnessing the emergence of a *global administrative law*. I will attempt to demonstrate that this results from the development and fusion of the preceding two forms of ultra-state administrative law. It is a type of law that belongs to a legal order that includes amongst its subjects states as well as individuals.

In the following sections, I will summarily explain the first two phases and will then concentrate on the last one. I wish to point out, however, that in the international legal order new institutions and models tend to coexist alongside the old without taking them over entirely<sup>5</sup>; and that the characteristics of the more recent phase can for the moment be guessed rather than actually known.

### **The Dualistic Order and International Administrative Law.**

In the domestic legal orders of democratic states the relationship between private parties and the institutional framework has a duplicate dimension. On the one hand, the public administration is expressed through the social group of reference and receives from it the powers that it exercises. On the other hand, the members of the social group are also the recipients of the exercise of the powers conferred upon the public administration. As such, one sees the double

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<sup>5</sup> This was noted recently by A. Cassese, *Diritto Internazionale I. I lineamenti*, Bologna, Il Mulino, 2003, p. 32: "Usually, old legal mechanisms are gradually supplanted by new institutions, at least to eliminate the most evident incongruities. Instead, in the international community, there exist two different models, side by side, a traditional one and a modern one. In the first, (that could be defined as Grotius-like), the international community is founded upon a state-oriented vision of international relations; it is characterized by rules that aim to ensure the coexistence and cooperation among sovereign nations, each acting to accomplish its own interests. The more modern and Kant-like model is rather based on a universal and cosmopolitan view which underlines transnational solidarity. New legal institutions, that began to gain footing during the aftermath of the First World War, and later at an increased pace, after the Second World War, have not supplanted and eradicated the old framework structured according to the Grotius-like model. These instead are overlapping with the old model".

standing of the citizen. Quite apart from the subject, he above all *participates*, that is, has an influence on the exercise of the powers granted to the public administration. The citizen also enjoys *guarantees* or defense mechanisms against the exercise of such powers by public authorities.

In terms of the relationships between global public governance and private parties, the dualist theory excludes both of these perspectives.

Above all, it excludes the first because participation is reserved to states. Only states can ultimately influence the actions of international organizations. Naturally, the holders of offices within international organizations are natural persons, that is, private parties. These, however, are nominated by governments and are not elected by the people. Further, and most importantly, normally such individuals do not hold their office in their own right and in the interest of all the members of a relevant community, as is the case for the holders of public offices within a state administration. The officials of international organizations hold their office as representatives of the single state that nominated them, in its exclusive interest, and according to the instructions received. In other words, the true holder of an international office is the state and not the natural person that happens to represent it.

In effect, international organizations that came to the forefront between the second half of the eighteenth century and the aftermath of the First World War, the so called public international unions, were collective bodies that brought together representatives of states<sup>6</sup>. Such bodies normally availed themselves of a reduced administrative apparatus temporarily furnished by the state that hosted the organization (the so called director state). There were no subjects in those organizations that did not act by virtue of a service relationship established with an individual member state.

However, the dualism theory also excludes, as mentioned earlier, the other aspect of relations between private parties and institutions. In fact, even the ability to exercise public power with respect to private parties is reserved to the state of which they are citizens. The decisions of international organizations cannot reach private parties without the consent and the

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<sup>6</sup> See generally on public international unions, among others, L. Renault, *Les Unions Internationales. Leurs avantages et leurs inconvénients*, in *Revue générale de droit international public*, 1896, p. 25; P. Reinsh, *Public International Unions*, Boston - London, Ginn, 1911; L. Woolf, *International Government*, New York, Brentano, 1916; K. Neumeyer, *Les Unions Internationales*, in *Revue de droit international des sciences politiques et sociales*, 1923-24, p. 348 ss. For a summary illustration, see G. J. Mangone, *A Short History of International Organizations*, McGraw-Hill Book Company, New York, 1954, p. 67 ss.



mediation of states and their respective administrative systems. As Triepel had noted, international law, according to the dualist view, is like a field marshal that dispatch orders only to generals through which these will then reach the troops.

The discourse on the relations between international organizations and private parties could, therefore, be ended even before it begins. Such relationships in fact do not exist because neither international organizations nor private parties have an autonomous existence with respect to states on the international scene. Composed exclusively by states, the international order is entirely horizontal in nature. It is unfamiliar with a gap between its organization and its subjects. It does not allow for dialectic between the public and private spheres. As such, according to Giannini's postulate, it cannot have an administrative law.

There is a paradox here, however, that requires explanation. Precisely during the initial period of the history of international organizations, dominated by dualist views, the predecessors of current global public governance were assigned to the areas of administration and administrative law<sup>7</sup>. The international organization was viewed as an international administration, and from this, derived the notion of public international unions. The law applied to international institutions, and produced by these unions, was considered administrative law. The legal literature of the time, and especially Italian publications, explains this apparent paradox. The fact is that, at that time, international administration was intended as a *common* administration of the states<sup>8</sup>. There wasn't an actual administrative organization of the international legal order that was placed above the states. Public international unions were conceived rather as administrative organizations created by several states to operate within their territories. Similarly, the law of public international unions was not intended as a new branch of the international legal order, different from common interstate law. *International administrative law*, as anticipated earlier, is essentially interstate law in terms of its nature; it is administrative only as to its contents - that is the subjects that it centers on<sup>9</sup>. As traditional international law, it

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<sup>7</sup> Among the first studies on international administration, see P. Kazansky, *Theorie de l'administration internationale*, in *Revue général de droit international public*, vol. 9, 1902, p. 23 ss. Later in time, D. Burns, *International administration*, in *British Yearbook of International Law*, 1926, vol. VII, p. 59; M. Dendias, *Les principaux services internationaux administratifs*, in *Recueil des cours de l'Académie de droit international*, I, 1938, p. 301.

<sup>8</sup> See D. Anzilotti, *Gli organi comuni nelle società di Stati*, in *Riv. dir. int.*, vol. VIII, p. 156 ss.

<sup>9</sup> U. Borsi, *Carattere ed oggetto del diritto amministrativo internazionale*, in *Riv. dir. int.*, 1912, p. 375. Borsi observes how international administrative law is part of international law because it is law, produced by the collective will of states expressed through treaties, that regulates relations between states regarding subjects that "are considered the realm of modern social administration, and that do not change if they are handled by several states

is created by states and it regulates relations between them. Differently from traditional international law, however, it imposes on states obligations in terms of their internal, rather than foreign, policies.

*Common state administration* and *international administrative law* therefore were two concepts that were in line with dualistic schemes. All of the administrative organization remained as belonging to the state: internal, if only of one state, and international, if belonging to more than one state. All of administrative law emerges from the state: internal if produced by a single state and international if produced by several states by way of agreement.

### **Dualism Revisited: Administrative International Law**

After the First World War, the creation of the League of Nations opened a new phase in the history of international law. It also opened a new phase in the history of relations between international organizations and the private subjects and in the history of ultra-state administrative law.

The League of Nations had a Secretariat that was independent from states<sup>10</sup>. According to Eric Drummond's view, the principles of the British *civil service* were transplanted into the international organization<sup>11</sup> creating the new figure of the *international civil servant*<sup>12</sup>. The *international civil service* is often considered by international law scholars as a minor secondary

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with concurrent actions, instead of by each state by specific initiative, and if, instead of receiving norms exclusively from laws and regulations, they find their subject matter in treaties and international custom ". Later, in the Italian legal literature, A. Rapisardi Mirabelli, *Théorie générale des Unions Internationales*, in *Recueil des cours de l'Académie de droit international*, vol. VII, 1925, and *Il diritto internazionale amministrativo*, Padua, 1939.

<sup>10</sup> On the origins and meaning of the International Secretariat, independent from states, the literature is vast. See, in particular, E.F. Ranshofen-Wertheimer, *The International Secretariat*, Washington, Carnegie Endowment for International Peace, 1945; F. P. Walters, *A History of the League of Nations*, Oxford University Press, 1952; J. Siotis, *Essai sur le Secrétariat International*, Genève, Librairie Droz, 1963; G. Langrod, *La fonction publique internationale*, A.W. Sytoff, Leyden, 1963; T. G. Weiss, *International Bureaucracy*, Lexington Books, Toronto - London, 1971. On current problems in international administration, see, among others, C. De Cooker (edited by), *International Administration. Law and Management Practices in International Organizations*, Dordrecht/Boston/London: UNITAR, Martinus Nijhoff, 1990, with annual supplements; Y. Beigbeder, *The Internal Management of United Nations Organizations*, London, Macmillan, 1997.

<sup>11</sup> See R. S. Jordan, *The Influence of the British Secretariat Tradition on the Formation of the League of Nations*, in Id. (edited by), *International Administration*, New York – Oxford, 1971.

<sup>12</sup> On the origins of the role, a seminal study is that of S. Bastid - Basdevant, *Les fonctionnaires internationaux*, Paris, Recueil Sirey, 1931. For the current regime, see, among others C.F. Amerasinghe, *The Law of the International Civil Service (As Applied by the International Administrative Tribunals)*, Oxford, OUP, 1994 (2<sup>nd</sup> ed.). On the gap between the idea of the international civil service and its practical outcome, see A. Ali, *The International Civil Service: The Idea and the Reality*, in C. de Cooker, *International administration*, cit., I.1.

subject reserved to specialists. Administrative law commentators should, however, have an increased awareness of its importance. They will better understand the role that the growth of bodies of professional bureaucrats has played in the formation of the modern state.

From the standpoint that is of interest in this context, the *international civil service* introduces into the international order the aspects of the relationship between public organizations and private parties negated by the dualism theory.

First, in terms of *participation*, private parties acquire a right of access to public international offices. Title to “political” offices of international organizations does in fact remain reserved to the states. However, title to administrative offices is conferred directly upon individuals. According to the principles stated for the first time by Drummond, and today integrated in all modern international organizations, international civil servants do not represent their state of origin. They hold their offices in their own right, in fact as private individuals, and in the interest of the organization.

Second, the international civil servant is not simply a private party that partakes in the exercise of public international functions and therefore has an influence on the activities of international organizations. He or she is also a private party toward which the powers of international organizations are exercised. When such bodies recruit, promote or terminate an employee, their decisions have an immediate effect on a private party, notwithstanding the consent and mediation by the state of which that individual is a citizen. This is why there emerges the need for guarantees for private individuals-civil servants with respect to international organizations. Such necessity is evidenced by the inception and development of international administrative tribunals and the laws that they apply and produce<sup>13</sup>.

The *international civil service* therefore represents an injection of verticality in the international legal order. First, it has its own administration: the international secretariat is not simply the extension of a state administration because it is staffed with professional, independent and neutral personnel. Second, the international system allows private parties to assume rights and obligations provided for by international laws on their own, thus becoming subjects within the system.

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<sup>13</sup> On the origins of international administrative tribunals, see S. Bastid - Basdevant, *Les tribunaux administratifs internationaux et leur jurisprudence*, in *Académie de droit international - Recueil des cours*, II, 1957, p. 348 ss. and, later, *Le tribunal administratif des Nations Unies*, in Conseil d'Etat, *Etudes et documents 1969*, Fasc. n. 22, Paris, 1970.

Such a vertical dimension opens the door to the establishment of an "*administrative international law*". Unlike international administrative law, this kind of law displaces the dualistic order. It is not state law. It is also not interstate law. In fact, it can be distinguished from traditional international law not only in terms of its contents, but also its nature. It regulates relations between subjects – international organizations and private parties – neither of which is a state.

The scope of such law is, however, initially very limited. A private party's participation only deals with public international offices lacking any decision-making powers outside the organization. In turn, the ability of the international organization to exercise its power over private parties is limited only to its civil servants. This ability, therefore, develops within the organization.

It is precisely on this internal aspect that the prevailing legal culture has focused on to refine and reaffirm its dualistic principles. The international organization (each individual one) has been viewed as if it were a state. The belief being that in the same way as states, an international organization has its own internal law, of which the rules governing secretariat personnel form a predominant portion. As a consequence, the dualism theory was once again spared: a) *administrative international law* is in reality internal law: not exactly state law, but "similar by nature" to state law<sup>14</sup>; b) the private individual who is a civil servant is not a subject of the international order, but of the internal order of an individual international organization; c) the international organization does not directly exercise authority over the subjects of state systems, but only over the subjects of its own internal order<sup>15</sup>.

### **The Crisis of the Dualism Theory: a Move Toward a Global Administrative Law?**

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<sup>14</sup> See U. Borsi, *Il rapporto di impiego nella Società delle Nazioni*, in *Riv. dir. internaz.*, 1923, p. 273.

<sup>15</sup> L. Focsaneanu expressed himself on the subject matter very clearly (*Le droit interne de l'organisation des Nations Unies*, in *Annuaire française de droit international*, 1957, p. 325): "to date, the international community is composed on the one hand of states and on the other of certain entities that, without being states, have an international legal standing and are subjects of international law. The "*summa divisio*" of legal reality must, as a consequence, distinguish: a) international law, governing relations between subjects of the international legal order and b) the domestic law of subjects of international law. As the latter are subdivided into states and non-state entities, the second term of the classification will also be subdivided into state domestic or national law and the internal law of non-state entities, that is, international organizations. National law and the internal law of international organizations are two coordinated notions, occupying symmetrical positions with regard to the law of the people (..) Further, the internal law of international organizations, in the same way as national law, is composed of a multitude of particular legal systems, each organization, as each state, having its own legal system".

In 1923, in underlining his theories on the dualistic separation between international law and domestic law, Triepel added: "Certainly, it is possible that a future evolution may produce a new international law that recognizes some social groups within the current states as independent international subjects (...). It may be that the threatened dissolution of the modern state may place some large economic groups where states once stood and will as a consequence produce an absolutely new international law. While we wait, we shall maintain our theory "<sup>16</sup>.

If one considers that today, in the top 100 major economic powers, there are 49 states and 51 multinational corporations, one might think that Triepel's wait is over. In order to illustrate the most recent phase of relations between private parties and international organizations, however, it shall be useful to proceed by way of inductive reasoning and examples.

#### *4.1. The Extra-territorial Effects of Internal Administrative Rules*

In a world progressively freed of duties and tariffs, when a state introduces measures on the safety of food products, it makes a decision that affects the interests of out-of-state producers. In order to access that market, such producers will have to conform to food safety measures of a probably higher standard than those provided for in their home state.

In a world where capital resources circulate freely, when a state poorly exercises its supervisory functions over its banking system it can provoke a financial crisis that will spread to other states hurting out-of-state investors.

In a world where businesses freely choose where to locate themselves, when a state issues low labor standards, this can negatively influence the citizens of other states. This practice can jeopardize their economic interests because businesses that operate in those areas can decrease their costs and stand out as privileged in global competition. At the same time, it can prejudice the interests of workers in other states: on the one hand, because their respective governments may be in turn pushed to lower their labor standards (the so called "race to the bottom"); on the other, because businesses may be tempted to relocate to countries with lower labor costs.

All of these examples, and many more that could be mentioned, illustrate the same phenomenon. Due to market integration, decisions made by states in the exercise of their internal

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<sup>16</sup> H. Triepel, *Les rapports entre le droit interne et le droit international*, in *Recueil des Cours*, 1923, p. 82.

sovereignty progressively acquire a direct external relevance. These have, as it has been suggested, a “global impact”<sup>17</sup>. As a consequence, if state governments want to safeguard the interests of their national communities, they must succeed in influencing the internal political decisions of other states. The more internal politics produce effects outside of states, the more their foreign policies produce effects within them.

Such a phenomenon is not recent, but its size is. Still, at the beginning of the twentieth century, Otto Mayer, the founder of German administrative law, could state that “our State does not but by mere exception expect to exercise its authority over foreign territory”<sup>18</sup>. Today that exception tends to become the rule, because the realm of enforcement of decisions by states is always less territorially confined.

#### *4.2. The Development of International Administrative Law: the Penetration of International Rules in Domestic Legal Systems*

The new dimensions of the phenomenon reveal the inadequacy of old instruments. What the traditional instrument to influence the domestic policies of other States was has already been stated: international administrative law. Established already in the nineteenth century, it developed significantly over the course of the following one. There no longer exists an area of domestic policy (and therefore a subject of national administrative law) on which international regulation does not press upon, often over abundantly. However, international administrative law is an instrument that comes across as more and more inefficient, because its penetration into domestic legal systems is, according to the canons of legal dualism, left to the mediation power of states. There is the filter of state sovereignty between international rules and their domestic applications.

This creates an unbalance. While the economy becomes *global*, its legal regulation remains *international*. The state loses control over economic fluxes, but maintains control over the legal ones. As wind and rain in the known metaphor, goods and capital can enter without permission in the hut of the (poor) state, but not rules.

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<sup>17</sup> A.C. Aman, *Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest*, in *Indiana Journal of Global Legal Studies*, vol. 6, 1999, p. 417.

<sup>18</sup> O. Mayer, *Le droit administratif allemand*, Giard-Bri re Editeurs, Paris, 1906, § 62, (*Le droit administratif international*), p. 354.

More recent developments show a tendency to correct such unbalance at many international organizations and particularly at those geared toward the governance of economics. The ability of international rules to penetrate domestic legal systems thus grows<sup>19</sup>.

Let us once again address the examples cited earlier: the safety of food products, supervision over the banking industry, and the protection of labor.

a) The safety of food products.

International rules in matters of food hygiene have since 1963 been subject to international standards approved by the Codex Alimentarius Commission<sup>20</sup>. Once approved, the standards are published and distributed to the Commission's member states. States are invited to notify the Secretary of the Commission as to their "acceptance" of the standards<sup>21</sup>. They can opt for a "full acceptance" or also for an "acceptance with specified deviations". In the first case, a state guarantees the free distribution within its territory of the products that comply with the standards as well a prohibition on the sale of products that are not compliant. In the second case, the guarantee is referred to products that conform to the international standard, as modified by the derogations and exceptions set forth in detail and justified in the declaration of acceptance. The state that has accepted the standards is responsible for their uniform and impartial application with respect to all home-produced or imported products distributed within its territory. States that do not intend to accept the standards must instead (a) indicate whether products that are in compliance can nevertheless be distributed freely within their territory, and (b) indicate in what respects national regulation of the subject matter differs from the international standard and the reasons for such discrepancies<sup>22</sup>.

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<sup>19</sup> Recently on the subject, see S. Cassese, *Shrimps, Turtles and Procedure: Global Standards for National Administrations*, *IILJ Working Paper 2004/4*, available at <http://www.nyuailj.org/papers/2004/2004.4.htm>.

<sup>20</sup> It is a particular international organization, instituted by way of a joint decision by two other international organizations, the FAO and WHO, whose members, by way of a simple notification to the general directors of the two organizations, later also became members of the Commission. Although it is an intergovernmental organization, that is, composed of state delegates, it nevertheless adopts its decisions based on procedures that are dominated by administrations. On one hand, the Secretary of the Commission has the power of initiative and proposal. On the other, officials from national administrations in the sector participate to the meetings of the numerous committees hosted by member states. These committees have the task of examining and amending the rule proposals advanced by the Secretary before they are submitted to the Commission for final approval as a Codex Alimentarius standard.

<sup>21</sup> Codex Alimentarius Commission, *Procedures for the elaboration of Codex standards and related texts- PART 3*. The Secretary periodically publishes information on notifications received from state governments regarding their acceptance of standards.

<sup>22</sup> Commission of Codex Alimentarius, *General Principles of the Codex Alimentarius - 4 - ACCEPTANCE OF CODEX COMMODITY STANDARDS*.

As one may notice, the penetration of international norms into domestic legal frameworks corresponds to dualistic schemes. It is subordinated to a series of manifestations of a state's will. First, the state decides whether to join the international organization that approves such standards. Second, the state participates in the elaboration of the rule. Finally, the state decides whether to accept each individual standard and can also, in the process of integrating the international rule into its system, decide upon amendments or derogations.

In this situation, the harmonization process of various national legislations in matters of food hygiene, assigned to traditional international administrative law, has progressed strenuously. The legislative framework has, however, changed since 1995 due to the creation of the World Trade Organization ("WTO"). In particular, the rules contained in the so-called *SPS Agreement* ("*Agreement on the application of sanitary and phytosanitary measures*") affects the efficiency of the norms approved by the Codex Alimentarius Commission. As known, the goal of the *SPS Agreement* is to balance the liberalization of commercial exchanges with the protection of consumer health. It aims at preventing states from introducing sanitary measures that in reality have protectionist economic objectives. To this end, the agreement refers to the rules of the *Codex Alimentarius*<sup>23</sup>. It provides, in particular, that national rules, if in conformity with *Codex Alimentarius* standards, are presumed to be actually "necessary" to protect health; and therefore are considered compatible with WTO law<sup>24</sup>. In a different respect, national rules that do not align themselves with such standards, and that set forth higher levels of sanitary protection are not characterized by such a presumption. In this case, the rule is admitted, but on the condition that: a) there exists a scientific justification for it<sup>25</sup>; b) the measure was adopted based on appropriate

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<sup>23</sup> See *SPS Agreement*, Art. 3.1: "To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3".

<sup>24</sup> See *SPS Agreement*, Art. 3.2: "Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994". As established by the *Appellate Body*, (*EC Measures Concerning Meat and Meat Products, WT/DS26/AB7R, WT/DS48/AB/R, January 16, 1998*, par. 170), "under Art. 3.2. of the SPS Agreement, a Member may decide to promulgate an SPS measure that conforms to an international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the SPS Agreement and of GATT 1994".

<sup>25</sup> See *SPS Agreement*, Art. 3.2: "Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification (...)". In particular, in order for there to be a scientific justification, it is necessary that "on the basis of an examination and evaluation of available scientific information (...), a Member determines that the relevant international standards (...)



risk assessment procedures conducted according to the techniques developed by international organizations (above all, the *Codex Commission*)<sup>26</sup>; c) the measure was devised taking into account the interest in protecting commercial exchanges<sup>27</sup> and constitutes the least possibly restrictive burden on international commerce<sup>28</sup>; d) the rule was approved with due consideration of the interests of exporting states, allowing these to request and obtain a reasoned explanation regarding the choice made.

Overall, the decision by states not to conform their domestic system to the international rules on food hygiene is admitted in the abstract. It is, nevertheless, subject to conditions and limitations, the observance of which is supervised by the dispute settlement bodies of the WTO. These often end up exercising a review of the reasonableness of sanitary policy choices undertaken by States. For this reason, the effectiveness of the rules on food safety approved by the Codex Alimentarius Commission changes. Their ability to penetrate within state domestic systems increases. First, such rules bind all WTO member states, even those that are not members of the Codex Commission. In this way, they also become binding on states that have not joined the international organization that originated them and that have not, therefore, participated in their elaboration. Second, and most importantly, the standards of the Codex Commission are binding on member states even when these have not “accepted” them or have accepted them with reservations or exceptions. The decision to conform the domestic order to international rules was, when based solely on the *Codex Alimentarius* regime, the result of the exercise of a sovereign state’s free will. Due to the effects of the link between such regime and the WTO one, the same decision tends instead to be transformed into a discretionary choice, subject to the limits and checks provided for and exercised by global public governance.

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are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection”. (Agreement on the application of sanitary and phytosanitary measures, Art. 3.3, note 2).

<sup>26</sup> See *SPS Agreement*, Art. 5.1: “Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations”. In cases where scientific knowledge on the existence of health risks is not sufficient, states may, based on available information, adopt temporary sanitary and phytosanitary measures pursuant to the precautionary principle provided for in the Rio Declaration (Principle 15). However, the SPS Agreement provides a narrow interpretation of such principle requiring the state that invokes it to obtain additional information, within a reasonable timeframe, necessary for a more objective risk assessment, and to consequently monitor and review the measures adopted.

<sup>27</sup> See *SPS Agreement*, Art. 5.4: “Members should, when determining the appropriate level of sanitary and phytosanitary protection, take into account the objective of minimizing negative trade effects”.

<sup>28</sup> See *SPS Agreement*, Art. 5.6: “(.) Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection”.

## b) banking supervision

National rules in the area of banking supervision are the object of a harmonization activity that developed since 1974 through the Basel Committee on Banking Supervision instituted by the governors of the central banks of countries that belong to the “Big Ten”. In such a setting, the representatives of central banks jointly approve standards and guidelines aimed at harmonizing banking supervision activities carried out by various national authorities. Recently, the Basel Committee approved a list of twenty-five Core Principles for Effective Banking Supervision. These fundamental principles are considered "minimum requirements" and "are intended to serve as a basic reference for supervisory and other public authorities in all countries and internationally". Naturally, such principles are not binding on banking supervisory authorities that are not represented within the Basel Committee. To be precise, these are not even binding upon the national authorities that belong to the Committee. In fact, the Basel Committee adopts its standards "in the expectation that individual authorities will take steps to implement them". In full respect of dualist principles, then, the effectiveness of international rules in domestic systems is subordinated to voluntary acceptance by a national authority: a) it is necessary that said authority has joined the organization that elaborates the rules; b) it is necessary that the authority participate, or may participate, to the rules' formulation process; c) finally, it is also necessary that the authority decides to conform to the elaborated rules, integrating them within the domestic legal system and ensuring their enforcement.

Also in this case, however, the legal framework has recently undergone significant changes. Here, too, it is the effect of the link between the international regime relating to banking supervision and other international organizations, such as the International Monetary Fund (the “IMF”) and the World Bank.

The crises of the nineties shed light on the dramatic effects that can result from the weakness of national financial systems. These effects are produced within, but also on the outside of, countries that are struck by financial debacles. Financial globalization accentuates so-called systematic risk. In order to reduce such risk and prevent a further crisis, in 1999 the IMF and the World Bank launched two initiatives that fall within the general supervisory function assigned to the IMF pursuant to Article IV of the Articles of Agreement. The first initiative, the *Financial Sector Assessment Program* (“FSAP”), aims at identifying the vulnerability of national financial systems by way of an overall “health checkup”. The second initiative, the *Reports on*

*the Observance of Standards and Codes* (“ROSCs”) is directed in particular at verifying the observance of a series of international standards which are recognized, but often not produced, by the IMF and the World Bank. Among these, the Core Principles approved by the Basel Committee occupy a central role. In carrying out either function, then, teams of IMF and World Bank officials, also assisted by officials of standard-setting agencies such as the Basel Committee, make visits to the countries involved. During these visits, they organize meetings with national authorities and representatives from the private sector. As a conclusion to such inspections and meetings, they formulate a detailed opinion on the observance of internationally recognized standards. This may take the form of a specific ROSC, in reference to one or more standards, or as a more comprehensive Financial Sector Stability Assessment (“FSSA”) on the overall condition of the national financial system.

It is true that state participation to these initiatives is voluntary. It is also true that the publication and disclosure of the evaluations made by the international administration are subordinated to the consent of the state undergoing the check. However, it is a fact that financial institutions active in international markets rely on information on the observance of internationally recognized standards in the course of their investment decisions<sup>29</sup>. This explains the availability and interest shown by states in undergoing inspection and in conforming to such standards in order to display the positive assessment received on international financial markets<sup>30</sup>. As a result of the initiatives undertaken by the IMF and the World Bank, then, the effectiveness of international rules on banking surveillance adopted by the Basel Committee also undergo transformation. First, such effectiveness develops also with regard to the numerous states, members of the IMF or the World Bank, whose authorities for banking supervision are not part of the Basel Committee and therefore do not participate in the approval of the relating standards. Second, a state decision to observe the standards, and thus to enforce them within their

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<sup>29</sup> See IMF-WB, *International Standards: Strengthening Surveillance, Domestic Institutions, and International Markets*, March 5, 2003, p. 12: “Major market participants appear to be using the information on countries’ observance of internationally recognized standards, including ROSCs. A survey of large internationally active financial institutions found that 58 percent of respondents use ROSCs in their financial decision-making”. The document is available at <http://www.imf.org>.

<sup>30</sup> States indeed press for their progress in conforming to internationally recognized standards to be assessed and disclosed to the public. S. Ingres, Director of the Monetary and Financial System Department of the IMF, for example, points out that: “we are moving into a phase where we also need to make updates because countries change things, they improve, and they say: well, you assessed us a few years back. Now we have changed a hundred of different things. We want you to come and take a second look, because we want to tell others that we look better than last time” (transcript of an Economic Forum - *Ensuring Financial Stability: the IMF’s Role*, December 16, 2003, at [www.imf.org/external/np/tr/2003/tr0301216.htm](http://www.imf.org/external/np/tr/2003/tr0301216.htm), last visited 29.01.04).

domestic legal systems, is influenced by global public governance. It does not threaten sanctions in the event of a failure to comply with international rules as in the case of WTO adjudicating bodies. It does, however, promise awards in the event of compliance in the form of a “certification” that states can take advantage of in international capital markets.

c) the protection of workers’ rights

Ample international regulation on the protection of work has existed for a long time. Since its founding in 1919, the ILO has adopted over 180 conventions and 185 recommendations. The latter are non-binding in nature and are directives aimed at guiding national policies. Conventions, instead, have the same effect as international treaties. This does not mean, however, that once approved by the ILO these are immediately binding upon all member states. Member states are in fact free to decide whether to individually *ratify* each convention that is approved. Only in the event of ratification do states undertake the obligation to conform their domestic legal systems to the requirements of the convention. However, even the implementation process is not an automatic effect of ratification. The fulfillment by a ratifying state of the obligation to implement the convention is subject to supervision by the ILO. Nevertheless, the ILO is not vested with significant powers to apply sanctions against states that fail to implement a convention.

The introduction of international rules in a state legal framework is governed by dualistic mechanisms. It is necessary that a state voluntarily joined the organization that produced the rules; that it had the opportunity to participate in the rule-making process; that it ratified the rules; and finally, in fulfilling its implementing obligations, that it actually integrated the international rules within its legal system.

In 1998, in order to overcome the difficulties associated with a failure by states to ratify conventions, the ILO approved the Declaration on Fundamental Principles and Rights at Work. It draws a number of fundamental principles from the abundant legal production of the organization: freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the abolition of child labor, and the elimination of discrimination among workers. Such principles, based on the text of the Declaration which interprets the ILO Constitution, are binding on all member states. As such, they also bind states

that have not ratified the conventions from which the principles are extrapolated<sup>31</sup>. In 1999, with the creation of the Global Compact (the “GC”) of the United Nations, these principles acquired further legal enforceability. Assimilated by the GC, of which the ILO is also a member, they have become directly enforceable with respect to private businesses. By adhering to the GC, private businesses commit to conforming their conduct to the international rules. Obviously, the GC is not vested with the enforcement power necessary to force private businesses to abide by international rules. However, it utilizes a system of conditionality. To this end, it releases attestations of corporate social responsibility that businesses can display on both consumer and investor markets.

In this way, international rules for the protection of work do not simply become effective with respect to states that have not ratified them. There is more. The intermediation power of states is actually bypassed. Private parties align themselves with international rules without even waiting for the state they operate in to integrate the rules into its domestic legal system.

All the hypotheses analyzed illustrate the same tendency. The power of states to exclude or filter the applicability of international rules within their borders is reduced. Having given up control of economic fluxes, states must, at least in part, relax their control over legal fluxes. The *old* international administrative law increases its ability to penetrate state domestic legal systems. In this way, it has a more direct impact on private parties. The more this ability develops, the more such law loses its original characteristics. It thus tends to transform itself into a *new* global administrative law.

#### *4.3. The Development of Administrative International Law Beyond the Internal Legal Systems of International Organizations.*

As shown above, due to the development of international administrative law private parties are increasingly subject to the effects of choices made in international settings. As a

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<sup>31</sup> ILO *Declaration on Fundamental Principles and Rights at Work*: "The International Labour Conference (...) 2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: a) freedom of association and the effective recognition of the right to collective bargaining; b) the elimination of all forms of forced or compulsory labour; c) the effective abolition of child labour; d) the elimination of discrimination in respect of employment and occupation".

consequence, there is also the need to ensure to such private parties access to mechanisms of control, participation and defense that are directly related to those choices.

Under a dualistic system, the decisions of international bodies are directed at states whose governments then decide whether to apply them to individuals. In this context, it is sufficient to guarantee that international organizations answer to their members (“internal accountability”) and that members’ governments in turn answer to their citizens. International law ensures satisfaction of the first need and internal administrative law the second.

However, when the rules and decisions of international organizations appear as able to reach private parties, bypassing the ever more penetrable barrier interposed by state sovereignty, the problem of their “external accountability” arises. It is necessary that international organizations be accountable to “individuals or groups who are affected by an organization’s decisions and activities but who are not formally part of the organization”<sup>32</sup>. International law, which only takes states into consideration, is inefficient to reach this goal. So, too, is domestic administrative law: “by focusing on the domestic decision on implementation, it misses the actual center of decision-making, which is on the international level”<sup>33</sup>.

Thus, the intervention of administrative international law, which by its very nature regulates relationships between private parties and ultra-state bodies, becomes necessary. For a long time, international civil servants appeared as the only private subjects to which international rules and decisions applied directly. For this reason, administrative international law was almost exclusively concerned with them. However, as the cases of private parties that were subject in a more direct fashion to the effects of public international powers increase, administrative international law is also called upon to broaden its scope.

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<sup>32</sup> One World Trust, *Power without Accountability?*, The Global Accountability Report 2003, p. 3.

<sup>33</sup> Cfr. B. Kingsbury, R. Stewart and N. Krisch, *Administrative Law and Global Governance* - Research Project Outline, IILJ - NYU Law, June 2003, p. 13. See also Id., *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1, Global Administrative Law Series, available at [www.iilj.org](http://www.iilj.org): “The rise of regulatory programs at the global level and their penetration of domestic counterparts means that the decisions of domestic administrators are increasingly constrained by substantive and procedural norms established at the global level; the formal need for domestic implementation then does no longer provide for meaningful independence of the domestic from the international realm. (..) In our view, international lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts. National administrative lawyers can no longer insist that adequate accountability for global regulatory governance can always be achieved through the application of domestic administrative law requirements to domestic governmental regulatory decisions. We argue that current circumstances call for recognition of a global administrative space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each.”

In fact, rules and legal principles of administrative law are currently under development in many international organizations. These are drawn from domestic administrative law and are transplanted and adapted to the international context. For the time being, this is occurring in a sporadic, disorderly and fragmented manner. Nevertheless, certain guiding principles already come to light, that I will attempt to illustrate briefly by recurring to some examples taken from the laws applicable to the World Bank<sup>34</sup>.

a) Transparency.

The first guiding principle is transparency. It consists in access by private parties to information held by international organizations. The World Bank, for example, adopted in 1994, and subsequently amended in 2001, its "*Policy on Disclosure of Information*". The policy begins with a statement on the principle of a "presumption in favor of disclosure", subject to the provisions contained in the policy itself<sup>35</sup>. In reality, the principle according to which disclosure is the rule and secrecy is the exception is in part retracted by subsequent provisions adopted by the World Bank. Such provisions are first and foremost concerned with indicating for each of type of function which information is available to the public. For each type of act, they further provide limitations and conditions to disclosure<sup>36</sup>. Second, there are limits of a general character that apply to all information held by the World Bank: "while every effort is made to keep constraints to a minimum, the effective functioning of the Bank necessarily requires some derogation from complete openness. The following constraints apply to all information referred to in this statement"<sup>37</sup>. Finally, there is also a rule which allows the Bank broad discretion to

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<sup>34</sup> For a more detailed analysis, see N. Bernasconi-Osterwalder and D. Hunter, *Democratizing Multilateral Development Banks*, in *The New "Public": the Globalization of Public Participation*, Environmental Law Institute, 2002, available at <http://www.ciel.org>.

<sup>35</sup> The World Bank Policy on Disclosure of Information, June 2002, II.4: "(..) there is a presumption in favor of disclosure, subject to the provisions of this statement". In order to facilitate public access to information, "the Bank has established the InfoShop to serve as the central contact for persons seeking to obtain Bank documents. The InfoShop, located at Bank Headquarters, serves the public in member countries through the Public Information Centers (PICs) that are listed in Appendix 2 to this statement, and the internet".

<sup>36</sup> For example, *Country Assistance Strategies* ("CASs"), that, as will be explained subsequently, define the framework of assistance programs for a specified country, "are publicly available (..) unless in exceptional circumstances, the country concerned objects to such disclosure and the Executive Directors agree that it may not be disclosed" (The World Bank Policy on Disclosure of Information, III.A.7).

<sup>37</sup> The World Bank Policy on Disclosure of Information, IV.82. Among the general limitations, for example, it is provided that "the Bank does not make publicly available documents that contain proprietary information, such as trade secrets or pricing information, without the express permission of the owner of such information (IV.84); or, to preserve "the integrity (..) of the Bank's own decision-making processes", "internal documents and memoranda written by Executive Directors and their Alternates and Senior Advisors, by the

exceptionally preclude access to information for which disclosure would normally be allowed: "public availability of some information may be precluded on an *ad hoc* basis when, because of its content, wording, or timing, disclosure would be detrimental to the interests of the Bank, a member country, or Bank staff<sup>38</sup>".

Notwithstanding such limits, the *Policy on Disclosure of Information* has increased transparency in the activities of the World Bank and along with it, so has the organization's accountability. As noted by some<sup>39</sup>, the debate previously centered on the duty to inform the public. Presently, it focuses rather on several other issues: the quantity and quality of publicly available information, the timeliness of its disclosure, the broadness of derogations to providing access, and the discretion exercised by the Bank in providing for specific exceptions to such principle, etc. In any case, the rules at issue provide for a right to obtaining information held by private citizens who can exercise it autonomously and directly against an international administration. They do not require the collaboration of the state they belong to, which often has countervailing interests.

#### b) participation

The second guiding principle is participation. This involves the direct involvement of private parties in the decision-making of international organizations.

There are two forms that are most commonly known. The first consists of the inclusion of non government representatives in the delegations representing states within the international organization. The most notable example is employers' and workers' delegates of industrial organizations that sit at the ILO's General Conference<sup>40</sup>. In these cases, the private party does not entirely cease to represent its national community because the party is nominated by its own government and expresses the views of the most prominent industrial organizations present in its

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President of the Bank, and by Bank staff to their colleagues, supervisors, or subordinates are considered confidential and not publicly available" (IV.87).

<sup>38</sup> The World Bank Policy on Disclosure of Information, IV.90.

<sup>39</sup> C. Chamberlain, *Public Access to information: the State of Disclosure at the Multilateral Development Banks* (1998), cited in N. Bernasconi-Osterwalder and D. Hunter, *Democratizing Multilateral Development Banks*, *supra*.

<sup>40</sup> See ILO Constitution, Art. 3.1: "(The General Conference) shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members".



national context<sup>41</sup>. Once nominated, however, the delegate breaks away from his or her state government: he or she votes independently from its state delegates<sup>42</sup>; above all, they participate, along with the representatives of employers or workers nominated by the governments of the other member states, in electing some delegates of the Governing Body<sup>43</sup>. Within such body, the *intergovernmental* character of political representation blends with the *transnational* character of the representation of interests.

The second form of participation is of a functional character and not structural. It does not allow private subjects to become in charge of international bodies, allowing them rather to intervene during the course of the decision-making process with a consultative role. The model of reference in this instance is Article 71 of the United Nations Charter<sup>44</sup>. Based on this provision and other analogous constitutional provisions, there has been in recent times a dramatic increase in the number of non-governmental organizations (NGOs) which are attributed consultative status<sup>45</sup>. This allows them to exercise a series of procedural rights through which they may influence the international decision-making process<sup>46</sup>. Also in this case, private parties express general and de-localized interests, traceable to broad transnational communities<sup>47</sup> and often matching those attributable to the care of international governmental organizations (IGOs)<sup>48</sup>.

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<sup>41</sup> See ILO Constitution, Art. 3.5: "The Members undertake to nominate non Government delegates and advisers, chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries".

<sup>42</sup> See ILO Constitution, Art. 4.1: "Every delegate shall be entitled to vote individually on all matters which are taken into consideration by the Conference".

<sup>43</sup> See ILO Constitution, Art. 7.1: "The Governing Body shall consist of 56 persons: 28 representing governments, 14 representing the employers, and 14 representing the workers". Art. 7.4: "The persons representing the employers and the persons representing the workers shall be elected respectively by the Employers' delegates and the Workers' delegates to the Conference".

<sup>44</sup> Based on it, as known, the Economic and Social Council "may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence".

<sup>45</sup> The number of organizations with "consultative status" within the Economic and Social Council of the United Nations has, over the course of thirty years from 1968 to 1998, risen from 377 to 1,350. Later, in just three years, it reached 2,088 (see *Cooperation between the United Nations and all relevant partners, in particular the private sector*, Report of the Secretary General, 28 august 2001, UN-GA, A756/323).

<sup>46</sup> For example, organizations that obtain general or special *consultative status* by the Economic and Social Council of the United Nations, pursuant to Resolution No. 31 of 1996: a) can request that the Secretary General insert certain issues of particular interest to them in the Council's agenda (§28); b) can designate their own delegates as observers at the Council's public meetings and those of its subsidiary bodies (§29); c) can submit, on matters for which they have particular competences, written memoranda that the Secretary General is obligated to distribute to the members of the Council (§ 30); d) can intervene orally during the course of the Council's meetings when it is discussing issues added to the agenda by such organization or otherwise if invited by the Council itself (§32).

<sup>47</sup> For example, the transnational structure of the organization is requested by the cited Resolution No. 31 of 1996. National organizations that are not structured in this manner, on the one hand, can be granted "consultative status" only if preceded by an opinion by the state they belong to, and on the other, they cannot aspire to broader participatory powers of entities with "general consultative status" reserved to organizations "whose membership,

Alongside the development of these more traditional forms of participation, other more original forms emerge that are even more interesting to administrative law scholars. These are cases in which private parties, as individuals or as a group, manifest their own interests by using an international procedure. That is, they do not act as representatives of a transnational community that is more or less organized in a stable manner. Rather, they vindicate interests that, although localized within one state, may nonetheless be harmed or prejudiced by an international decision. It is not a coincidence that these forms of participation have materialized particularly in relation to the activities of the World Bank or the IMF. As some have observed, "while global institutions use binding decisions for global governance only in limited circumstances, they quite often use financial decisions, especially aid and financing conditionality, for this purpose"<sup>49</sup>.

The mechanism of conditionality, in fact, explains why the decisions of the World Bank can easily affect the interests of private parties within states that depend on the financial support of the Bank. Such mechanism, however, is ever more frequently used by the Bank to also guarantee the participation of the same private parties to the decision-making that affects their interests.

Indeed, the World Bank subordinates the approval of financial assistance for projects presented by member states on the *condition* that they follow the procedures for participation.

This scheme applies above all to the planning activities surrounding all the decisions to grant financial support to individual projects in a particular state. Starting from July 2002, in fact, the so-called *Country Assistance Strategy* must be developed based on another prior planning document that fixes the strategic guidelines of a national policy to reduce poverty. The *Poverty Reduction Strategy Paper* ("PRSP") is developed by a state<sup>50</sup>, but must later obtain approval

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which should be considerable, is broadly representative of major segments of society in a large number of countries in different regions of the world" (§32).

<sup>48</sup> Resolution No. 31 of 1996 further provides conditions that refer to the purpose of the organization and the nature of its activities: the former must be "in conformity with the spirit, purposes and principles of the Charter of the United Nations" (§ 2); the latter must be "of direct relevance to the aim and purposes of the United Nations" (§8), and, for admission to general consultative status, these have to deal with a greater part of the activities and competences of the Economic and Social Council. More generally, private organizations may be admitted if they pursue public interest goals that match those of the United Nations, while for-profit ones that pursue individual interests may not be (for example, industry associations are admitted, but not individual multi-national corporations). Overall, participation is geared toward collaboration.

<sup>49</sup> See B. Kingsbury, R. Stewart and N. Krisch, *Administrative Law and Global Governance* - Research Project Outline, cited at p. 11.

<sup>50</sup> PRSPs are the expression of a change in strategy in the grant of financial aid by the IMF and the World Bank. In the 80s and 90s international financial assistance was subordinated to the realization of "Structural Adjustment Programmes" (SAPs). These programs of structural reform, inspired by a free trade ideology, provided

from the Executive Boards of the World Bank and the IMF<sup>51</sup>. In particular, such organizations look to verify whether the paper was formulated according to procedures that guarantee adequate level of participation by the affected populations<sup>52</sup>.

The same scheme is also further applied in reference to decisions on the approval of single projects. For example, when these have a significant environmental impact or involve the resettlement of populations present in a particular territory, there are *ad hoc* provisions that require states to fulfill more specific consultation obligations of the concerned parties<sup>53</sup>.

In these cases it could be objected that participation by private parties is still indirect according to the dualistic scheme. In fact, it is the state and not the international organization that consults them. Nevertheless, national participation becomes directly relevant at the international level. The failed or insufficient participation by private parties in the elaboration of a PRSP precludes its approval by the international organization. Under these hypotheses, then, there are international norms that confer upon private subjects participation rights in composite administrative proceedings. These take place partly in an international setting and partly in a

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the privatization of public enterprises and the liberalization of markets. They were elaborated in Washington, D.C. and imposed upon debtor countries largely according to the "one size fits all" approach. At the end of the 90s, the limits of this approach came to the forefront. SAPs were thus abandoned. In September of 1999, in occasion of the Annual meeting of the WB and the IMF, a new strategy was outlined: in order to reduce poverty it was necessary to listen to the poor. All decisions on loan grants and loan forgiveness programs must now find their base in the planning activity of the concerned state, which must follow procedures that ensure maximum participation by the population. Currently, PRSPs constitute the basis for: a) decisions relating to loan forgiveness programs adopted as part of the "Heavily Indebted Poor Countries Initiative"; b) decisions on financial assistance granted by the World Bank through the International Development Association ("IDA"); c) decisions on financing granted by the IMF through the PRGF (Poverty Reduction and Growth by Facility) program; d) decisions on financial assistance granted by many other *multilateral and bilateral donors*.

<sup>51</sup> Approval is granted based on a "Joint Staff Assessment" performed by officials of the World Bank and the IMF. The JSA expresses "an overall assessment (...) as to whether or not the strategy presented in the PRSP constitutes a sound basis for concessional assistance (...). A positive opinion "does not necessarily indicate that the staff agree with all of the analysis, targets, or public actions set forth in the PRSP or consider that the PRSP represents the best possible strategy for the country. Rather it indicates that the staff consider that the strategy provides a credible framework within which the Bank and the Fund are prepared to design their programs of concessional assistance" (See "Guidelines for Joint Staff Assessment of a Poverty Reduction Strategy Paper", available at <http://www.worldbank.org/poverty/strategies>).

<sup>52</sup> The JSA must verify that the PRSP contains a description of the "participatory process" used: "A PRSP will describe the format, frequency, and location of consultations; a summary of the main issues raised and the views of participants; an account of the impact of the consultations on the design of the strategy; and a discussion of the role of civil society in future monitoring and implementation" (See "Guidelines for Joint Staff Assessment of a Poverty Reduction Strategy Paper", cit.).

<sup>53</sup> See, for example *The World Bank Operational Manual, Operational Policies*, OP and BP 4.12 - *Involuntary Resettlement*. According to its contents, when, in the event of the realization of a project, it is indispensable to recur to decisions that involve an "involuntary resettlement" of the population, the project must conform to a series of conditions. Among these, it is necessary that "displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs".

national one. The dualistic separation of the two phases complicates the comprehension of such a legal reality rather than facilitating it.

### c) Judicial Review and Accountability

What happens, though, if the World Bank does not abide by its own rules? For example, what if it finances a project presented by a state that has not respected the rules on the participatory process? The third guideline that was alluded to earlier specifically concerns the right of private parties to activate control mechanisms on the legitimacy of decisions made by international organizations.

For example, to this end, in 1993, the World Bank created an *Inspection Panel*<sup>54</sup>. Private parties can recur to it when their rights or interests are directly harmed or threatened by the realization of a project financed by the Bank itself: it is required that the harm is the result of a series of violations of “operational policies and procedures”, that regulate the planning, assessment and execution of projects financed by the Bank and that result in a "material adverse effect"<sup>55</sup>.

A request for inspection by a private party can trigger, with prior authorization by the Executive Board, an inspection by the *Panel*. It will verify whether the decision to grant financing was made by the World Bank’s administration in violation of the rules established by such international organization. In particular, the *Panel* submits a report to the Executive Directors in which it sets forth its opinion on the allegations of wrongdoing indicated in the request, that is, "whether the Bank has complied with all relevant Bank policies and procedures". After receiving assessments by management, the Executive Directors communicate to the private

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<sup>54</sup> See Resolution No. IBRD 93-10/ Resolution No. IDA 93-6, "*The World Bank Inspection Panel*", September 22, 1993. The contents of the resolution were then the subject of authentic interpretation, with two further normative productions in 1996 (*Review of the Resolution Establishing the Inspection Panel - Clarifications of Certain Aspects of the Resolution*, October 17, 1996) and later in 1999 (*Conclusions of the Board's Second Review of the Inspection Panel*, April 20, 1999). In addition, the Panel adopted its own more detailed *Operating Procedures* based on such legal documents.

<sup>55</sup> See Resolution No. IBRD 93-10/ Resolution No. IDA 93-6, Art. 12: "The Panel shall receive requests for inspection presented to it by an affected party in the territory of the borrower which is not a single individual (i.e. a community of persons such as an organization, association, society or other grouping of individuals) (...). The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (...) provided in all cases that such failure has had, or threatens to have, a material adverse effect".

parties who requested the investigation "the results of the investigation and the action taken in its respect, if any".

The *World Bank Inspection Panel* ("WBIP") is a hybrid. In part, it is an instrument of judicial review. The investigation closes with the evaluation of the legitimacy of an administrative decision that harmed the right of a private party. This finding, however, is not followed by any remedies, that is, "the possible consequence of a judgment enforcing the requester's violated rights"<sup>56</sup>. For this reason, the WBIP is first and foremost a mechanism of accountability. It triggers the responsibility of the World Bank's administration with respect to member states by utilizing the requests for inspection by private parties to this end.

Indeed, it is this triggering mechanism of accountability that is of most interest here. It refutes the traditional dualistic framework. Private parties immediately challenge an international decision and not its domestic application. They set in motion the accountability of an international bureaucracy without having to act through their government delegate.

In all of these scenarios, therefore, private parties engage in the exercise of rights, as against international organizations, that are generally recognized to them by their domestic administrative laws. These are rights of access to information, participation, and the judicial review of the legitimacy of administrative decisions. As a consequence, administrative international law no longer comes across as internal law. It does not only apply to relations between international organizations and international officials, but also to relations with private parties outside of an international organization's internal system.

## 5. Conclusion

The analysis undertaken permits the formulation of two closing observations.

The first refers to the question posed at the beginning of the paper. Giannini's postulate finds further confirmations. As dualism gradually lost its rigor, and private parties acquired a subjectivity outside the realm of the state, administrative law also surpassed those boundaries. In the same way as European administrative law has taken shape, a *global administrative law* is

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<sup>56</sup> S. Schlemmer-Schulte, *The World Bank Inspection Panel*, in N. M. Blokker - H.G. Schermers (edited by), *Proliferation of International Organizations*, The Hague, Kluwer Law International, 2001, p. 512.

perhaps also emerging. The latter sets itself apart from both international administrative law and administrative international law. Nevertheless, in the end, it is the result of the development of both. It can be deemed the result of the spilling over of those components beyond their respective traditional limits.

As international administrative law, global administrative law also conditions domestic administrative law. It is, however, equipped with an increased ability to penetrate domestic legal systems and tends, for this reason, to link and intertwine itself with domestic administrative law, rather than separating from it.

As administrative international law, global administrative law also regulates vertical relations between international organizations and private parties. It does not, however, constitute an internal law of international organizations: it was perhaps already far-fetched to state that a French citizen employed by UNESCO would become subject to the internal order of such international organization; it would now indeed be ridiculous to attribute this trait to a group of farmers from Uganda that submit a request to the *World Bank Inspection Panel*.

Finally, the development of a global administrative law appears to be a combination of two connected phenomena. On one hand, that of an international administrative law that more directly affects private parties within states. On the other, that of an administrative international law that, on remand, extends its sphere of application to private parties that are subjected to the effects of international decisions while not being international officials.

The second closing observation concerns the relations between politics and administration, or between constitutional law and administrative law.

Beyond the state, there are still no global parliaments or governments, therefore, private parties continue to exercise their political citizenship according to the international model, that is, through the governments of their respective states. In an increasing manner, however, they exercise, directly and independently from national governments, some important rights connected to administrative citizenship: the right to vest public administrative offices, the right to access administrative documents, the right to participate to administrative proceedings, the right to trigger mechanisms of judicial review on the legitimacy of administrative decisions.

It can therefore be stated that constitutional law today remains either national or international in nature. Administrative law, however, becomes global. If there is indeed a global citizenship emerging, it is for now an administrative citizenship and not a political one.

States are the first to have experienced political citizenship and, much later, administrative citizenship. Perhaps one day the reverse process may be said to have occurred for global public governance.