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GLOBAL ADMINISTRATIVE LAW: AN ITALIAN PERSPECTIVE

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Administrative Law Beyond the State[*]

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1. Is there an Administrative Law beyond the EU?

Notwithstanding the fact that no serious scholar could deny, today, that a European administrative law does exist, serious scholars do deny that an administrative law is conceivable in the legal space beyond the EU.

The cultural assumption behind such approach is easy to recognize. It can be traced back to Heinrich Triepel, a "founding father" of legal dualism: "*We do not know an organized community that has the power to pose legal norms upon the State and the individual as its members*"[1]. The space beyond the State and the EU, according to legal dualism, is entirely occupied by international law, which is rooted on the concept of a law between equal sovereign states exercising authority within their territorial borders. In such a space, no authority above the states can take decisions directly affecting individuals inside states, and no state can take decisions affecting individuals beyond its territory. As a consequence, is allegedly absent the conflict between public power and individual freedom, which is somehow the ID card of administrative law.

The perspective of Global Administrative Law studies could largely be seen as an attempt to challenge such a view, arguing that globalization creates today, even beyond the EU, an increasing number of "non-domestic" relationships which imply a conflict between public power and individual freedom. As these relationships escape to domestic administrative law, a Global Administrative Law, to be applied to them, partly is emerging, and partly ought to emerge and develop, in order to preserve the rule of law in a globalized and interdependent world.

More specifically, two kinds of non domestic relationships between public power and individual freedom are increasing, and, correspondingly, two *souls* of GAL are emerging.

On the one hand, supranational authorities regulate, more directly than in the past, private conduct. It does not mean that supranational authorities formally have the power to adopt rules and decisions directly and immediately binding on firms and individuals, irrespective of national incorporation and national implementation. It does mean, however, that supranational authorities substantially have the power to adopt rules and decisions immediately affecting firms and individuals, as long as states often have no other alternative but to incorporate and implement rules and decisions adopted at the supranational level: increasingly, this is the place in which the public power affecting individual freedom is actually exercised.

On the other hand, domestic authorities regulate, more intensively than in the past, foreign conduct. Again, it does not mean that domestic authorities formally have the power to "directly affect, bind, or regulate property beyond its own territory, or control persons that do not reside within it": notwithstanding the increasing trend to the extraterritorial application of domestic regulation[2],

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[*] A shorter and different version of this paper will be published in C. BORIES (ed.), Le droit administratif global, Pedone, Paris, 2012.

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[1] 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)

[2] K. Raustiala, *Does the Constitution Follow the Flag? The Evolution of Extraterritoriality in American Law*, OUP, 2011. On the topic, S. Battini *Extraterritoriality: an Unexceptional Exception*, in T. Zwart, G. Anthony, Jean Bernard Auby and John Morison (edited by), *Values in Global Administrative Law*, Hart Publishing, Oxford, 2011.

territoriality is still the rule[3]. It does mean, however, that domestic rules and decisions, even when formally applied to conducts occurring within national borders, have substantial effects outside national territory as long as their application involve foreign subjects: increasingly individual freedom is affected by a public power exercised by foreign domestic authorities.

This paper will very briefly focus on both kinds of relationships in turn, using a few examples, and then will draw some general concluding remarks.

2. Supranational authorities regulating private subjects

It is trivial to observe that, as globalization progresses, domestic regulators, facing global problems, have to exercise collectively their powers in order to overcome their intrinsic territorial limit. Therefore, just like in domestic legal orders Parliaments delegate rule-making and adjudicatory powers to administrative agencies, so states delegate similar powers to supranational bodies. These bodies, ranging from formal international organizations to informal networks of domestic public or private actors, become thus a source of a huge mass of regulatory decisions, which could be best conceptualized, according to the GAL perspective, as administrative regulation[4].

Such regulation, however, today affects individual freedom more directly than it is believed according to the dualistic paradigm: domestic authorities, rather than the recipients of decisions adopted at the international level, are often just an enforcement tool of global decisions against private subjects.

A couple of examples could clarify the concept.

The first example is drawn from environmental regulation of civil aviation and refers to administrative rulemaking. The second example is drawn from anti-terrorism regulation and refers to administrative adjudication.

First example. The International Civil Aviation Organization (ICAO) adopts environmental standards in order to reduce emissions from aircraft and aircraft engines. The ICAO standards are not formally binding. States are free to adopt different standards, if they so decide. However, if a member state adopts a standard which is not "equal to or above" the ICAO standard, other member states do not have to allow aircrafts belonging to that state to travel through their airspace. On the other hand, if a member state adopts a standard which is above the ICAO standard, it results in an additional economic burden to domestic airlines, not applicable to air carriers belonging to states adopting a lower standard. In 1999, the ICAO adopted a higher standard. In 2003, the US regulator (EPA), according to the Administrative Procedure Act, started a "notice and comment" procedure in order to modify the domestic standard. Some environmental organizations proposed to adopt a standard above the level set by ICAO. The EPA, however, decided to match exactly the level of environmental protection defined by the international organization. The reasons given for such a decision, however, did not focus on environmental or health concerns; rather, the reasons focused on market harmonization: "*because aircraft and aircraft engines are international commodities, there is commercial benefit to consistency between U.S. and international emission standards. Manufacturers would only have to design to one emission standard globally, and air carriers would only need to be*

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3 According to Otto Mayer, "*notre Etat ne prétend que par exception à exercer son autorité dans la sphère du territoire étranger*" (*Le droit administratif allemand*, Giard-Briére Editeurs, Paris, 1906, § 62, (*Le droit administratif international*) p. 354).

4 See B. Kingsbury, N. Krisch, and R. B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems* 15 (2005); S. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 *NYU J. Int'l L.&Pol* 663 (2005); See also the essays published in: 68:3–4 *Law and Contemporary Problems* (2005); 37:4 *NYU J. Int'l L. & Pol.* (2005); 17 *Eur. J. Int'l L.* 1 (2006); 6:2 *Int'l Org. L.R.* (2009).

concerned with making sure the engines installed on their aircraft meet one standard. Such harmonization has economic and record keeping (and reporting) benefits"[5].

In such a context, are the participatory rights granted by the Administrative Procedure Act to domestic environmental organization still useful, once the domestic decision is substantially (thought not formally) prepackaged at the supranational level ? However, as a partial redress to such a loss of due process rights, ICAO grants to international coalitions of environmental organizations the observatory status which implies a set of participatory rights directly referring to the supranational decision-making process: the right to propose the adoption of new standards or the modification of the existing ones; the right to make comments to be taken into account by the deciding authority, and so on: overall, "*a right to participate in the formation of SARPs* [ICAO standards], *made up of several other more precise rights*"[6].

Second example. As is well known, a specific UN body (the Sanctions Committee) has been entrusted with the power to designate and place on a list (Consolidated List) individuals and entities associated with Al-Qaida. UN member States are bound to freeze the financial assets of any individual or entity designated by the Committee[7]. However, in an important and well-known judgment of 2008, the European Court of Justice set aside the European Council decision to freeze the assets of Mr Kadi, who had been designated by the UN Committee, on the grounds that his rights to a hearing and to an effective judicial remedy were patently disregarded[8]. As a partial redress to that decision, in 2009, the Security Council issued a Resolution which imposed a sort of duty to give reasons upon the UN Committee and provided for a sort of independent and impartial administrative review of listing decisions[9].

Therefore, in the first example, we have non domestic rules, contained in ICAO agreements, which: (a) on the one hand, substantially give a supranational organization rulemaking powers in order to set the level of environmental and health protection referring to the air pollution caused by emissions from aircraft and aircraft engines; and (b) protect the interests of affected people and firms by granting them the right to participate in a "notice and comment" procedure referring to the supranational decision making process.

In the second example, we have now non-domestic rules, contained in UN Resolutions, which: (a) on the one hand, give a supranational organization adjudicatory powers in order to limit the property rights of private subjects; and (b), on the other hand, protect the property rights of the affected persons by granting them due process guarantees, such as the duty to give reasons and the right to an independent review.

What kind of law is that? We could stipulate, for peace of some international law scholars, that this is still International Law. However, we should admit that such International Law is very much removed from its traditional and original paradigm, according to which it is a law "*among* the States" and its subjects are "States and only States". We could also stipulate, for peace of some administrative law scholars, that this is not Administrative Law. However, if this is not Administrative Law, we should admit that it seems as if it were.

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5 EPA, *Emission Standards and Test Procedures for Aircraft and Aircraft Engines - Summary and Analysis of Comments* (EPA420-R-05-004 – November 2005), p. 6:

6 Tiago Fidalgo de Freitas, *From participation towards compliance: The role of private actors in the making of SARPs by ICAO*, Paper presented at the 3rd Global Administrative Law Seminar – Viterbo 15-16 giugno 2007.

7 Resolution 1267 (1999) - S/RES/1267 (1999), 15 October 1999 and subsequent amendments and modifications

8 *See* Judgement of The European Court of Justice (Grand Chamber), 3 September 2008, in Cases C-402/05 P and C-415/05 P.

9 Resolution 1904 (2009) - S/RES/1904 (2009), 17 December 2009

3. Domestic authorities regulating foreign subjects

Let us now turn to the second type of "non-domestic" relationships between public power and individual freedom, namely those between domestic authorities and foreign subjects. This is also the space occupied by the *second soul* of Global Administrative Law.

In conditions of economic interdependence, domestic regulation has an increased extraterritorial impact. It affects foreign conduct, particularly foreign firms seeking to market their products, to provide their services or to make their investments in the territory of any of the states sharing a common market. This is hardly a new phenomenon. Domestic rules and administrative decisions have always had a cross-border impact. However this old phenomenon has now increased in size, and the change in quantity becomes at a certain point a change in quality: it had never occurred that a so intruding and developed domestic administrative regulation was applied on a social and economic structure so deeply integrated and globalized. When markets, ruled by a deep administrative regulation that is *domestic*, become *global*, an unbalance is inevitably created: companies, which are called to move around an economic area without borders become exposed to the various and different domestic administrative regulations operating in that area and are forced to comply with each one, in order to commercialize their products in all the countries where they are in force. Traditionally, in domestic legal orders, Administrative Law has always meant, for companies, an important protection against the intrusiveness of administrative regulation. But the procedural guarantees set out by the domestic administrative law cannot obviously be enforced against foreign authorities. In this respect, companies have to rely on foreign administrative law, which is often not familiar, changing from land to land, sometimes underdeveloped. That is why a higher administrative law, more uniform as defined by supranational sources of law, is now emerging, providing companies operating around the world with a minimum quantity of administrative guarantees to rely on, whatever the country in which they do business. A growing set of supranational rules is thus emerging, which regulate the exercise of the domestic regulation affecting foreign freedom.

Three other examples could clarify the concept.

The first example refers to food safety regulation in Italy. In 2000, the Italian government suspended the placing on the Italian market of some GMO products patented by *Monsanto*, a multinational corporation headquartered in the US, on consumers' health grounds. Monsanto contested the decision before the Italian Administrative Tribunal. However, at the same time, Monsanto managed to persuade the US government to claim, before the WTO, the violation of the SPS Agreement. This Agreement regulates the power of WTO Member States to adopt rules and administrative measures which, in order to protect health and environment, restrict international trade. The exercise of that power is subject both to procedural and substantial restrictions. As for the former, administrative decisions restricting international trade must comply with provisions which are very similar to the corresponding provisions of domestic laws regulating the administrative procedure: procedures must be undertaken and completed without undue delay; the standard processing period of each procedure must be published and the anticipated processing period must be communicated to the applicant; information requirements must be limited to what is necessary for appropriate control, inspection and approval procedures; judicial or administrative review of decisions must be ensured; and so on[10]. As for substantial restrictions, domestic administrative measures, adopted in application of domestic food safety legislation, must be actually "*necessary*" to ensure consumers' health and must be "*based on*" a sufficient scientific evidence and an "*appropriate risk assessment*". The WTO Panel issued its report in 2006[11] and declared unlawful the Italian measure at issue, as it lacked a

[10] On the topic, P. M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 *U. Pa. J. Int'l Econ. L.* 1 2003; S. Charnovitz, *Transparency and Participation in the World Trade Organization*, The George Washington University Law School Public Law and Legal Theory Paper n. 142.

[11] See G. Shaffer and M. Pollack, *Reconciling (or Failing to Reconcile) Regulatory Differences: The Ongoing Transatlantic Dispute over the Regulation of Biotechnology*. Workshop on The New Transatlantic Agenda and the Future of

"*rational relationship*" with the risk assessment conducted by the Italian scientific consultative body (Italian Superior Institute of Health), which stated that: *"in the light of current scientific knowledge* [...] *there are no risks to human or animal health due to the consumption of derivatives of the GMOs* [...]*"*. Therefore, the WTO Panel concluded that "*there is no apparent rational relationship between Italy's safeguard measure, which imposes a prohibition, and risk assessments which we understand found no grounds for considering that the use of T25 maize, MON810 maize, MON809 maize and Bt-11 maize (EC-163) endangers human health or the environment*"[12]. Remarkably, the Italian Administrative Tribunal reached the same conclusions, following the same reasoning: it set aside the decision on grounds of inconsistency between its content and the results of the investigation. To put it differently, the exercise of the administrative power has been unreasonable[13].

The second example refers to public procurement in Canada. In August 2005, the Canadian Department of Public Works and Government Services, acting on behalf of the Treasury Board Secretariat, sent a Request for Proposals for the provision of professional audit services. As a qualified supplier, Deloitte & Touche submitted its bid. However, another company won the contract. Deloitte & Touche filed a claim to the *Canadian International Trade Tribunal*, which is a domestic quasi-judicial body that also acts as an international body, as it is competent for claims filed by companies alleging an infringement of the NAFTA and GPA provisions. These international agreements regulate public procurement procedures, in order to open tendering procedures to the participation of foreign companies and in order to introduce, in this way, more competition among bidders[14]. For example, the WTO Government Procurement Agreement (GPA) imposes on member states the obligation to provide to suppliers all information necessary to permit them to submit responsive tenders[15]. Deloitte & Touche claimed the violation of this specific provision, arguing that the government introduced a new criterion for the evaluation of the proposals after the submission of the bids. The *Canadian International Trade Tribunal* sustained the allegation and recommended that the Canadian government compensate Deloitte & Touche for its "lost opportunity", at one-quarter of the profit that Deloitte would have earned had it been the successful bidder in the procurement: "*it is clear that the evaluation used an evaluation criterion not previously disclosed to bidders, or reasonably predictable from the RFP. Accordingly, the Tribunal finds that PWGSC breached Article 506(6) of the AIT, Article 1013(1)*

(Contd.)

Transatlantic Economic Governance, European University Institute, Florence, 18-19 June 2004. Available at SSRN: http://ssrn.com/abstract=955277; G. Marceau and J. P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. A Map of the World Trade Organization Law of Domestic Regulation of Goods, Journal of World Trade*, 36 (5), 2002; R. Hudec, *Science and Post-discriminatory WTO Law*, 26 *B.C. Int'l & Comp. L. Rev*. 2003; J. L. Dunoff, *Lotus Eaters: Reflections on the Varietals Dispute, the SPS Agreement and WTO Dispute Resolution*, Institute for International Law and Public Policy – IILPP, White Papers Series, 2006-1

12 *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* - Reports of the Panel - WT/DS291/R; WT/DS292/R; WT/DS293/R, 29/09/2006, para 7.3195 (d).

13 Tar Lazio, Sezione I, 3 dicembre 2004, n. 14477

14 See on the topic the paper by Hilde Caroli Casavola in this volume. See also H. Caroli Casavola, *Internationalizing Public Procurement Law: Conflicting Global Standards for Public Procurement*, in Global Jurist Advances: Vol. 6 (2006), Iss. 3, Available at: http://www.bepress.com/gj/advances/vol6/iss3/art7; J.B. Auby, *L'internationalisation du droit des contrats publics*, in *Droit administratif*, 2003 (Aug.-Sept) ; C. McCrudden and S. G. Gross, *WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study*, 17 EUR. J. INT'L L. 151 (2006).

15 Particularly, art. XII, 2 states as follows: "*Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following: […] h the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of products or services of other Parties, customs duties and other import charges, taxes and currency of payment*".

of NAFTA and Article XII(2) of the AGP"[16]. The rule applied by the Canadian Tribunal, according to which administration must determine, and previously disclose, the evaluation criteria, is very well known in most domestic administrative law systems. It is an application of a more general standard, that is to say the impartiality principle.

The last example refers to environmental protection in Mexico. In 1998, The Mexican Agency for environmental protection (INE) refused the renewal of the license for an hazardous waste landfill, owned by a Spanish corporation, TECMED. As a foreign investor, TECMED was entitled to the protection provided for in the Bilateral Investment Agreement between Spain and Mexico. This Agreement, as the majority of the approximately 2.500 *Bilateral Investment Agreements* (*BITs*) currently in force, committed the contracting parties not only to admit and promote foreign investment, but also to guarantee substantial rights to foreign investors, in order to protect them against the unlawful or arbitrary exercise of the regulatory power of the host State. Two types of clauses, typically set out in Investment Treaties have the most severe impact on domestic administrative regulation: "*indirect expropriation*" and "*fair and equitable treatment*"[17]. As for the latter, the Investment Treaty between Mexico and Spain provides as follows:"*Each Party shall accord to covered investments of investors of the Other Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security"*. As the Agreement enables the foreign investor to bring suit against the host State before an international arbitral tribunal, TECMED filed a request for an arbitration, alleging, *inter alia*, the violation of the duty to accord to foreign investors a "*fair and equitable treatment*". The arbitral tribunal stated that the measure applied by the Mexican government infringed the *fair and equitable treatment* clause and awarded a compensation for damages of more than 5 million dollars. The Tribunal has stated that the fair and equitable treatment clause implies a due process requirement, which obliges the government to ensure a "*fair hearing*" of the addressee of an adverse measure before adopting the decision. However, the Mexican government, in the tribunal's opinion, did not allow TECMED to an adequate defense before denying the permit renewal: "*During the term immediately preceding the Resolution, INE did not enter into any form of dialogue through which Cytrar or Tecmed would become aware of INE's position with regard to the possible non-renewal of the Permit and the deficiencies attributed to Cytrar's behavior —including those attributed in the process of relocation of operations— which would be the grounds for such a drastic measure and, thus, Cytrar or Tecmed did not have the opportunity, prior to the Resolution, to inform of, in turn, their position or provide an explanation with respect to such deficiencies, or the way to solve such deficiencies to avoid the denial of renewal and, ultimately, the deprivation of the Claimant's investment*"[18]. The Mexican Government thus infringed the International Treaty, providing for a *fair and equitable treatment* of the investor, as long as it infringed the principle of *due process*, which is at the center of most domestic administrative law systems.

Therefore, in all the examples referred above, we have: (a) non domestic rules, contained in international agreements, regulating the administration, by domestic authorities, of domestic legislation, such as Italian (or European) food safety legislation, Canadian public procurement

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[16] Canadian International Trade Tribunal, Deloitte & Touche LLP v. Department of Public Works and Government Services - Determination and reasons issued Thursday, May 11, 2006, File No. PR- 005-044.

[17] On the topic, R. Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 38 N.Y.U. J. Int'l L. & Pol., vol. 37 (2006), p. 953; G. Van Harten and M. Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, *European Journal of International Law*, Vol. 17, No. 1, pp. 121-150, 2006 Available at SSRN: http://ssrn.com/abstract=907655.

[18] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, par. 173. See S. W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, IILJ Working Paper 2006/6 (Global Administrative Law Series), available at http://www.iilj.org.; S. W. Schill, *Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed*, in *Transnational Dispute Management*, vol. 3 (2) April 2006.

legislation, or Mexican environmental legislation; (b) judicial or quasi-judicial decisions, adopted by international court (on domestic court acting as international court), setting aside domestic administrative decisions on grounds of violation of specific non domestic rules, related to more general principles, such as reasonableness, impartiality and due process.

No one could doubt that those principles, when applied by domestic courts in disputes involving domestic administrative authorities and referring to domestic administrative decisions, are "Administrative Law". Should we reach a different conclusion when precisely the same principles are applied in precisely the same kind of disputes, by international judicial or quasi-judicial bodies? If the answer is no, we should admit that the WTO panel, the Canadian International Trade Tribunal and the Arbitral Tribunal have all applied a non domestic administrative law, which they contribute to create and develop.

4. Concluding Remarks

To sum up, the following conclusions could be drawn.

First of all, because of globalization, individual freedom is today increasingly threatened by a "*puissance publique*" which is exercised, other than by domestic authorities, by supranational and foreign ones as well. To the traditional case in which the state regulates citizens' conduct, which is still the core of administrative law, is now to be added an ever increasing number of cases in which supranational authorities regulate private conduct, or domestic authorities regulate foreign conduct, both of which were, in the past, an exception to the opposite rule.

Secondly, these increasingly emerging regulatory relationships are themselves regulated by a law, which is neither purely domestic, nor purely international. It is neither a law to be applied only inside states, nor a law to be applied between equal and independent political communities. It involves states and individuals at the same time. In this respect, it could be best conceptualized as a "global law", as it applies in a legal space which crosses domestic and international law, without being a unitary and monistic legal order at the same time.

Finally, such a global law is mainly made of legal materials (such as due process, duty to give reasons, independent review, impartiality, reasonableness, notice and comment, etc.) which mirror what in the most-developed domestic legal systems is known as administrative law. In other words, this global law "looks like" administrative law.

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