LEGAL PRINCIPLES FOR GLOBAL PROCEDURES

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This analysis starts from the idea that one of the most astonishing features of the global legal order is the speed with which it has developed principles in order to discipline global administrative proceedings by the rule of law. Principles like the right to a hearing, the duty to provide a reasoned decision and the duty to disclose all relevant information have developed and been enforced in the global arena in the course of just a few years, while their development in domestic legal orders has taken decades or centuries, depending on the State.

The development of these procedural principles in the global arena has a twofold impact: they apply to global decision-making processes and they may also affect domestic proceedings.

Basic principles for the global procedures have been established by treaties, statutory instruments, secondary legislation and global courts.

To sum up, we will try to argue that the global due process of law, compared to the national one, is richer, but less effective. It is richer in terms of openness, participation and consultation; is less effective, because transparency, the requirement of reasoned decisions and judicial review are not always granted, and therefore the entire body of the rule of law is not developed in the global arena.

When we talk about global procedures or global principles, first o all we have to point out the main global actors and their networks.

If we look at the United Nations, we can see that **t**here are 191 Member States of the United Nations. There are approximately 2000 international organizations. There are around 15-20,000 international non-governmental organizations (NGOs)[1].

The global legal order is very often described as a multilevel system of governance. This common view posits the first level as the State level, and the second as the global level. However, the reality is more complex.

Firstly, from a formal point of view, all members of the international community are legal equals. «*A small republic is no less a sovereign State than the most powerful kingdom*»[2]. But:

a. «*the world's economic fragmentation arises from its political divisions. Lack of "jurisdictional integration" sustains bad government: in effect, there are too many countries*»[3];

[1] See *Yearbook of International Organizations 2003-2004*, Munchen, Saur, 2003. According to the United Nations, there are 44,000 NGOs: *Building Partnerships. Cooperation between the United Nations System and the private sector*, New York, United Nations Public Information, 2002.

[2] E. DE VATTEL (1758), quoted in A. CASSESE, *International Law*, Oxford, Oxford University Press, II ed., 2005, p. 52.

[3] M. WOLF, *Why Globalisation Works*, New Haven and London, Yale University Press, 2004 (see *The Economist*, July 17, 2004).

b. «*more than half the world's countries have fewer people than the State of Massachusetts, which has about 6 million*»[4];

c. «*of the 10 richest countries in the world in terms of GDP per head, 6 have fewer than 1 million people*»[5];

d. *in addition to fragmentation and difference in size, there are also important differences in power and influence.*

It follows that States are not in fact equally sovereign.

Secondly, global actors include not only States, but national agencies as well. Most global regulations derive from the interaction between domestic agencies and global regimes. From the global perspective, we are witnessing a disaggregation of the State, in which the paradigm of «the State-as-a-unit» is losing its validity.

Thirdly, members of international organizations include not only States, but also non-national institutions, like the European Union (as in the case of the International Olive Oil Council and the World Trade Organization) and other regional organizations, as well as private, non-governmental bodies, like in the case of the Internet Corporation for Assigned Names and Numbers – ICANN. We can also mention the numerous «observers» that participate in the activities of international organizations. It is, therefore, better to avoid the common denomination of such organizations as «intergovernmental».

Fourthly, «[*f*]*ive main types of globalized administrative regulation are distinguishable: administration by formal international organizations; administrations based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administration by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions. In practice many of these layers overlap or combine* [….]»[6].

Fifthly, recent initiatives are «*designed to include civil society – defined as all interest and identity associations outside the state – in the governance activity of international organizations*»; «[….] *when the [World]Bank issues a loan for a specific development project such as a dam, it requires that the recipient government consult with the local residents and NGOs to design relocation plans and environmental preservation measures*»[7].

Sixthly, «[….] *NGO involvement in all processes of IGO activities, ranging from monitoring treaty obligations, treaty-generation processes, and treaty implementation processes at the national level, has been crucial and indispensable.* [….] *they have creatively fed their knowledge and expertise into the decision-making processes at all levels*»[8].

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[4] A. ALESINA and E. SPOLAORE, *The Size of Nations*, Cambridge MA, MIT Press, 2003 (see *The Economist*, December 20, 2003).

[5] *Idem.*.

[6] B. KINGSBURY, N. KRISCH, R. STEWART, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1 (Global Administrative Law Series), available at *http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf*, p. 8 (now also published in *Law and Contemporary Problems*, 68, 2005, no. 3-4, pp. 15 ff.). These authors are still puzzled by mutual recognition and cooperative standards: are they distributed administrative regulation, or (bilateral) network regulation, or a «sui generis» category?

[7] F. BIGNAMI, *Civil Society and International Organizations: A Liberal Framework for Global Governance*, available at *http://www.law.virginia.edu/home2002/pdf/workshops/0506/bignami.pdf*, p. 3.

[8] E. RIEDEL, *The Development of International Law: Alternatives to Treaty-Making? International Organizations and Non-State Actors*, in *Developments of International Law in Treaty Making*, edited by R. Wolfrum and V. Röben, Berlin, Springer, 2005, p. 317; see also the comment of S. Hobe to Riedel article, *ibidem*, p. 328. For a variety of reasons, some

So, while it is extremely pervasive, the global legal order is not entirely universal. Individual States are not members of all international organizations. Some global institutions have, in fact, a regional area of influence.

Therefore we can observe that:

a. international organizations do not rely only on States: they have established a direct dialogue with civil society;

b. States are more powerful than is usually imagined, as they play a double role in the global legal order: they act according to the State-as-unit paradigm, and they also act through their own agencies, according to the fragmented-State paradigm;

c. States are also less powerful than we commonly think, in that they share their role inside the global institutions with non-governmental organizations;

d. the statement that States enjoy sovereign equality is a legal principle that does not correspond with reality;

e. national and global governance cannot be presented as a two-level system of governance, as civil society organizations, domestic agencies and supranational organizations all play a role as global actors;

f. global regulators penetrate domestic agencies, that thus lose their independence.

How does it work the global machine? There is no higher authority in the global legal order. Therefore, there is not the kind of hierarchy that characterizes domestic governments. Nor there is uniformity, as some global regimes are more developed than others, some less so. Given these conditions, how can the global machine work? And what are the principles and rules on which it is based?

Almost any human activity is subject to some global regulation. Global regulatory regimes go from forest preservation to the control of fishing, water regulation, environmental protection, arms control, standardization and food safety, financial and accounting standards, Internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labour standards, antitrust regulation, and more.

Among these regulatory regimes there are great differences. Some provide just a framework for State action, others establish guidelines in order to guide domestic agencies, others affect national civil society. Some regulatory regimes create their own implementation agencies, while others rely on national or regional authorities for implementation. To settle disputes, some regulatory regimes have judicial bodies, others resort to negotiation.

Taken together, these regulatory regimes present five main problems. Firstly, there is significant overlapping between them. Secondly, they have a strong impact on domestic regulatory powers. Thirdly, they establish standards for private parties, by-passing national regulatory authorities. Fourthly, they are binding. Lastly, they have serious enforcement problems.

The first problem is that of interconnection (*regime complex*). As observed by the Arbitral Tribunal (Annex VII UNCLOS), «*there is frequently a parallelism of treaties*» and «*the current range of international legal obligations benefit from a process of accretion and cumulation*»[9]. This interconnection has been called «regime complex»: «[….] *an increasingly common phenomenon is the*

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authors, like R. Stewart, prefer to include pervasive differences in collective action issues and accountability mechanisms, to make a consistent and strong distinction between economic actors and «social» NGOs.

[9] Arbitral Tribunal (Annex VII UNCLOS), SBT Case, n. 52, 14 August 2000, available at *http://www.itlos.org/case_documents/2004/document_en_249.pdf*.

"regime complex": a collective of partially overlapping and non hierarchical regimes»[10] .

The decoupling of standard-setting and standard-enforcement creates new problems of accountability: «*If third parties enforce standards, it will be especially difficult for the standard users to hold the standard setters accountable for the consequences of those standards*». «[D]*ecoupling rule making and enforcement is the key to the accountability deficit of standards*»[11].

The principle that WTO rules are not to be interpreted in isolation from other rules of general public international law was established by the first WTO Appellate Body decision[12]. It follows from this that the different regulatory regimes are not self-contained, because they do not exist in isolation from other rules of global law. Therefore, for example, trade rules must be interpreted in connection with environmental protection rules.

Secondly, global regulatory regimes have a strong *impact on domestic regulation*. Global law takes functions out of the domestic field and asserts control over domestic agencies. For example, many WTO agreements impose obligations on national authorities to ensure transparency, to provide harmonization, to guarantee equivalence, to introduce consultation and control procedures[13].

As global regulation emerges out of heterogeneous and fragmented regimes, the interaction between the conflicting global regimes and the great variety of domestic regulations raises one big problem: how can such a fragmented legal order command the compliance of domestic governments? The answer to this question lies in the new opportunities that global regulation provides to national regulatory agencies, while also imposing new obligations on them. There is also another side to the coin: national legal and administrative cultures use global regulation in an attempt to capture new fields. For instance, American adversarial legalism – in particular, the requirement to consult before taking decisions, notice and comment procedures, the right to a hearing, - is conquering the world through global regulation.

Thirdly, global regulation has *direct effect*, in a such as it directly affects parties being regulated at the national or local level. Recently, a WTO report has listed 49 global standard setting bodies, not including the global financial standard setting agencies. These bodies adopt standards that are implemented directly by national firms, like banks. Those standards penetrate into the national regulatory context and, while not legally binding, are obeyed in practice at the national level[14].

Global regulatory decisions are binding. Even when they are not formally binding, compliance is nevertheless monitored. And even when they are not binding and compliance is not monitored, such decisions are often obeyed («*Even if it is non binding, what does it matter, if it is obeyed?*»[15]). Global regulation is directly enforced by supranational regulators.

As we already said, one of the most astonishing features of the global legal order is the speed with which it has developed principles in order to discipline global administrative proceedings by the rule of law.

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[10] K. RAUSTIALA and D. G. VICTOR, *The Regime Complex of Plant Genetic Resources*, in *International Organization*, 58, 2004, no. 1, p. 277, on the «connecting regimes», see also the very important contribution by S. BATTINI, *Amministrazioni senza Stato – Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003, pp. 232 ff.

[11] D. KERWER, *Rules that Many Use: Standards and Global Regulation*, in *Governance*, 18, 2005, no. 4, pp. 623 and 624.

[12] WTO Appellate Body, US Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 20 May 1996, available at *http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/2ABR.wpf*, p. 17.

[13] S. CASSESE, *Global Standards For National Administrative Procedure*, IILJ Working Paper 2004/4 (Global Administrative Law Series), available at *http://www.iilj.org/papers/2004/2004.4%20Cassese.pdf*, p. 7 (now also published in *Law and Contemporary Problems*, 68, 2005, no. 3-4, pp. 109 ff.).

[14] S. BATTINI, *Quattro percorsi* cit. See D. KERWER, *Rules that Many Use: Standards and Global Regulation*, cit., p. 618, on the many ways of enforcement of global financial standards.

[15] D. ZARING, *Informal Procedure, Hard and Soft, in International Administration*, IILJ Working Paper 2004/6 (Global Administrative Law Series), availale at *http://www.iilj.org/papers/2004/2004.6%20Zaring.pdf*, p. 38.

The development of these procedural principles in the global arena has a twofold impact: they apply to global decision-making processes and they may also affect domestic proceedings.

Basic principles for the global procedures have been established by treaties, statutory instruments, secondary legislation and global courts.

For example, Article 34 of the Patent Cooperation Treaty establishes the rights of the applicant to communicate orally and in writing with the International Preliminary Examining Authority, amend the claims, receive a written opinion from the Authority and respond to the written opinion. In this case, procedural rules are imposed on global agencies.

Article 6.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) provides that «[t]*hrough the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered*». Article 6.4 of the same Agreement provides that «[t]*he authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases* [….]». In this case, the duty to provide interested parties an opportunity to obtain the relevant information and be heard is imposed on domestic agencies in order to favour reactions from foreign enterprises which have dumped their products.

Article 3.1 of the GATT Safeguard Measures and Article XIX of the GATT establish the duty to provide a reasoned and adequate decision, with explanations, to importers, exporters and other interested parties (among them, foreign governments). In this case, global law imposes procedural rules on domestic agencies, and grants not only private parties, but also foreign governments the right to an explanation.

Article 7 of the Sanitary and Phytosanitary Agreement provides that «[m]*embers shall notify changes in their sanitary and phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B*». Para. 1 of this Annex provide that «[m]*embers shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested members to become acquainted with them*»[16]. The transparency principle is, in this case, imposed on individual national authorities mainly to benefit national authorities in other States.

Global rules grant participation to private parties vis-à-vis domestic authorities (thus strengthening the participatory rights already granted in many national legal orders), to national governments vis-à-vis global agencies or other national governments, to global institutions vis-à-vis other global institutions, to private parties appearing before global institutions. Participation is therefore ensured vertically: to private parties before national governments and global agencies; and to national governments before global organizations. And it is in place horizontally as well, guaranteed to: national governments before other national governments; and global institutions before other global institutions. Thus participatory rights created at the global level establish links among the different levels of government and between them and civil society[17].

Those and other similar provisions raise many interesting questions: how is the administrative procedure changed by putting domestic agencies and private parties on the same plane? Do hearings in the global arena play the same role as administrative hearings do in national law? How does the

[16] On this provision, WTO Appellate Body, Japan – Measures affecting agricultural products, 22 February 1999, WT/DS76/AB/R, available at

http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/76ABR.doc.

[17] S. CASSESE, *A Global Due Process of Law?*, (forthcoming).

«interest representation model» apply to the global legal order? Do particular structures and procedures fulfil the same function in the global environment as they do in a national one?

To sum up, the global due process of law, compared to the domestic one, is richer, but less effective. It is richer in terms of openness, participation and consultation; is less effective, because transparency, the requirement of reasoned decisions and judicial review are not always granted, and therefore the entire body of the rule of law is not developed in the global arena.