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THE GLOBAL POLITY

GLOBAL DIMENSIONS OF DEMOCRACY
AND THE RULE OF LAW



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I. WHO RUNS THE WORLD?

WHO runs the world? The customary answer to this question is that the world is run by national governments (States), by common agreement, in different territories. States have different degrees of influence, and therefore power is not balanced¹; they establish links among themselves, giving rise to international law.

This answer overlooks two important facts. The first is that States have gone through a complex process of aggregation and disaggregation over time; the second is that they have been joined, during the last twenty years, by a growing number of non-State bodies.

If we examine the trends in the numbers of polities in Europe over the course of the last thousand years or so, we see that there has been a process of aggregation. In two centuries they halved (from 1000 in the 14th century to 500 in the 16th), and then diminished by a further 30% in the two hundred years that followed, leaving some 350 by the end of the 18th century². By the early 20th century there were only 25 such polities in existence. The British historian Mark Greengrass has summarized this process in his claim that “*swal-*

[1] See J.-J. Roche, *Théories des relations internationales*, Paris, Montchrestien, 8th edition, 2010.

[2] It should be noted that during this 400-year period, these political bodies were progressively integrated within larger, hierarchically organized institutions (empires).

lowing' and 'being swallowed up' were fundamental features of Europe's political past"³.

If, however, we ask the same question of the 20th and 21st centuries, we are immediately struck by the extent to which the opposite process of disaggregation has occurred. In half a century, the number of polities in existence has increased fourfold. In 1945, there were 50 (the 50 States that attended the San Francisco Conference, at which the United Nations Charter was drafted); by 2010, there were approximately 200⁴.

Moreover, from the middle of the 20th century onwards, national governments have increasingly been accompanied by other actors, such as multinational corporations, international governmental organizations (IGOs) and non-governmental organizations (NGOs), that challenge the capacity of the States to lead. In this neo-medieval system⁵, an important role is played by the approximately 2000 existing global regulatory regimes⁶. Among them, "[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; administra-

[3] M. Greengrass, *Introduction: Conquest and Coalescence*, in M. Greengrass (ed.), *Conquest and Coalescence: The Shaping of the State in early modern Europe*, London, Edward Arnold, 1991, p. 2.

[4] For example, there are 192 members of the United Nations (UN); 183 members of the International Labour Organization (ILO); and 153 members of the World Trade Organization (WTO).

[5] P. Khanna, *How To Run the World: Charting a Course to the Next Renaissance*, New York, Random House, 2011.

[6] On international regulatory regimes, S.D. Krasner (ed.), *International Regimes*, Ithaca NY and Cambridge MA, Cornell University Press, 1983 and M. Noortman, *Enforcing International Law. From Self-Help to Self-contained Regimes*, Aldershot, Ashgate, 2005.

tion by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions. In practice many of these layers overlap or combine [...]”⁷.

International governmental organizations⁸ are – as a rule – established by national governments: States integrate in larger bodies that incorporate diversified “local” legal orders. But IGOs sometimes reproduce themselves (many IGOs, such as the Codex Alimentarius Commission, are established by other IGOs). Moreover, they are not mere agents of the States, from which they have become increasingly autonomous. On the contrary, they have a role in guiding and constraining State behaviour: they conclude treaties and make rules; they create standards; they help transform the

[7] B. Kingsbury, N. Krisch, R. Stewart, *The Emergence of Global Administrative Law*, in *Law and Contemporary Problems*, 2005, vol. 68, Summer-Autumn, n. 3-4, p. 20. 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? On the variety of global regimes, E. J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, in *Chicago Journal of International Law*, 2010, vol. 11, Summer, p. 242

[8] Including minor organizations, IGOs numbered 7530 in 2006 (in 1981, 1039; in 1960, 154; in 1951, 123). To give one example of their growth in size: There were 75,282 United Nations officials in 2007 compared to only 52,107 in 1997. For these data, see S. Cassese, *Relations between International Organizations and National Administrations*, in International Institute of Administrative Sciences, XIXth International Congress of Administrative Sciences, *Proceedings*, Deventer, Kluwer, 1985, p. 165 and B. Kingsbury and L. Casini, *Global Administrative Law Dimension of International Organizations Law*, in symposium on “Global Administrative Law in the Operations of International Organizations” (eds. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), *International Organizations Law Review*, 2009, vol. 6, n. 2, p. 326, nt. 23. On international organizations, see H.G. Schermers and N.M. Blokker, *International Institutional Law, Unity within Diversity*, IV ed., Boston, Martinus Nijhoff Publishers, 2003; J. Klabbers, *An Introduction to International Institutional Law*, Cambridge, Cambridge University Press, 2002, and C.F. Amerasinghe, *Principles of the Institutional Law of International Organisations*, II ed., Cambridge, Cambridge University Press, 2005.

[9] J. E. Alvarez, *International Organizations as Law-makers*, Oxford, Oxford University Press, 2008.

internal structure of national governments; and they establish rules that are directly binding on private parties. Many global regulators were established as mission-oriented bodies, but subsequently evolved in a sector- or field-oriented direction (for example, the UN refugee agency (UNHCR) was established to protect refugees, but has expanded its remit to deal with issues relating to displaced persons in general).

An example of an intergovernmental network of national regulators is the Basel Committee on Banking Supervision, which includes representatives of 27 national banking supervisory authorities (usually the central banks).

A remarkable model of hybrid public-private global organization is provided by the International Organization for Standardization (ISO), whose members are the national bodies “*most representative of standardization in their countries*”. Therefore, the ISO is a “*non-governmental organization that forms a bridge between the public and private sectors*”¹⁰, within which some bodies are entirely private, while others are part of the governmental structure of their countries or have some form of governmental mandate¹¹.

Another example of hybrid private-public organization is the Internet Corporation for Assigned Names and Numbers (ICANN). It is a non profit partnership, established in 1998 under California

[10] See <http://www.iso.org/iso/about.htm>. On ISO membership, see http://www.iso.org/iso/about/structure/members_categories.htm.

[11] See E. Shamir-Borer, *The Evolution of Administrative-Law Norms and Mechanisms in the International Organization For Standardization*, paper presented to the second GAL Seminar, June 2006, Viterbo, available at <http://www.iilj.org/GAL/documents/ShamirBorerISO.doc>, at 9. This paper points out that over 70% of the national standardization bodies taking part in the ISO are governmental in nature. On private governance in general, H. Schepel, *The Constitution of Private Governance. Product Standards of Integrating Markets*, Oxford, Hart, 2005.

law¹². Its structure conforms to a “multi-stakeholder” or “multi-organizational” model, characterized by the existence of multifarious entities and institutions¹³. Nevertheless, it differs from the ISO in that it displays a particular form of hybridization: it is composed of private entities, but it performs a public function; in other words, it has a private “façade”, but the substance of its activities is public in nature¹⁴.

The International Chamber of Commerce (ICC) is, on the other hand, a perfect example of an entirely private global regulator. It brings together only private bodies and its main tasks involve the promotion of “international trade, services and investment”¹⁵. Furthermore, the enforcement of its standards is completely entrusted to the Chamber itself, without any interference from public or national authorities. The ICC, however, collaborates with several States and governmental organizations, by concluding agreements and providing recommendations¹⁶.

To these global institutions must be added the large – and increasing – number of international NGOs (of which there were

[12] ICANN must abide by the laws of the United States and can be called to account by the judicial system, i.e. ICANN can be taken to court. It is headquartered in Marina del Rey.

[13] These entities are the “Board of Directors”; three “supporting organisations” that deal with IP addresses (ASO), domain names (GNSO) and country code top-level domains (CCNSO); four “advisory committees”; a “Technical Liaison Group”; and the President and the Chief Executive.

[14] See E. Brousseau, M. Marzouki, C. Meadel (eds.), *Governance, Regulations and Powers on the Internet*, Cambridge, Cambridge University Press, 2009 and L. B. Solum, *Models of Internet Governance*, Illinois Public Law Research Paper no. 07-25 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136825.

[15] See the Preamble and article 1 of ICC Constitution (http://www.iccwbo.org/uploadedFiles/ICC/ICC_Home_Page/pages/ICC_Constitution_EN_8_June_2009.pdf).

[16] Note that the ICC is the main business partner of the UN and its agencies. Moreover, it collaborates with WTO.

61,345 in 2006; 14,752 in 1981; 1,422 in 1960; and only 955 in 1951)¹⁷ and numerous different epistemic communities (for example, those of environmentalists, of physicists, of biologists).

Such global regulatory regimes operate in so many areas that it can now be said that almost every human activity is subject to some form of global regulation. Global regulatory regimes cover fields as diverse as forest preservation, the control of fishing, water regulation, environmental protection, 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, regulation and finance of public works, trade standards, regulation of finance, insurance, foreign investments, international terrorism, war and arms control, air and maritime navigation, postal services, telecommunications, nuclear energy and nuclear waste, money laundering, education, migration, law enforcement, sport, and health.

There are significant differences between regulatory regimes. Some merely provide a framework for State action, others establish guidelines in order to guide domestic agencies, and others still impact upon civil society at a national level. Some regulatory regimes create their own enforcement mechanisms, while others rely on national or regional authorities for implementation. To settle disputes, some regulatory regimes have judicial bodies, while others resort to different forms of dispute resolution, such as negotiation, conciliation or mediation. Many areas are covered by more than one regulatory regime (leading to an overlapping of regulators)¹⁸.

[17] B. Kingsbury and L. Casini, *Global Administrative Law Dimension of International Organizations Law*, cit., p. 326, nt. 23

[18] For example, the International Maritime Organization (IMO) and the International Seabed Authority (ISA) regulate the use of the sea, as does the International Tribunal for the Law of the Sea (ITLOS). The following international organizations exist in – and do

Global regulatory regimes are established because a growing number of issues and problems cannot be addressed or resolved by national governments alone. These issues themselves are global in nature, and as such are beyond the power of individual governments to regulate: internet governance, environmental control, the Olympic Games, and the recent economic crisis provide example¹⁹.

The process of globalization is comprehensive and has a powerful impact on national governments, as the following comments by a German philosopher, a Dutch-Argentine sociologist and by a Swiss-German political scientist indicate: “By ‘globalization’ is meant ‘the cumulative processes of a worldwide expansion of trade and production, commodity and financial markets, fashions, the media and computer programs, news and communications networks, transportation systems and flows of migration, the risks generated by large-scale technology, environmental damage and epidemics, as well as organized crime and terrorism’”²⁰. “A good part of globalization consists of an enormous variety of micro-processes that begin to denationalize what had been constructed as

not exhaust – the environmental area alone: the International Whaling Commission, the Secretariat of the United Nations Framework Convention on Climate Change, the United Nations Environment Programme(UNEP) Ozone Secretariat, the Secretariat of the Convention on Biological Diversity, the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Secretariat of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the United Nations Secretariat of the Convention to Combat Desertification, the FAO/UNEP Secretariat of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Secretariat of the UNEP Convention on Migratory Species, and the International Tropical Timber Organization.

[19] See S. Charnovitz, *Addressing Government Failure through International Financial Law*, in *Journal of International Economic Law*, 2010, vol. 13, n. 3, p. 743.

[20] J. Habermas, *The Divided West*, Cambridge, Ciaran Cronin, 2006, p. 175.

national”²¹. “[...] I suggest that we think of statehood as a product which is produced by the state in association with other actors [...]”²².

II. THE BASIC FEATURES OF THE GLOBAL POLITY

In the global space there are – as already noted – many regulators. It is impossible, therefore, to deny that there is a global political organization, even a global polity; and it is important to identify its particular characteristics²³.

In what follows, I will set out the main features of this global polity, and subsequently analyse the most important ones.

a. There is no single global and comprehensive legal order and no global government, but rather several global regulatory regimes²⁴, without one hierarchically superior regulatory system (the United Nations Organization is more comprehensive than others, but it is

[21] S. Sassen, *Territory, Authority, Rights: from Medieval to Global Assemblages*, Princeton University Press, 2006, p. 1.

[22] C. Zürcher, *When Governance meets troubled States*, in M. Beisheim-G. F. Schuppert (hrsg.), *Staatszerfall und Governance*, Baden-Baden, Nomos, 2007, p. 11. Zürcher continues by saying: “It is sufficient to think of who provides security in Afghanistan or Tajikistan, domestic authority in Kosovo or Bosnia, or public services in Mozambique or Burundi. There are also international institutions and organizations in place to assume these functions – think of the UN transitional administration, the international forces in Afghanistan, or of the World Bank’s suggestion to set up so called ISAs (Independent Service Authorities) in low income countries under stress (LICUS)”.

[23] For the point of view of a political scientist, see A.M. Slaughter, *A New World Order*, Princeton, Princeton University Press, 2004.

[24] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN General Assembly, A/CN.4/L.682 13 April 2006 and T. Treves, *Fragmentation of International Law: The Judicial Perspective*, in *Comunicazioni e studi*, 2007, vol. XXIII, pp. 821-875.

less developed, as – for example – it lacks an efficient dispute settlement mechanism open to private parties²⁵). The global polity is the empire of “ad-hoc-cracy”: global regulatory regimes do not follow a common pattern; they are not uniform because they have to balance, area by area, national diversity and global standards.

This system has been nicely encapsulated in the formula “governance without government”²⁶. It is also possible to interpret this as a global composite constitution, with many “feudal lords”, either territorial and general (national governments), or functional and specialised (IGOs). National governments retain the monopoly over the use of force, but surrender their sovereignty. Like the “feudal anarchy”²⁷, the global polity is not “systematic”, unitary and centralized and therefore does not fit into the State paradigm.

Genetically, the global polity is the result of a piecemeal approach. National governments have promoted – or at least allowed – the development of their competitors (global regulatory regimes that exercise public power, and frequently constrain the behavior of States). It would have been impossible to establish one single and unitary legal order, because this would have replaced national governments with a cosmopolitan government.

[25] On the main features of the United Nations Organization, see M. W. Doyle, *A Global Constitution? The Struggle over the UN Charter*, paper presented to the Hauser Globalization Colloquium Fall 2010, NYU Law School.

[26] J. N. Rosenau and E.-O. Czempiel (eds.), *Governance without Government. Order and Change in World Politics*, Cambridge University Press, 1992. See also K Nicolaidis and G. Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, in *Law and Contemporary Problems*, 2005, vol. 68, Summer – Autumn, n. 3 – 4, p. 263.

[27] K. F. Werner, *Naissance de la noblesse. L'essor des élites politiques en Europe*, Paris, Fayard, 1998 (Italian translation *Nascita della nobiltà. Lo sviluppo delle élites politiche in Europa*, Torino, Einaudi, p. 58).

b. Vertically, there is continuity and no clear dividing line between the global and the national levels²⁸. National governments are at once principals (because they establish and control global institutions) and agents of IGOs (insofar as they implement international regimes). Global organizations are subject to the control of national governments even as they supervise them. Global institutions have also in many cases established direct links with national civil societies. The global legal space, therefore, is neither hierarchical, nor layered, but rather “marbled”: global, transnational, supranational and national are intermixed.

c. Horizontally, the diverse global regulatory regimes are self-contained (leading to the fragmentation of the global legal space)²⁹, but they establish mutual interconnections and linkages³⁰; together, they constitute an enormous conglomeration of interdependent legal orders. This interconnection has been called a “regime complex”: “[...] a collective of partially overlapping and non hierarchical regimes”³¹

[28] On the integration of States in the global space, J. McLean, *Divergent Legal Conceptions of the State: Implications for Global Administrative Law*, in *Law and Contemporary Problems*, 2005, vol. 68, Summer – Autumn, n. 3 – 4, p. 167 and S. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, in *Journal of international law and politics*, 2005, vol. 37, Summer, n. 4, p. 663.

[29] A. Lindroos, M. Mehling, *Dispelling the Chimera of Self-Contained Regimes: International Law and the WTO*, in *European Journal of International Law*, 2006, vol. 16, n. 5, p. 858 and E. Benvenisti – G. W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, in *Stanford Law Review*, 2007, vol. 60, November, pp. 595-631.

[30] See D.W. Leeborn, *Linkages*, *American Journal of International Law*, 2002, vol. 96, p. 5 ff.

[31] K. Raustiala and D. G. Victor, *The Regime Complex of Plant Genetic Resources*, in *International Organization*, 2004, vol. 58, Spring, p. 277, reprinted in B. Simmons and R. Steinberg (eds.), *International Law and International Relations: An International Organization Reader*, Cambridge University Press, 2007. On the “connecting regimes”, see also the very important contribution by S. Battini, *Amministrazioni senza Stato – Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003, p. 232 ss.

d. The public-private divide is blurred and does not follow the domestic paradigm of government regulating business³².

e. Compliance, while compelled in national legal orders through enforcement and the legal exercise of power (“*covenants, without the sword, are but words*” (Hobbes³³)), in the global space is “induced”.

“[...] [T]he Codex Alimentarius Commission (CAC) has changed after the World Trade Organization (WTO) referred to it as the reference point for the elaboration of international food standards”. Before 1995, “it was entirely voluntary for member states to base their national regulations on Codex standards”. After 1995, a State wishing to go beyond the global food standards must demonstrate the scientific basis of its measure and how it complies with the level of protection established by the Codex Alimentarius Commission (F. Veggeland and S. Ole Borgen, *Negotiating International Food Standards: The World Trade Organization’s Impact on the Codex Alimentarius Commission*, in *Governance*, 2005, vol. 18, October, n. 4, pp. 683 and 701; R.A. Pereira, *Why Would International Administrative Activity Be any Less Legitimate? A Study of the Codex Alimentarius Commission*, in *The Exercise of Public Authority by International Institutions*, eds. A. von Bogdandy et al., *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 210, Berlin, Springer-Verlag, 2010, pp. 541-571). The two global regulatory regimes thus reinforce each other. The decoupling of standard setting and standard enforcement produces 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”. “decoupling rule making and enforcement is the key to the accountability deficit of standards” (D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, in *Governance*, 2005, vol. 18, October, n. 4, pp. 623 and 624).

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 (WTO Appellate Body, *US Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996, p. 17).

It follows from this that the different regulatory regimes are not entirely self-contained, because they do not exist in isolation from other rules of global law.

[32] On global private governance, see W. Mattli and T. Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, in *Law and Contemporary Problems*, 2005, vol. 68, Summer – Autumn, n. 3 – 4, p. 225 and E. Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, in *European Journal of International Law*, 2006, vol. 17, n. 1, p. 47. On public-private bodies in the global space, see L. Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, in *International Organizations Law Review*, 2009, vol. 6, n. 2, p. 421.

[33] T. Hobbes, *Leviathan* (1651), London, J. M. Dent & Sons Ltd., 1962, Part II, Chapter XVII, par. 2, p. 87.

Global bodies use surrogates to implement their standards. One such surrogate, noted above, is that of the “regime complex”, linking one regime to another: trade and labour, trade and human rights, environment and human rights (for example, allowing the imposition of trade penalties for non-implementation of labour or environmental standards). Another possibility is retaliation, authorizing controlled self-enforcement: it induces one party (one State) to obey to the law because of the threat that another party (another State) will be authorized by a third party (the WTO Dispute Settlement Body) to react. Still another option is to introduce incentives for compliance: for example, to provide additional rights as a “prize” for fulfilling obligations³⁴. Implementation and enforcement may also be left to national governments acting as instruments of global institutions³⁵.

f. Global regulatory regimes impose the rule of law and democratic principles on national governments. A body of administrative law principles has developed in the global space: due process, the right to be informed and consulted, the right to a hearing, the duty to give reasons, the right to a judge; both procedural fairness and judicial review are influenced by the new context and thus open to change³⁶. Some democratic principles (free elections, freedom of

[34] For instance, see IATA standards enforcement: in this case, compliance with IATA rules opens up market incentives for carriers, by including code-sharing, wet lease, and aircraft leasing opportunities.

[35] See the example of the food standards implementation. On this issue, F. Cafaggi, *Private Regulation, Supply Chain and Contractual Networks: the Case of Food Safety*, RSCAS 2010/10 (Robert Schuman Centre for Advanced Studies - Private Regulation Series), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554329.

[36] On global administrative law in general, B. Kingsbury, N. Krisch, R. Stewart, *The Emergence of Global Administrative Law*, cit.; E. D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, in *Administrative Law Review*, 2002, vol. 54, Winter, n. 1, p. 415; B. S. Chimni, *Co-Option and Resistance: Two Faces of Global Administrative Law*, in *Journal of international law and politics*, 2005, vol. 37, Summer, n. 4, p. 799; C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, in *European Journal of International Law*, 2006, vol. 17, n. 1, p. 187; A. von Bogdandy, R. Wolfrum, J. von

association, free speech) are imposed by global actors (such as the European Union) on national governments³⁷.

g. There is no representative democracy at the global level; but a surrogate, deliberative democracy emerges through participation in the decision making processes.

The existence of the global polity raises many analytic and normative questions. The most salient of the former are: do global rules bind national administrations and private individuals within States, or do global administrations only have the power to make recommendations? Is there a core of command-and-control (i.e. regulatory instruments that rely on public orders, which must be obeyed and enforced with recourse to police power) in the global administrative system? Are disputes settled through judicial (or quasi-judicial) procedures, or are they mainly settled through negotiation?

The most important normative questions are: Should there be direct or indirect democratic legitimation of the global polity? Should global administrative bodies (agents) be accountable to governments (principals)? Should it be possible to participate in the administrative process and obtain a review of the decisions? Should

Bernstorff, P. Dann, M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, Heidelberg, Springer, 2009; B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, in *European Journal of International Law*, 2009, vol. 20, n. 1, pp. 23-57; B. Kingsbury and L. Casini, *Global Administrative Law Dimensions of International Organizations Law*, cit., p. 319. See also, in the French literature, J.-L. Halperin, *Profils des mondialisations du droit*, Paris, Dalloz, 2009 (tracing the history of legal globalization, from Roman law to constitutionalism and codification), but mainly J.-B. Auby, *La globalisation, le droit et l'Etat*, Paris, L.G.D.J., II edition, 2010. In the Italian literature, M. R. Ferrarese, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Roma – Bari, Laterza, 2006 and S. Cassese, *Il diritto globale*, Torino, Einaudi, 2009.

[37] On global democracy, J. Cohen and C. F. Sabel, *Global Democracy?*, in *New York University Journal of International Law and Politics*, 2005, vol. 37, Summer, n. 4, p. 763.

participation and review mechanisms be made available to only national administrations or also to private parties?

III. A TWO-LAYER SYSTEM?

The global legal space is frequently described as a multilevel system of governance. This common view posits the first level as that of the State, and the second as that of global governance, with a basic division of labour: the former dealing with “high” and the latter with “low” politics. The reality, however, is more complex.

From a formal point of view, States, as members of the international community, are legal equals: *“A small republic is no less a sovereign State than the most powerful kingdom”*³⁸. But *“the world’s economic fragmentation arises from its political divisions. Lack of ‘jurisdictional integration’ sustains bad government: in effect, there are too many countries”*³⁹; *“more than half the world’s countries have fewer people than the State of Massachusetts, which has about 6 million”*⁴⁰; *“of the 10 richest countries in the world in terms of GDP per head, 6 have fewer than 1 million people”*⁴¹. States such as Saint Vincent and the Grenadines or Antigua and Barbuda had an estimated population of 100,000-120,000 in 2008, yet they are full members of the United Nations. Moreover, in addition to fragmentation and differences in size, there are also important differences in terms of power and influence. The

[38] E. De Vattel (1758), quoted in A. Cassese, *International Law*, Oxford Univ. Press, 2005 (II ed.), p. 52.

[39] M. Wolf, *Why Globalisation Works*, Yale University Press, 2004 (see *The Economist*, July 17, 2004).

[40] A. Alesina – E. Spolaore, *The Size of Nations*, MIT Press, 2005, p. 1.

[41] *The Economist*, December 20, 2003.

proposition that States enjoy sovereign equality is a legal principle that does not correspond with reality.

Global actors include not only States, but national agencies as well. Many global regulations derive from the interaction between domestic agencies and global regimes. There is, in the global arena, a dis-aggregation of the State. The paradigm of “the State-as-a-unit” is lost.

Members of international organizations include not only States, but also non-national institutions (such as the European Union, which is a party to the International Olive Oil Council and the World Trade Organization), as well as private non-governmental bodies (as in the case of the ICANN⁴²). Many international organizations also allow a range of bodies to participate as “observers” in their activities. It is, therefore, often better to avoid the common denomination of such organizations as “intergovernmental”.

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*”⁴³. “[...] NGO

[42] R. Uerpman-Witzack, *International Regulation by International Regulatory Organizations: a Model for ICANN?*, in *The Global Community: Yearbook of International Law and Jurisprudence*, 2008, n. 1, p. 113; E. Schweighofer, *Role and Perspectives of ICANN*, in *Internet Governance and the Information Society: Global Perspectives and European Dimensions*, Utrecht, Eleven, 2008, p. 79; D. Drazner, *The Global Governance of the Internet: Bringing the State Back In*, in *Political Science Quarterly*, 2004, vol. 119, n. 3, p. 477; J.P. Kesan e A.A. Gallo, *Pondering Politics of Private Procedures: The Case of ICANN*, *University of Illinois College of Law, Law and Economics Working Papers*, n. 74, 2007 (<http://ssrn.com/abstract=1120489>)

[43] F. Bignami, *Civil Society and International Organizations: A Liberal Framework for Global Governance*, in “Duke Law Faculty Scholarship”, Paper 1126 (2007) (<http://scholarship>).

*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*⁴⁴.

Finally, the global legal polity, while so pervasive, is not universal. Some States are not members of all international organizations. Some institutions that are regarded as global because they operate beyond the State have, in fact, a regional area of influence (for example, the European Union).

The activities of global regulators – who cannot be regarded as mere agents of States – impact upon domestic agencies, which thus lose their independence; moreover, these regulators do not rely on State institutions alone because they often establish – as already noted – a direct dialogue with civil society actors within the State in question.

On the other hand, States are more powerful than is often claimed, as they play a double role in the global legal order: they act both according to the State-as-unit paradigm and also through their individual agencies, according to the fragmented-State paradigm. But States are also less powerful than we commonly think, in that they share their role inside the global institutions with a variety of NGOs.

law.duke.edu/faculty_scholarship/1126).

[44] E. Riedel, *The Development of International Law: Alternatives to Treaty-Making? International Organizations and Non-State Actors*, in R. Wolfrum – V. Roeben (eds.), *Developments of International Law in Treaty Making*, Berlin, Springer, 2005, p. 317; see also the comment of S. Hobe on the Riedel article, *ibidem*, p. 328. For a variety of reasons, some authors, such as R. Stewart, prefer to include pervasive differences with regard to collective action issues and accountability mechanisms in making a consistent and strong distinction between economic actors and “social” NGOs.

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

International and regional organizations, States and non-State actors are mutually implicated within global governance structures and follow the logic of collective action⁴⁵. This "[...] is becoming a heterogeneous, multilayered logic, derived not from one particular core structure, such as the State, but from the structural complexity embedded in the global arena. Globalization does not mean that the international system is any less structurally anarchic; it merely changes the structural composition of that anarchy from one made up of relations between functionally differentiated spheres of economic activity, on the one hand, and the institutional structures proliferating in an ad hoc fashion to fill the power void, on the other"⁴⁶. "Global regulation typically does not operate on two distinct, vertically separated levels, international and domestic. Rather, it functions through a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes and actors, resembling nothing so much as a Jackson Pollock painting"⁴⁷.

[45] P. G. Cerny, *Globalization and the Changing Logic of Collective Action*, in *International Organization*, 1995, vol. 49, n. 4, Autumn, p. 595.

[46] P. G. Cerny, *Globalization and the Changing Logic of Collective Action*, in *International Organization*, 1995, vol. 49, n. 4, Autumn, p. 620 (reprinted in C. Lipson and B.J. Cohen (eds.), *Theory and Structure in International Political Economy*, MIT Press, 1999 and in J.A. Frieden and D.A. Lake (eds.), *International Political Economy: Perspectives on Global Power and Wealth*, London, Routledge, IV ed., 2000).

[47] R. Stewart, *The Global Regulatory Challenge To U.S. Administrative Law*, in *New York University Journal of International Law and Politics*, 2006, Vol. 37, p. 703.

