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*J.H.H. Weiler  
European Union Jean Monnet Chair*

in cooperation with the



### **THE NEW PUBLIC LAW IN A GLOBAL (DIS)ORDER A PERSPECTIVE FROM ITALY**

Jean Monnet Working Paper 18/10

**Stefano Battini**

**The Procedural Side of Legal Globalization:  
The Case of the World Heritage Convention**

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## **The New Public Law in a Global (Dis)Order – A Perspective from Italy**

This working Paper was borne of the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (*Istituto di ricerche sulla pubblica amministrazione* - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration. The seminar's purpose was to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The project challenged some of the traditional conventions of academic organization in Italy. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions were not limited to scholars in the field of “Administrative Law,” “Constitutional Law,” or “International Law,” but of the integrated approach of the New Italian Public Law scholarship, as explained in the prologue to this paper. The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler, *Director, Jean Monnet Center for International and Regional Economic Law & Justice*

Sabino Cassese, *Judge of the Italian Constitutional Court*

## **Prologue: The New Italian Public Law Scholarship**

Since the second half of the 20<sup>th</sup> Century, a new distinctive Italian Public Law Scholarship has been developing.

Originally, traditional Italian Public Law scholarship was highly influenced by the German positivist and dogmatic approach. As a consequence, Italian Scholarship devoted greater attention to the law found in books rather than to law in action; the majority of legal scholars were also practicing lawyers; and Scholarship was focused on interpreting the law, not in analyzing the conditions of legal change and reform.

Beyond the mainstream of this scholarship, and within the line which links the founder of the Italian Public Law School, the Sicilian professor and politician Vittorio Emanuele Orlando to his main pupil, Santi Romano (who had also been the President of the Council of State) and to the most renowned student of Santi Romano, Massimo Severo Giannini, in the last quarter of the 20<sup>th</sup> century a new generation of scholars grew, whose programme was to find new ways to study Public Law. Since then, therefore, a new Italian Public Law has been developing.

The work of this New School has several distinctive features. It developed in the field of administrative law, but it has greatly contributed to the main subjects of constitutional law, such as the State and its crisis, and the Constitution. It has turned from German to British and especially American legal culture. It combines attention to tradition with that for innovation. It studies institutions and how they operate within their historical development and it contributes to researches on the history of Public Law ideas. It is not confined within the usual borders of the Public Law discipline, but it has a great interest in studying topics that are at the intersection of law, politics, economics, and sociology. It is an example of lateral thinking and it adopts methodological pluralism. It has greatly contributed to the ongoing body of research on the Europeanization and globalization of law, in collaboration with foreign scholars. It combines study of statutes with study of judicial decisions. It is engaged not only in study of the law, but also in legal reforms, participating in several manners to the legal process. It has gained prominence in the general public opinion, because its members play the role of public intellectuals. It is mainly based in Rome, but it has ramifications elsewhere (Universities of Viterbo, Urbino, Siena, Naples, Catania). It has established strong and permanent links with many European (French, German, British, Spanish), and some non-European legal cultures, namely American. It has produced important collective works (treatises, dictionaries) and edits two important law journals (“*Rivista trimestrale di diritto pubblico*” and “*Giornale di diritto amministrativo*”). It has established a research institute (*Istituto di ricerca sulla pubblica amministrazione* - IRPA), that is very active in the field.

For all these reasons, the Jean Monnet Center at NYU School of Law and the IRPA decided to host a seminar in order to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The seminar – entitled “The New Public Law in a Global (Dis)Order – A Perspective from Italy” – took place on the 19th and 20th of September, 2010, at the New York University (NYU) School of Law<sup>♦</sup>.

Here, a selection of the papers presented at the Seminar has been published. Our will and hope is that these articles shall contribute to the growth of the Italian Public Law Scholarship and to strengthen its efforts in dealing with the numerous legal issues raised by globalization.

Sabino Cassese, *Judge of the Italian Constitutional Court*

Giulio Napolitano, *Professor of Public Law at University "Roma Tre"*

Lorenzo Casini, *Professor of Administrative Law at University of Rome "Sapienza"*

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<sup>♦</sup> Authors were selected through a call for papers and they were the following: Stefano Battini; Lorenzo Casini; Roberto Cavallo Perin, Gabriella Racca e Gianlugi Albano; Edoardo Chiti; Elisa D’Alterio; Maurizia De Bellis; Federico Fabbrini; Francesco Goisis; Daniele Gallo; Elena Mitzman; Giulio Napolitano; Cesare Pinelli. Discussants at the seminar were Eyal Benvenisti, Sabino Cassese, Angelina Fisher, Matthias Goldmann, Benedict Kingsbury, Mattias Kumm, Giulio Napolitano, Pasquale Pasquino, Richard B. Stewart, Luisa Torchia, Ingo Venzke, and Joseph H.H. Weiler. More information available at <http://www.irpa.eu/index.asp?idA=302>.



**THE PROCEDURAL SIDE OF LEGAL GLOBALIZATION:  
THE CASE OF THE WORLD HERITAGE CONVENTION**

By Stefano Battini\*

**Abstract**

The conceptual premise of Global Administrative Law is that, in order to cope with globalization, states' right to regulate has been increasingly entrusted to global authorities, adopting rules and decisions which are best conceptualized as administrative regulation. Therefore, GAL is an answer to vertical and substantial institutional and legal globalization and it develops in order to avoid the risk of an administrative regulation (which goes global) unregulated by administrative law (which remains domestic). This paper, however, takes a slightly different approach to GAL. Focused on the impact of global regulatory regimes on domestic regulation, it argues that those regimes change the very nature of domestic rules and decisions as long as they are adopted according to decision-making processes open to the participation of "external" subjects, representing the interests of different political communities. From this perspective, GAL, conceived as global law regulating domestic regulation, is not an answer to vertical and substantial institutional and legal globalization, and contributes to the development of a horizontal and procedural path to legal globalization

The paper maintains this point by examining a single global regulatory regime— namely the World Heritage Convention regime - and, particularly, by considering three specific cases, referring to three different domestic administrative decisions, to whom that Convention has been applied. The World Heritage Convention regime – as well as many other global regulatory

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regimes –places on domestic authorities the burden of taking into account the global interests affected by their decisions. This is a typical procedural burden, drawn from the heritage of (domestic) administrative law. Thus, legal globalization progresses along a procedural path and according to administrative law (rather than private law) concepts.



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## Introduction

Globalization-global regulation-global administrative law (GAL). The main approach taken by GAL scholars follows along just such a chain. The premise is that, in order to cope with globalization, particularly with global markets, regulation has been increasingly entrusted to formal international organizations or informal networks of public and sometimes private bodies. These global authorities produce rules and decisions that are best conceptualized as administrative regulation.<sup>1</sup> Therefore, as administrative regulation has gone global, so must administrative law, which is the law regulating administrative regulation.<sup>2</sup> According to this perspective, GAL develops in order to avoid the risk of an administrative regulation (which goes global) unregulated by administrative law (which remains domestic). GAL is a way to ensure the Rule of Law in a globalized world. It is an answer to vertical and substantial institutional and legal globalization, conceptualized as global administrative regulation, which is in turn an answer to social and economic globalization.

This paper, however, takes a slightly different approach to GAL. It doesn't deal with an administrative law as applied to global regulation, meaning to rules and decisions issued by international organizations or global networks of domestic administrations. It focuses, rather, on the impact of those rules and decisions on domestic regulation. More specifically, the essay's premise is that global regulatory regimes change the way in which domestic authorities take their decisions. Global regulatory regimes - it is argued - change the very nature of domestic rules and decisions, making them less domestic, as it were. Those decisions, as regulated by global regulatory regimes, are still domestic from a structural point of view, as long as they are adopted

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<sup>1</sup> See B. Kingsbury, N. Krisch and R.B. Stewart, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* (2005) pp. 15–62; S. Cassese, "Administrative Law without the State? The Challenge of Global Regulation", 37 *New York University Journal of International Law and Politics* (2005) pp. 663–694; B. Kingsbury and L. Casini, "Global Administrative Law Dimensions of International Organizations Law", 6 *International Organizations Law Review* (2009) pp. 319–358. See also the essays published in: 68:3–4 *Law and Contemporary Problems* (2005); 37:4 *New York University Journal of International Law and Politics* (2005); 17 *European Journal of International Law* 1 (2006); 6:2 *International Organizations Law Review* (2009). In a different perspective, J.-B. Auby, *La globalisation, le droit et l'État* (L.G.D.J., Paris, 2<sup>nd</sup> edition, 2010).

<sup>2</sup> "In liberal democratic societies, administrative regulation is itself regulated by administrative law" (R.B. Stewart, "Administrative Law in the Twenty-First Century", 78 *NYU Law Review* (2003) 437).

by national or local bodies, representing a specific political territorial community. From a procedural point of view, however, they are no longer domestic, as long as they are adopted according to decision-making processes open to the participation of “external” subjects, representing the interests of different political communities.

From this perspective, GAL, conceived as global law regulating domestic regulation, is not an answer to vertical and substantial institutional and legal globalization. It is rather an alternative to that model of integration. More specifically, the application of GAL to domestic regulation creates a horizontal and procedural path to legal globalization. According to this model, legal globalization progressively integrates different political territorial communities without obliging them to vertically transfer to common global bodies their substantive right to regulate. Instead, it obliges each political community to regulate its own territory according to the procedural duty to take all the affected interests into account, including those stemming from outside its borders.

This point is demonstrated through the examination of a single global regulatory regime—namely the World Heritage Convention regime - and, particularly, by considering three specific cases, each referring to three different domestic administrative decisions, to which the Convention has been applied.

The first decision deals with the construction of a pipeline, and the determination of its path, for transporting oil from Western Siberia to the Pacific Ocean, in Russia. This would be the longest oil pipeline in the world, extending approximately 2,485 miles (4,000 kilometers), and costing between 11 and 17 billion dollars. The convenient path for the pipeline crosses a seismic area close to Lake Baikal, which entails the risk of polluting the oldest and deepest lake in the world. The second decision regards the building of an additional bridge over the river Elbe, in Dresden, in Germany. The new bridge addresses the transport needs of Dresden residents, who also approved the project by a local referendum; however, the design selected for the project, a four-lane bridge resembling a motorway, can have a serious impact on the landscape of Dresden. The third decision, finally, involves an authorization to mine pumice stone in Lipari, Italy. The

job of about 40 Italian miners depends on that authorization, which, however, could undermine the volcanic landforms of Aeolian Islands.

All these are clearly the kind of discretionary choices the law usually entrusts to agencies that are charged with balancing conflicting interests, particularly socio-economic and urban development concerns, on the one hand, and the protection of natural and cultural heritage, on the other hand. However, these are examples of decisions adopted by domestic authorities according to global decision-making processes; they involve domestic actors and institutions, as well as international authorities, foreign governments and transnational non-governmental organizations. And what makes these decision-making processes “global” is the World Heritage Convention, on the basis of which Lake Baikal (1996), the Aeolian Islands (2000), the Dresden Elbe Valley (2004), as well as more than other 900 properties of outstanding universal value around the world, have been inscribed on the World Heritage List. Thanks to the inclusion on such a list, these sites belonging to the territories of member states have been placed under a special legal regime. Inclusion on the list makes the interests of non-Russian citizens in the conservation of Lake Baikal legally relevant, just as it involves non-Germans and non-Italians in the conservation of the Dresden landscape and the Island of Lipari. These geographical places legally escape the rest of the national territory in which they are situated. They escape partially from the pull of the borders that delineate that territory. They are located in a “global legal space” and are thus relevant to the entire global community. For this reason, as domestic decisions having an impact on the world heritage affect the entire global community, so the interests of the world community must be taken into account when those decisions are adopted. The World Heritage Convention regime – as well as many other global regulatory regimes – performs such a function. It puts on domestic authorities the burden of taking into account the global interests affected by their decisions. This is a typical procedural burden, drawn from the legacy of (domestic) administrative law. Thus, legal globalization progresses along a procedural path and according to administrative law (rather than private law) concepts.

Section 1 contextualizes the paper’s thesis, examining the procedural model of integration among national legal orders in light of the drawbacks to the possible alternatives. These are, on

the one hand, the independent exercise of the right to regulate by each state within its own territory, according to the traditional international system, based on independence and equality of states; on the other hand, the vertical transfer of that right to regulate to global authorities, whose decisions are binding in the territory of all states. In the present condition of world interdependence, both systems suffer from an accountability and an effectiveness deficit.

Section 2 summarizes the characteristics of the WHC regime and analyzes the events related to the three cases referred above. The account of those cases goes into details, because the “globalization” of domestic decision-making processes does not fully emerge by looking only to the convention itself, or to the rules and guidelines enacted by its governing bodies. The WHC does not define procedures that domestic authorities must follow in adopting decisions with an impact on world heritage properties, although some procedural requirements are actually foreseen by both the Convention and its guidelines. The WHC regime, however, does confer “naming and shaming” powers, through which the international bodies can influence domestic authorities in the process of taking decisions that affect world heritage properties. The globalization of those processes, therefore, is the outcome of the contemporary and intertwined exercise of domestic and international powers. This phenomenon cannot be captured without looking at the way in which the Convention is implemented in specific and concrete cases.

Section 3 concludes by suggesting a procedural reading of the functioning of the WHC, arguing that it exemplifies a more general procedural model of legal and institutional integration, brought about by global regulatory regimes. This model is based on the introduction of global interests into the decision-making processes of domestic authorities, which are obliged to take those interests into account. The deficits of accountability and effectiveness in the exercise of public power posed by globalization must be re-evaluated in the light of the development of such a model of integration, the functioning of which largely draws on administrative law concepts.

## 1. **Regulating without borders: the double deficit of both domestic and global regulators in a globalizing context**

### 1.1. *Globalization and Domestic Regulation: ineffective for citizens and unaccountable to foreigners*

International law was once called upon to govern “the relations between [...] co-existing independent communities”.<sup>3</sup> According to the Westphalian system, each state exercises, within its own territory, its “domestic jurisdiction”, which establishes “the authority of the State to create and apply law irrespective of the conflicting interests of other states”.<sup>4</sup> Independence between states has been supposed to ensure effectiveness and accountability inside states. Domestic regulation is effective in so far as it governs all conduct occurring and having effects within the territory of the regulating state. Domestic regulators are accountable in so far as they represent the people affected by their decisions, meaning all and only the people residing in the territory of the regulating state.

International law, today, is called upon to govern the relations between increasingly interdependent communities. Globalization is progressively displacing the old Westphalian system, slowly eroding the “domestic jurisdiction” of states.<sup>5</sup> In such a different context, the states’ independent exercise of the right to regulate within their respective territories is no longer consistent with the values of the effectiveness and accountability of public regulation. Globalization, in fact, brings a twofold spatial disjuncture: on the one hand, a disjuncture between the territory in which the regulated conduct takes place and the territory in which it produces effects; on the other hand, the disjuncture between the territory in which the regulating

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<sup>3</sup> Permanent Court of International Justice, Judgement n. 9, *The Case of S.S. “Lotus”*, in *Publications of the Permanent Court of International Justice – Collection of Judgments*, Series A – N. 10, September 7<sup>th</sup>, 1927.

<sup>4</sup> H.H. Jones, “Domestic jurisdiction – from the Covenant to the Charter”, 46 *Ill. L. Rev.* 219, 1951-1952, p. 219. On the concept of domestic jurisdiction and its origins, see also J.L. Brierly, *Matters of Domestic Jurisdiction*, in 6 *Brit. Y.B. Int’l L.* 8 1925; L. Preuss, “The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction”, 40 *Am. J. Int’l L.* (1946) 721; A. Verdross, “Domestic Jurisdiction under International Law”, 3 *U. Tol. L. Rev.* (1971) 119.

<sup>5</sup> See on the topic J.H.H. Weiler, “The Geology of International Law – Governance, Democracy and Legitimacy”, 64 *ZaöRV* (2004) 547-562 (stating that “There is now increasingly international regulation of subject matter which hitherto was not only within the domain of States but within the domain of the administration within the State” – p. 559).

state has jurisdiction and the territory in which the exercise of that jurisdiction has an impact. The first disjuncture makes domestic regulation ineffective for citizens. The second one makes it unaccountable, with regard to foreigners.

As to the first aspect, it is trivial to observe that globalization makes the world smaller. It brings different territories, once well removed from one another, into proximity. Because of globalization, actions carried out in one place often produce effects in many different and sometimes very distant places. Anti-competitive activities of producers or service providers, for example, can affect consumers in every country in which their goods are sold or their services are provided, regardless of the place in which those activities are carried out.<sup>6</sup> The effects of posting data on a website can be felt wherever people can access the Internet.<sup>7</sup> Economic activities occurring in one country can have an impact on the environment of other countries, due to the transboundary effect of pollution, which doesn't respect borders.<sup>8</sup> What happens in one

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<sup>6</sup> See, for example, the *Hartford Fire* case (*Hartford Fire Insurance Co. v. California*, 509 US 764 - 1993), referring to the conduct of British reinsurers having had a direct negative impact on U.S. policy holders. In *Hartford Fire*, the U.S. Supreme Court held that U.S. antitrust rules are applicable to the conduct of British reinsurers, because it is "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States". In order to protect domestic consumers, domestic regulation has to reach conduct taking place abroad. If it fails to do so, it is ineffective. On the topic, K.W. Dam, "Extraterritoriality in an Age of Globalization: The Hartford Fire Case", *Sup. Ct. Rev.* (1993) 289.

<sup>7</sup> See, for example, the *Yahoo* case (Tribunal de Grande Instance de Paris, Ordonnance de référé 22 mai 2000, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France*; Tribunal de Grande Instance de Paris, Ordonnance de référé du 11 août 2000, *Association "Union des Etudiants Juifs de France", la "Ligue contre le Racisme et l'Antisémitisme" / Yahoo! Inc. et Yahoo France*; Tribunal de Grande Instance de Paris, Ordonnance de référé 20 novembre 2000, *UEJF et Licra c/ Yahoo! Inc.* Available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm#texte>). Yahoo was accused of permitting French Internet users to access its U.S.-based auction site, in which Nazi artifacts were offered for sale, in conflict with the French Law. The French Court ordered Yahoo "to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction site and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes". In order to protect French internet users, French regulation has been applied to conduct taking place in US. Without such an extraterritorial reach, which is however the exception, domestic regulation proves ineffective.

<sup>8</sup> In the *Trail Smelter* case (*Pakootas v. Teck Cominco Metals Ltd.*, No. CV-04-256-AAM, 2004; *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 n.2 - 9th Cir. 2006) a smelter located in Canada discharged its "slag" into the Columbia River, which carried the slag across the border into the United States, polluting the surrounding area. The District Court of the Eastern District of Washington held that U.S. environmental regulation could apply to a foreign corporation operating exclusively in a foreign country in accordance with that country's laws, just because the effects of its actions were felt within the United States. In order to protect the environment effectively, domestic regulation must be applied extraterritorially to foreign conduct having an impact on it. See on the topic M.J. Robinson-Dorn, "The Trail Smelter, Is What's Past Prologue? EPA Blazes a New Trail for CERCLA", 14 *NYU Env'tl L. J.* (2006) 233.

place potentially produces harm everywhere. As globalization also has a cultural dimension, the situations considered in this paper become pertinent. They refer to places declared to be “of interest not only to one nation, but also to the whole world”.<sup>9</sup> Therefore, what happens in those places produces effects everywhere, affecting the people of the whole world, whose common heritage is at stake.

To the extent that the territory in which some human conduct occurs is decoupled from the territory in which it produces its effects, the more domestic regulation proves ineffective, simply because of the intrinsic territorial limit. Only in exceptional circumstances does domestic regulation apply to foreign conduct extraterritorially. This conduct however may well affect citizens, in whose interest domestic regulators must perform the functions entrusted to them. Thus, in conditions of increasing interdependence, independent domestic regulators may become structurally ineffective, in so far as they can only regulate conduct taking place in their respective territories, without reaching conduct only having effects in those territories. Their rules and decisions do not have binding effects outside of their borders, where today occur many, if not most, of the activities which impact the lives of the citizens that domestic regulators represent.

As foreign conduct has an increased internal impact, domestic regulators are increasingly ineffective in protecting their citizens. However, neither they are accountable to foreigners, even as their rules and decisions have an increased external impact on them in turn. Here we see the second disjuncture “between regulatory jurisdiction and regulatory impact”.<sup>10</sup> As human activities taking place in one country increasingly produce effects in other countries, so does the

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<sup>9</sup> See Operational Guidelines for the Implementation of the World Heritage Convention, art. 269: “Once a property is inscribed on the World Heritage List, the State Party should place a plaque, whenever possible, to commemorate this inscription. These plaques are designed to inform the public of the country concerned and foreign visitors that the property visited has a particular value which has been recognized by the international community. In other words, the property is exceptional, of interest not only to one nation, but also to the whole world”.

<sup>10</sup> See J. Scott, *Cooperative Regulation in the WTO: the SPS Committee*, Global Law Working Paper 03/06, Hauser Global Law School Program - NYU School of Law, p. 7-8 (stating that “The point is a simple one but no less important for it. In the context of a globalizing market for agricultural products, a familiar gap has emerged between ‘*jurisdiction*’ and ‘*impact*’. Political fragmentation co-exists with deep market integration. It may be the EU which regulates, but the EU’s trading partners also pay an economic price, and undergo far-reaching societal transformations in a bid to secure compliance. It is this *disjuncture between regulatory jurisdiction and regulatory impact* which is said by some to constitute one of the most pressing normative problems of our time, particularly when it comes to the actions of powerful states”).



domestic regulation of those activities. Both domestic over-regulation and domestic under-regulation of transnational phenomena affects foreign interests. Strict domestic regulation of economic activities can affect foreign firms who have to comply with it in order to market their products in different countries. However, lax domestic regulation of economic activities can affect foreign consumers. Thus, if domestic anticompetitive conduct affects foreign consumers, then domestic antitrust rules allowing such a conduct affects them too; if domestic actors pollute foreign territories, then domestic environmental regulation enabling such an outcome affects foreign citizens as well. In the cases examined in this paper, domestic under-regulation threatens foreign interests. More precisely, domestic relaxed rules protecting the cultural or natural heritage situated in the territory of a single state, as well as the poor administrative enforcement of those rules, affects the interests of people residing all over the world, all of whom share in the same common heritage of mankind. Thus, domestic regulators impinge on a global commons, without representing (all) the owners of those assets.

The more that domestic regulation acquires an extraterritorial impact, the more domestic regulators become unaccountable, since their legitimacy is territorially limited. As it has been argued, an “external accountability gap” arises.<sup>11</sup> Therefore, in condition of interdependence, domestic independent regulators largely produce a kind of “regulation without representation”. They adopt rules and administrative decisions that have a direct or indirect external impact on foreign and global interests. Yet, they do not receive any legitimacy from - and are not accountable in any sense to - the foreign peoples affected by those rules and decisions.<sup>12</sup>

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<sup>11</sup> R. Keohane, “Global Governance and Democratic Accountability”, in D. Held and M. Koenig-Archibugi, *Taming Globalization: Frontiers of Governance*, Polity, 2003; R.W. Grant and R.O. Keohane, “Accountability and Abuses of Power in World Politics”, 99 *American Political Science Review*, no. 1, February 2005. I also refer to “The Globalization of Public Law”, 18 *European Review of Public Law*, no 1, spring 2006.

<sup>12</sup> See on the topic A. von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization and International Law*, 15 *EJIL* (2004) 900 (stating that “a structural democratic deficit in the age of globalization arises. Many state measures impact upon individuals in other states. However, these persons, as non-citizens, have almost no possibility to assert their interests and preferences within the democratic process of the regulating state”; and remarking that “a fundamental rights understanding of democracy [...] not only include citizens, but requires – in order to minimize heteronomy – that the preferences and interests of affected foreigners be taken into account”).

## 1.2. *Globalization and Global Regulation: ineffective against states and unaccountable to individuals*

As globalization progresses, domestic regulators become both ineffective and unaccountable. There could be an apparently easy answer to such a two-fold deficit: substituting global regulation for domestic regulation, or at least introducing global standards in order to harmonize domestic rules. Actually, such a path has been followed. Vertical and substantial integration, namely the transfer of the right to regulate up to global bodies, is the *magna pars* of the institutional and legal reply to economic and social globalization: “as the problems policymakers address have gone global so have the policymakers”.<sup>13</sup> By going global, national policymakers collectively overcome the territorial limit that restrains them.<sup>14</sup> By re-gaining the same geographical dimension of the phenomena they have to cope with, regulators are supposed to be effective and accountable once again, as long as they reach the regulated activities wherever taking place and they represent people affected by those activities wherever they happen to be.

However, global regulation also has its drawbacks, both in terms of its effectiveness and in terms of accountability.

As to effectiveness, global regulation is affected by the institutional framework in which it takes place which, despite the different features of the more recent geological strata,<sup>15</sup> is still rooted in the principle of state sovereignty. Such a principle has impressed two features upon the

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<sup>13</sup> K. Raustiala, “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law”, 43 *Virginia Journal of International Law* (2002) 4.

<sup>14</sup> See R.O. Keohane, S. Macedo and A. Moravcsik, *Democracy-Enhancing Multilateralism*, IILJ Working Paper 2007/4, Global Administrative Law Series, (stating that “even if democracy is degraded in the process, the ends justify the undemocratic means, because the pooling of sovereignty allows states to achieve policy goals none could realize alone. [...]. It is thus worthwhile to sacrifice some degree of domestic democratic control in order to render national governance more effective in terms of policy outputs, thus also, ultimately, maintaining domestic political support”).

<sup>15</sup> Following the metaphor used by Weiler, *supra* note 5.

international institutional system that, up to now, have curbed global regulation: fragmentation and dualism.<sup>16</sup>

First of all, a community made of sovereign communities could not tolerate a kind of superstate, that is to say a general legal order with an institutional framework representing all sorts of interests of human societies and potentially performing all types of functions entrusted to it. In order to avoid such a threat, nation-states have built a functionally fragmented international institutional system, composed of a number of mono-functional and self-contained regimes, throughout which global regulation currently is spread. As a consequence, global regulatory choices, unlike domestic ones, are rarely the outcome of an accurate balancing of different and conflicting interests, as each regime looks at the regulatory problems at issue from its particular point of view, maximizing the specific interest entrusted to it, just like “a man with a hammer sees every problem as a nail”.<sup>17</sup>

Secondly, the principle of state sovereignty is at odds with the penetration of international rules into domestic legal orders without the consent of states. Because of dualism, just as domestic rules cannot reach conduct taking place in the territory of another state without its consent, so international rules cannot bind individuals without the mediation of the state. And those rules cannot be enforced without the active cooperation of that State. As Heinrich Triepel put it in 1899, international law is like a field marshal who dispatches orders only to generals, through whom these will then reach the troops.<sup>18</sup> Global regulation today is certainly very different from international law in Triepel’s time. Its ability to gain the compliance of states, and to penetrate into their domestic legal orders to directly reach private actors, has increased

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<sup>16</sup> On the topic, let me refer to *Amministrazioni senza Stato* (Giuffrè, Milano, 2003), and to “Il sistema istituzionale internazionale dalla frammentazione alla connessione”, *Rivista italiana di diritto pubblico comunitario* (2002), p. 969 ss..

<sup>17</sup> M. Koskeniemi, *International Law: Between Fragmentation and Constitutionalism*, available at [http://cigj.anu.edu.au/cigj/link\\_documents/KoskeniemiPaper.pdf](http://cigj.anu.edu.au/cigj/link_documents/KoskeniemiPaper.pdf), (stating that “a specialised institution is bound to see every problem from the angle of its specialisation. Trade institutions see every policy as a potential trade restriction. Human rights organs see everywhere human rights problems, just like environmental treaty bodies view the political landscape in terms of environmental problems and so on”).

<sup>18</sup> E. Triepel, *Volkerrecht und Landesrecht* (C.L. Hirschfeld, Leipzig, 1899).

enormously in recent times.<sup>19</sup> Notwithstanding this change, most global regulation today still lacks binding force for individuals and even with regard to states, often taking instead the form of so-called soft law.

It is true that global regulation, though formally only soft law, does have a substantively hard impact,<sup>20</sup> as states and even private subjects often have no choice but to follow it. The harder this impact becomes, however, the more sensitive the accountability drawbacks of global regulation appear.

In the domestic context, regulators are made accountable, on the one hand, through a (direct or indirect) electoral link with the people affected by their decisions and, on the other hand, through the regulation of the regulators themselves, which is mainly ensured by administrative law. In the global context, however, both of these accountability mechanisms are weakened.

As to the first one, remoteness softens the electoral link between rulers and ruled. The higher the level at which the regulation takes place, the longer the chain connecting the regulator to the people affected by its decisions.<sup>21</sup> Moreover, global regulation might suffer from a sort of imbalance in representation. It is true that conduct taking place here produces effects everywhere; however, it is also true that its impact is often harder here than everywhere else. Notwithstanding the fact that the internal impact of a specific conduct is stronger than its external effect, the global regulation of such a conduct gives the representatives of every country

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<sup>19</sup> Let me refer, on this specific topic, to *International Organizations and Private Subjects: A Move toward a Global Administrative Law* ?, IILJ Working Paper 2005/3, New York University School of Law, Available at SSRN: <http://ssrn.com/abstract=723165>.

<sup>20</sup> A.M. Slaughter, "The Real New World Order", 76 *Foreign Aff.* (1997) 183. See also on this topic D. Zaring, "Informal Procedure, Hard and Soft, in International Administration", 5 *Chicago Journal of International Law* (2005) 547.

<sup>21</sup> See M. Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", 15 *EJIL* (2004) 916 (stating that global regulatory bodies "are notoriously difficult to hold democratically accountable on a national level" and, as a consequence, "the great institutional loser in the shift from classical international law to international law as governance is the national legislature and the national electoral process, the very institutions believed to be at the heart of liberal constitutional democracy"). See also on the topic A.C. Aman, Jr., *The Democracy Deficit: Taming Globalization Through Law Reform* (New York University Press, New York, 2004), as reviewed by K. Raustiala, "Book Review: The Democracy Deficit by Alfred C. Aman", *Journal of Legal Studies*, 2005 Available at SSRN: <http://ssrn.com/abstract=880798>.

equal opportunities to intervene in the decision-making process. Therefore, just as domestic regulation tends to undervalue foreign interests affected by domestic measures, so global regulation might overvalue them.

As for the second mechanism, by making decisions collectively at the global level, regulators largely escape domestic administrative law, which, of course, does not apply to global regulation. It does not apply to the decisions taken by national regulators within global bodies, as national constitutional law typically sees those decisions as the prerogatives of the executive with regard to matters of international relations, according, for instance, to the English doctrine of “royal prerogative power over foreign affairs”, or to the French doctrine of “*acte de gouvernement*”, or to the “foreign affairs exception” included in the APA in the United States.<sup>22</sup> Domestic courts, moreover, cannot directly challenge the decisions adopted by the global bodies themselves, which are usually covered by immunity, in order to ensure the independence of international organizations from any one state. They can challenge only the domestic decisions transposing or enforcing the global ones, potentially setting aside the former when the latter violate domestic administrative law principles, as in the Kadi saga.<sup>23</sup> Even in those cases, however, individuals are protected against global regulation by dualism, rather than by domestic (European) administrative law. Such law applies only because the global decision needs to be transposed or enforced inside the domestic legal order and by domestic authorities. In any case, domestic administrative law does not address the global regulatory decisions in the actual sites where these decisions are substantially taken. Because domestic administrative law is ineffective in regulating global regulation, a global administrative law, directly applying to global decisions,

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<sup>22</sup> In a dualist system, the doctrine of “foreign affairs function” in administrative law is somehow a symmetrical equivalent of that of “domestic jurisdiction” in international law. As the latter close to international law the door to the domestic legal orders, so the former close to domestic administrative laws the door to the international order. Globalization, not surprisingly, tends to open both kind of doors. On the foreign affairs function in the age of globalization, see C.J. Tibbels, “Delineating the Foreign Affairs Function in the Age of Globalization”, 23 *Suffolk Transnat'l L. Rev.* (1999) 389.

<sup>23</sup> See Judgement of The European Court of Justice (Grand Chamber), 3 September 2008, in Cases C-402/05 P and C-415/05 P. See N. Lavranos, “The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC”, in *Yearbook of European Law*, 2009; K.S. Ziegler, “Strengthening the Rule of Law, But Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights”, 9 *Human Rights Law Review*, n. 2 (2009).

would be needed to fill the gap. And GAL is actually emerging, as an increasing number of scholars, including myself, assert. As a group, we also underline the failures of GAL at the present stage of its development, particularly with reference to the lack of an effective judicial branch of government at the global level. Despite rapid progress, it would be hard to deny that up to now global regulation has been the Road Runner and GAL its Wile E. Coyote.

In such a context, the choice between domestic and global regulation is a hard one. Both solutions present an “equal deficit”.<sup>24</sup> The problems arising under the World Heritage Convention are evidence of that. Should the right to regulate activities having an impact on world heritage properties be entirely entrusted to the authorities with jurisdiction in the territories where those properties are situated? Or should that right to regulate be transferred up to a global body representing all people who share those common spiritual assets, regardless of where they reside? In the first case, a domestic regulator might be totally unaccountable to the foreign sharers of world heritage properties, affected by its decisions (as well as totally ineffective in protecting world heritage properties situated outside its borders). In the second case, a remote and mono-functional global regulator, escaping domestic administrative laws, might maximize the interest in the conservation of cultural and natural properties, which is equally shared by all human beings, while disregarding the competing economic or social impact of such regulation on the lives of the people residing close to the cultural or natural site at issue.

However, the actual functioning of the World Heritage Convention regime, examined in the next part of the paper, suggests that global regulatory systems may realize a more complex path of integration, which is something in between independent domestic regulation, on the one hand, and global regulation, on the other. This is a horizontal and procedural path to legal and institutional globalization. It assigns to the domestic regulator the power to take decisions, while

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<sup>24</sup> See N. Krisch, *The Pluralism of Global Administrative Law*, 17 *EJIL* (2006) 270 (stating that the domestic constituency “is limited in that it cannot fully respond to the needs and interests of those outsiders that are affected by its decisions or that have a claim to be considered”, while the international constituency “is not capable of instituting structures of democratic participation that are nearly as thick and effective as those possible on the national level”. Therefore, according to the author, “since none of the constituencies can make a convincing claim for primacy, we should regard them as complementary and recognize that they stand in a non-hierarchical relationship”).

entrusting to global bodies the function of introducing foreign and global interests into the decision-making processes preceding those decisions. In this way, regulatory decisions are adopted by the authorities most accountable to the most affected interests, while all the affected interests are taken into account. A procedural model such as this progressively integrates domestic legal orders without depriving them of their right to regulate. In order to understand how this model works from a legal point of view, global administrative law seems a better tool than international law, for reasons which the last part of this paper will elaborate.

## **2. The World Heritage Convention Regime and its Functioning**

### *2.1. The World Heritage Convention: Principles, Organization and Powers*

The fundamental principles of the World Heritage Convention are established by its articles 4 and 6.

Art. 4 recognizes the duty of each State Party “of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage” situated in its territory. This duty “belongs primarily” to each State Party. However, according to art. 6, “whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage [...] is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate”. To this end, “the States Parties undertake [...] to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage [...], if the States on whose territory it is situated so request”.

The conceptual scheme of the WHC is clear. It entrusts each State Party with a global function (the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage), which must be performed in order to achieve an objective of the international community as a whole. Each State has to manage a “world heritage”, as art. 6 expressly defines it.

This scheme limits the sovereignty of Member States, since they lose the absolute freedom to dispose of the cultural and natural heritage situated in their territory. At the same time, however, it protects State's sovereignty, to the extent that entrusting the global function to the State means that it cannot be transferred to the international organization. The WHC certainly gives the international community a role in the identification and conservation of cultural and natural heritages, but it is a secondary and auxiliary one. The international community, in fact, supports action by the States, but does not substitute for them. Based on art. 6, the international community gives its "help" and intervenes only if the State "so requests." Art. 7 of the WHC is even clearer about this. It defines the role assigned to the international community as a whole in this way: "international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage".

Thus, each State performs a global function, supported by the international community as a whole. In order to exercise such a function, however, the international community must organize a complex of convention bureaus or offices and grant them various powers.

As to offices, the WHC has three components: a decision-making organ, an administrative secretariat, and various consultative organs. The decision-making organ is intergovernmental in nature. It is called the World Heritage Committee. It is composed of representatives of 21 States, elected periodically by the General Assembly of States Parties to the Convention. The administrative organ is the World Heritage Centre, which consists of a secretariat that assists the World Heritage Committee, preparing its meetings, determining its agenda, and assuring that its decisions are carried out. The secretariat is nominated by the Director General of UNESCO. Thus, the WHC regime is administratively connected with UNESCO, and through this link, to the general system of the United Nations. What distinguishes the WHC organization, however, is its consultative function. The World Heritage Committee makes use of technical organs that participate in its meetings "in an advisory capacity". The main bodies of this type are the International Council of Monuments and Sites (ICOMOS), which is competent on cultural heritage issues, and the International Union for Conservation of Nature and Natural Resources



(World Conservation Union – IUCN), which is competent in matters of natural heritage. These two organizations are very different from each other, but have common characteristics. Each has a mixed membership and are private organizations. Their membership comprises both public institutions (the IUCN also admits States as members), private institutions and private individuals. Each member State must form a national committee, which is also a mix of both public and private actors. These organizations are expressions of global civil society or of epistemic transnational communities. The ICOMOS is defined, according to its website, as a “global non-governmental organization”. As is not the case with most NGOs however, the WHC regime grants these organizations much more than a right to participation that is generally linked to observer status. IUCN and ICOMOS are fully involved in the organizational texture of the international regime. They are non-governmental organizations that are entitled to perform global public functions, even if only in a purely consultative way. The advisory bodies represent a strong point of the World Heritage Committee, giving it its own social base. Through IUCN and ICOMOS, the World Heritage Committee acquires information and evaluations regarding natural and cultural heritages of the various States, while remaining independent of the State governments. At the same time, the non-governmental organizations and the private actors, in each country working for the conservation of the cultural and natural heritage can influence, through their membership in the IUCN or the ICOMOS, the decisions of the World Heritage Committee, independently of their respective governments and, at times, in opposition to them.

The principal powers of the World Heritage Committee involve the establishment and management of two lists: the “World Heritage List” and the “List of World Heritage in Danger.”

Through the establishment of the World Heritage List, the World Heritage Committee supports the function of the States in identifying the natural and cultural heritages located within their territory. According to the Convention, every State Party submits to the World Heritage Committee an inventory of properties forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in a list of sites having “outstanding universal value.” On the basis of the inventories submitted by the States (the “tentative lists”) the World Heritage Committee, guided by its advisory bodies, establishes, keeps up to date, and publishes the World

Heritage List.<sup>25</sup> The inclusion of a property in the World Heritage List is based on an evaluation that refers both to the intrinsic value of the property and to the regulatory and institutional system foreseen for its protection and management.<sup>26</sup> When deciding to inscribe a property on the World Heritage List, the Committee adopts a Statement of Outstanding Universal Value, which recognizes its exceptional value. This recognition offers a benefit for the State concerned, even in economic terms, by increasing tourism. However, it also evokes “the requirements for protection and management in force” and becomes “the basis for the future protection and management of the property”. Therefore, by means of this Statement of Outstanding Universal Value, the domestic regulatory system for the protection of the property inscribed on the List, becomes at the same time the international parameter by which the member state’s respect for its duties under the convention are evaluated.

Once a property has been listed in the World Heritage List, the international body supports the member States in their efforts to protect and conserve the natural and cultural heritage of humanity. The international support is activated, specifically, by a “request of international

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<sup>25</sup> The listing procedure is regulated by the *Operational Guidelines for the implementation of the World Heritage Convention*, adopted and continually updated by the World Heritage Committee to both guide its activity and codify its practices. According to the Operational Guidelines, the procedure for inscription on the World Heritage List is broken down into three phases. The initiative phase is promoted by the State, which first has to submit to the World Heritage Centre a “tentative list” of different properties and then individual “nominations”. According to the Guidelines (art. 63 and 123), State parties are encouraged to prepare both tentative lists and nominations “with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties”. In the second phase, Advisory Bodies issue a technical evaluation, making use of experts, on-site missions and consultations with local NGOs. In the third phase, World Heritage Committee decides upon individual nominations..

<sup>26</sup> From this point of view, according to the *Operational Guidelines for the implementation of the World Heritage Convention*, “all properties inscribed on the World Heritage List must have adequate long-term legislative, regulatory, institutional and/or traditional protection and management to ensure their safeguarding” (art. 96-97). Such “legislative and regulatory measures at national and local levels should assure the survival of the property and its protection against development and change that might negatively impact the outstanding universal value, or the integrity and/or authenticity of the property. States Parties should also assure the full and effective implementation of such measures” (art. 98). The regulatory framework must include, in particular, the following requirements, which are thus a sort of internationally imposed part of the domestic law protecting heritage: a clear delineation of the boundaries of the property (art. 99); the arrangement of a “buffer zone”, namely of an “area surrounding the nominated property which has complementary legal and/or customary restrictions placed on its use and development to give an added layer of protection to the property” (art. 106); “an appropriate management plan or other documented management system which should specify how the outstanding universal value of a property should be preserved, preferably through participatory means” (art. 108).

assistance” from the interested State, authorizing the World Heritage Committee to take direct initiatives and to insure the conservation of the property. This work is financed in part by a fund (the World Heritage Fund) made up of member States’ contributions.

When the “request of international assistance” refers to a property “for the conservation of which major operations are necessary” the World Heritage Committee may also include it on the “List of World Heritage in Danger.” This inclusion should have the effect of bringing the attention of the international community to bear on the need to cooperate with the interested State in helping it to protect the property in question. According to art. 11.4 of the WHC, the List of World Heritage in Danger may include a property forming part of the cultural and natural heritage that is threatened by serious and specific dangers, such as the possibility of disappearance caused by “large-scale public or private projects or rapid urban or tourist development projects”. The inclusion on the List of World Heritage in Danger can be the first step toward the eventual removal of the property from the World Heritage List (delisting). That happens when the Commission ascertains that the property has definitively lost the “outstanding universal value,” that had originally determined its inclusion.

Based on the text of the Convention, there would seem to be no conflict between the sovereignty of the State and the prerogatives of the World Heritage Committee. The latter acts only in support of the former. The consent of the State is needed in both the phase of identification and that of conservation of the heritage located on its territory. In the first phase, inclusion on the World Heritage List presupposes a “nomination” by the interested State. In the second phase, inclusion on the List of World Heritage in Danger presupposes a “request of assistance” by the interested State.

However, if one consider the way in which the WHC, above all recently, has been interpreted and applied, such a conflict does in fact exist. It raises the central problem of the international limits on the State’s “right to regulate”. On the one hand, the State has the sovereign right to govern its own territory, making decisions that affect its natural and cultural heritage. On the other hand, there is the interest of the international community to care for this heritage even with respect to local decisions. The State has an interest in the inclusion of its own

properties on the list by the World Heritage Committee. However, in exchange, this allows the international Committee to influence local decisions regarding those properties.

The World Heritage Committee has progressively changed its approach. It no longer limits itself merely to supporting the actions of the interested State, but is playing a more active role, participating in the national and local processes of making decisions that affect the protection of the cultural and natural heritage sites in the member States. Two changes, introduced in the *Operational Guidelines for the Implementation of the World Heritage Convention*, are particularly important.

In the first place, a system of “Reactive Monitoring” was introduced, allowing the Secretariat and the Advisory Bodies to advise the World Heritage Committee regarding the state of conservation of specific properties “under threat.” To this end, States are invited “to inform the Committee, through the Secretariat, of their intention to undertake or to authorize in an area protected under the Convention major restorations or new constructions which may affect the outstanding universal value of the property”.<sup>27</sup> Moreover, the Secretariat may also receive information about the state of conservation of a property “from a source other than the State Party concerned.” In fact, this option is utilized by private actors and local NGOs to denounce initiatives and decisions taken by the State authorities in violation of their international obligations to conserve and care for their own natural and cultural heritage.

Secondly, beginning in the 1990s, the World Heritage Committee has had the power to include a property on the List of World Heritage in Danger even without the consent of the interested State. According to art. 184 of the Operational Guidelines, “the Committee is of the view that its assistance in certain cases may most effectively be limited to messages of its concern, including the message sent by inscription of a property on the List of World Heritage in Danger and that such assistance may be requested by any Committee member or the Secretariat”.

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<sup>27</sup> See *Operational Guidelines for the Implementation of the World Heritage Convention*, art. 172, according to which «notice should be given as soon as possible (for instance, before drafting basic documents for specific projects) and before making any decisions that would be difficult to reverse, so that the Committee may assist in seeking appropriate solutions to ensure that the outstanding universal value of the property is fully preserved”.

Reactive Monitoring, and inclusion without consent on the red list, have profoundly modified the original sense of the Convention,<sup>28</sup> provoking negative reactions on the part of some member States,<sup>29</sup> and triggering a deeper analysis of the legal status of the Convention by the Advisory Bodies<sup>30</sup> and by UNESCO.<sup>31</sup>

The List of World Heritage in Danger has progressively changed its function. It came to being as a tool for sounding an alarm that would bring to the attention of the international community the plight of a State unable to defend holdings of interest to humanity as a whole. It has instead become principally a mechanism for making the voice of the international

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<sup>28</sup> See N. Affolder, “Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance”, 24 *Pace Environmental Law Review* (2007) 35, stating that the drafting history of the *Convention* reveals that danger-listing should generally follow the request of a Member State and “must not lead to any kind of interference in the domestic affairs of the State or to any form of internationalism” (Final Report - Meeting of Experts to establish an International System for the Protection of Monuments, Groups of Buildings and Sites of Universal Interest, SHC.69//MD/4 (1969), online: <<http://whc.unesco.org/archive/1969/shc-md-4e.pdf>> at para. 72”). The author also quotes the *Draft Report: Special committee of government experts to prepare a draft convention and a draft recommendation to Member States concerning the protection of monuments, groups of buildings and sites* (SHC.72/CONF.37/19 (1972), online: <<http://whc.unesco.org/archive/1972/shc-72-conf37-19e.pdf>> at para. 26-30), according to which “these two lists are to be regularly kept up to date and distributed, and international assistance is to be used for property appearing in either one of these lists or in both of them. The inclusion of a property in these lists requires the consent of the State Party concerned. Although a request by the latter will be necessary before a property may be included a property in the “List of World Heritage in Danger”, the Committee will be able to include a property in the “World Heritage List” without the State concerned having requested it, but on condition that it consents”.

<sup>29</sup> See for example the position of the Australian Government about the Jabiluka case. In 1997 and 1998, scientists and environmental associations brought to the attention of the *World Heritage Committee* the existence of the project of carrying out a mining plant through Jabiluka, in the immediate vicinity of the Australian Kakadu National Park. The World Heritage Committee sent a mission of experts who suggested its inclusion on the red list. But the Australian government was opposed, noting a problem of a more general order: “the inscription of Kakadu National Park on the List of World Heritage in Danger without the request and the consent of the State Party, and against the express wishes of the State Party, could place at risk some of the fundamental principles that underpin the Convention—that is the respect for the sovereignty of the State Party, the safeguarding of the property rights provided for in its national legislation, and the primacy of the role of the State Party in the protection of the natural and cultural heritage. Such action also could be at odds with the terms of both the Convention, those relevant parts of the Operational Guidelines which are consistent with the Convention, and the benchmarks of Committee practice. It would represent a significant change to the basis upon which states took the serious step of becoming a party to the Convention and may deter other states from taking that step in the future. In short, the issue of whether the World Heritage Committee chooses to place Kakadu on the List of World Heritage in Danger is no longer an issue for Australia alone. It is a matter of vital importance to each and every State Party to the World Heritage Convention”.

<sup>30</sup> *Iucn, Analysis of the legal issues in the Draft Operational Guidelines*, WHC-02/CONF.202.INF.12.

<sup>31</sup> *Unesco, Legal Consideration concerning the Inscription of Properties in the List of World Heritage in Danger and the Deletion of Properties from the World Heritage List*, WHC-02/CONF.202/8.

community heard inside a State whose choices threaten a heritage that belongs to the whole world. The inclusion of a property, or the threat to include it on the red list, like the threat of its removal from the World Heritage List, are today mainly used to pressure States. Through a technique of name and shame, the World Heritage Committee influences local administrative choices that have an impact on the global interest in the preservation of natural and cultural heritages declared to have “outstanding universal value”. The cases recounted in some details in the succeeding section are testimony to this.

## *2.2. The World Heritage Convention in Action: the Baikal, Dresden Elbe Valley, and the Aeolian Islands Cases*

Three recent cases, which have arisen under the WHC, will illustrate the concrete functioning of this global regulatory system. They concern domestic decisions potentially affecting world heritage properties, namely the construction of an oil pipeline in Russia, near Lake Baikal, the building of a bridge in Germany, in the center of the city of Dresden, and the authorization of mining activities in the Italian Aeolian Islands. It is worth examining each of these cases.

### *Lake Baikal*

In July 2005, Greenpeace and other environmental organizations informed the World Heritage Committee that the company responsible for the construction and management of the East Siberia-Pacific Ocean oil pipeline had begun deforestation to create the path for a route that passed just 2 km from Lake Baikal. In light of this information, the Committee requested Russia to invite a joint mission of the World Heritage Centre and IUCN to the property; it decided that, on the basis of the outcome of that mission, the Committee might have to consider the inclusion of Lake Baikal on the List of World Heritage in Danger.<sup>32</sup>

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<sup>32</sup> *Decision 29 COM 7B.19*. At the 29<sup>th</sup> session of the World Heritage Committee (Durban, 10- 17 July 2005) the delegate of the Russian Federation showed, with the aid of a map, the chosen route, that in his view was located outside of the Baikal listed area. But the delegate of Santa Lucia (the Caribbean island-nation with a territory of 620 square meters – around 0.0036% of Russia – and with 160,000 inhabitants) observed that this route also passed through the borders of the property included on the list. Supported by the representative of Greenpeace Russia, who

The mission took place October 21-31, 2005. The UNESCO team, after consulting federal and local authorities, as well as representatives of local NGOs and experts, submitted a report to the World Heritage Committee. The report noted, with strong concern, that the route of the proposed pipeline approached the coast line of Lake Baikal in some places as close as 800 meters and that there was a general consensus among experts that the pipeline technology proposed by Transneft could lead to a substantial risk of accidents and oil spills. The report thus recommended to the World Heritage Committee that an eventual final decision by the State Party to approve the pipeline construction along this route should trigger inscribing the site on the List of World Heritage in Danger.<sup>33</sup>

In spite of this, and even though the project received a preliminary negative environmental impact evaluation, President Vladimir Putin pushed for the construction of the pipeline. As a result, the federal authority changed the composition of the EIA Commission and by March 2006 a positive environmental impact evaluation had been approved.

The decision unleashed protests by civil society and reactions from the international press.<sup>34</sup> The environmental organizations promptly informed the World Heritage Committee. On March 10, 2006, the President of the World Heritage Committee sent President Putin a letter in which he expressed profound concern about the impact of the route chosen for the pipeline on Lake Baikal and asked that it be modified so as to preserve the outstanding universal value of the property inscribed in the UNESCO list. Then, on March 29, the Director General of UNESCO sent a similar letter to the Russian Prime Minister. On March 30, the secretariat of the World Heritage Committee sent a letter to the Ambassador of the Russian Federation on behalf of UNESCO, asking that he make available the official decision and the evaluations by the Russian authorities.

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intervened as an observer, he asked that an independent mission be sent to ascertain what the actual route of the pipeline precisely was. The proposal was adopted (See *Draft Summary Records of the 29th session of the World Heritage Committee*, Durban, 2005 - WHC-05/29.COM/INF.22, p. 109).

<sup>33</sup> See P. Rosabal (IUCN) and G. Debonnet (UNESCO), *Mission Report – Reactive Monitoring Mission to Lake Baikal Russian Federation*, 21-31 October 2005, available at <http://whc.unesco.org/archive/2006>.

<sup>34</sup> See *International Herald Tribune (Russia approves Oil Pipeline Skirting Lake Baikal)*, by C.J. Chivers, March 7, 2006); *El País (Petróleo contra el Baikal)*, R. Fernandez, March 20, 2006).

The local and international pressures were effective. On April 26, the anniversary of the Chernobyl disaster, Putin organized a meeting with the federal and regional authorities in the city of Tomsk in Siberia. The meeting was widely publicized and reported on television. Putin asked the director of Transneft if an alternative pipeline route to the contested one were possible. Before he could reply, Putin continued, “from the moment that you hesitate, it means that this possibility exists.” Therefore, marking in red pen the contested route on the map, Putin added that the new route must be moved to at least a 40 kilometers distant from Lake Baikal: “if there is even a small chance of polluting Baikal, then we, thinking of future generations, must do everything possible not only to reduce this risk, but to eliminate it.”<sup>35</sup>

At its 30<sup>th</sup> session, in July of 2006, the World Heritage Committee noted “with satisfaction the confirmed re-routing of the Trans-Siberian oil pipeline at a distance of 250 to 450 km from the lake and outside of the boundaries of the World Heritage property, as recommended by the joint World Heritage Centre/ IUCN monitoring mission of October 2005 and commend[ed] the State Party for this courageous decision.”

The outstanding universal value of Lake Baikal has been protected. The re-routing of the pipeline has cost 1 billion dollars in additional construction.<sup>36</sup>

### *Dresden Elbe Valley*

The Waldschlösschen Bridge project, based upon the traffic assessments undertaken by the Municipality of Dresden indicating the need for an additional river crossing, has been approved, in 2005, by a local referendum. However, once the documents of the planning brief were released, ICOMOS noted that the crossing was “no longer an urban bridge, but instead an important road connection resembling a motorway”. After a meeting with the Mayor of Dresden and German national authorities, the Director of the World Heritage Centre appealed for a delay

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<sup>35</sup> The meeting in Tomsk was reported in an article appearing in the *International Herald Tribune* on April 27, 2006 (*Putin orders pipeline near Lake Baikal to be rerouted*, by S. Lee Myers available at <http://www.ihf.com/articles/2006/04/26/news/baikal.php>).

<sup>36</sup> See *Putin's intention to save Lake Baikal costs Russian oil giant Transneft 1 billion dollars* (on Pravda.ru, April 27, 2006, available at <http://english.pravda.ru/russia/kremlin/79617-baikal-0>).



to any construction and encouraged the city to carry out a visual impact study. This study concluded that the planned Waldschlösschen Bridge: a) “does not fit in with existing series of Dresden City bridges”; b) “obscures a number of views of the Dresden skyline and the Elbe Valley which are of historical importance as well as continuing relevance to daily life in the city”; and c) “cuts into the cohesive landscape of the Elbe river bend at its most sensitive point, splitting it irreversibly into two halves”.

At its 30<sup>th</sup> session (Vilnius, July 9–16, 2006) the World Heritage Committee, considering “that the construction of the Waldschlösschen Bridge would irreversibly damage the values and integrity of the property”, requested “the State Party and the city authorities to urgently halt this construction project” and decided “to inscribe the property on the List of World Heritage in Danger, with a view to considering delisting the property from the World Heritage List at its 31<sup>st</sup> session in 2007, if the plans are carried out”<sup>37</sup>.

The city of Dresden immediately halted the construction of the bridge after the receipt of the Committee’s decision. However, the State (Land) of Saxony requested that the construction be continued in accordance with the public vote. The city of Dresden appealed in vain to the Saxon Higher Administrative Court and to both the Saxon Constitutional Court and the Federal Constitutional Court. Notwithstanding the court decisions, the city of Dresden continued its search for a compromise, organizing meeting and workshops in order to evaluate alternative solutions, such as a lighter bridge and a tunnel.

At its 31<sup>st</sup> session, the World Heritage Committee (Christchurch, New-Zealand, 23 June - 2 July 2007), decided to show both flexibility and strength. It requested “the State Party to continue its efforts to find an appropriate solution to protect the outstanding universal value and integrity of the World Heritage property”. However, it also decided “to delete the property from the World Heritage List, in the event that the construction of the bridge has an irreversible

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<sup>37</sup> See *Decision 30COM7B.77*

impact on the outstanding universal value of the property”. Meanwhile, Dresden Elbe Valley was kept on the List of World Heritage in Danger.<sup>38</sup>

At the request of the State Party and the city authorities a “Reinforced Monitoring Mission” to the Dresden Elbe Valley was carried out February 4-5, 2008 by ICOMOS and the World Heritage Centre. The mission noted that construction works on the Waldschlösschen Bridge had already started, following the basic design of the original project. It stated that, when completed, such a solution would have a considerably negative, irreversible impact on the outstanding universal value of the World Heritage property. The mission finally suggested an alternative solution based on a tunnel, as discussed with the Dresden authorities.

At the 32<sup>nd</sup> session of the Committee (Quebec City, July 2-10, 2008), two options were discussed: to delete the property from the World Heritage List or to give a last chance to the alternative of a tunnel. The second option prevailed, strongly supported by the representative of a local NGO acting on behalf of the Tunnel Initiative.<sup>39</sup> Despite the Committee’s decision, however, the work on the bridge continued. At the request of the Mayor of Dresden, a meeting between the State Party, the Mayor, the city authorities, ICOMOS and the World Heritage Centre took place on October 14, 2008, to allow for a dialogue about potential solutions. However, the

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<sup>38</sup> During the discussion, the observer delegation of Germany asked for more time “to find a solution to protect the property and at the same time meet the transport needs of the residents”. It also declared that “the many people who [are] looking for compromise need to see both a strong message and a sign of flexibility from the Committee”. In the following discussion, the key position was that expressed by the delegation of Lithuania. It noted that opinions in Germany were clearly divided and that the dialogue underway opened up the possibility for compromise. It then recommended that the Committee should encourage this while sending a strong message. It also requested more information about the tunnel alternative from the concerned NGO, present in the room. A representative of the Tunnel Initiative took the floor, stating that opinion polls showed 60% support for a tunnel should this protect the outstanding universal value of the property. According to him, a strong message from the Committee, asserting that the tunnel was a viable solution, could assure the necessary two-thirds majority required for another referendum. See *Draft Summary Record of the 31<sup>st</sup> session of the World Heritage Committee* (Christchurch,, 2007) – WHC.07/31.COM/INF.24

<sup>39</sup> See *Decision 32COM 7A.26*. The final decision of the Committee regretted “the fact that the authorities, having allowed the construction works to proceed, have seriously compromised the outstanding universal value of the property”. The State Party was also strongly requested by the Committee ‘to immediately halt the current construction works’, “restore the property to its former state of conservation” and “reconsider the alternative tunnel option”. However, the Committee decided “to retain the Dresden Elbe Valley on the List of World Heritage in Danger, with the deletion of this property from the World Heritage List at its 33<sup>rd</sup> session in 2009, if the planned works on the bridge continue and the damage already caused is not reversed”

meeting did not produce any concrete results. By mid-November 2008, the foundations for the Elbe Bridge were completed. The World Heritage Centre and the Advisory Bodies thus concluded that the requests by the World Heritage Committee at its 30<sup>th</sup>, 31<sup>st</sup> and 32<sup>nd</sup> sessions to halt the project and the bridge construction had not been addressed and that the significant infrastructure works so far undertaken had impacted irreversibly the integrity and outstanding universal value of the property. At its 33<sup>rd</sup> session (Sevilla, Spain, June, 22-30, 2009), the Committee noted “with deep regret that the State Party was unable to fulfil its obligations defined in the *Convention*, in particular the obligation to protect and conserve the Outstanding Universal Value, as inscribed, of the World Heritage property of the Dresden Elbe Valley”. Thus, it decided “to delete the Dresden Elbe Valley (Germany) from the World Heritage List”<sup>40</sup>.

The transport and urban development needs of Dresden residents were met. The outstanding universal value of Dresden landscape was lost.

#### *The Aeolian Islands case*

The addition of the Aeolian Islands to the World Heritage List in 2000,<sup>41</sup> was based on the existence of a Territorial and Landscape Plan banning mining activities in the area, in order to protect its outstanding volcanic landscape. In spite of that plan, the legality of which had been also confirmed by both the Administrative Tribunal and the Constitutional Court,<sup>42</sup> the World Heritage Committee was informed by various Italian NGOs, which are also members of the Italian National Committee of IUCN and thus themselves part of the WHC regime, that 25% of the area of Lipari Island had been quarried for the extraction of pumice stone. At its 26<sup>th</sup> session (Budapest, June, 24-29 2002), therefore, the Committee urged Italy “to prohibit expansion of

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<sup>40</sup> See *Decision: 33 COM 7A.26*.

<sup>41</sup> See *Decision 24.COM-XA.1*

<sup>42</sup> The Mayors of two out of the four townships in the Islands, namely Lipari and Leni, as well as some private parties, contested the Plan before the Administrative Tribunal, maintaining that its prescriptions could harm the general economy of the Islands. In January of 2002, the Administrative Tribunal suspended its proceedings and asked the Italian Constitutional Court to rule upon whether the Plan was adopted according to a law which provided adequate participation of the city councils. Both the Constitutional Court (n. 478/2002) and the Administrative Tribunal, however, ruled in favour of the legality of the Territorial and Landscape Plan.

pumice extraction, as it may impact on the values for which the site was inscribed on the World Heritage List”.<sup>43</sup>

A number of meetings were then organized by the relevant national and local authorities in order to discuss with Pumex, the company operating the mines, and NGOs, a plan for the closure of the pumice quarries and the provision of alternative job solutions for workers involved in pumice extraction. At the same time, however, a new regional law permitting mining activities in areas that have been traditionally mined, and overriding the Territorial and Landscape Plan (l.r. n. 6 del 2001, art. 89), enabled Pumex to obtain temporary extensions of its licenses.

The World Heritage Committee, at its 27<sup>th</sup> session (Paris, June 29 - July 5, 2003), welcomed “the State Party’s intention to close the pumice quarries”, but expressed “concern about the status of requests for opening of a new pumice stone quarry and the extension of four existing quarries within the World Heritage Property”.

In the summer of 2003, a Pumex proposal to transfer mining activities to the interior of the crater, making it less visible from the outside, was opposed by local NGOs and then rejected by both IUCN and the World Heritage Committee, which again urged “the State Party to seek long-term solutions towards a closure of the existing quarries, to stop all mining activities in the World Heritage property”.<sup>44</sup>

Nevertheless, from 2004 to 2006 mining activities continued on Lipari Island. Further extensions of the authorizations to mine were granted (running, first, to December 2005 and, later, to March 2006) by the Mayor of Lipari, responding to concerns about the unemployment of pumice workers. On the basis of the IUCN’s advice,<sup>45</sup> the World Heritage Committee, at its 30<sup>th</sup> session, noted with great concern “that the mining activities continue to have major adverse impacts on the integrity of the property”, regretting “that little progress [had been] made in

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<sup>43</sup> See *Decision 26COM-21 (b)13*

<sup>44</sup> See *Decision 28.COM 15B.26*

<sup>45</sup> In its state of conservation report for the 30<sup>th</sup> session of the Committee (Vilnius, 9-16 July 2006), IUCN, on the basis of regular reports received from local NGOs and individuals, accompanied by photographic and audiovisual material, stated that “the northeast side of the island is totally devastated by the continuing operation of the pumice pits” and that “the ongoing mining activities continue to have major adverse impacts on the integrity of the World Heritage property”.

relation to the requested stop of all mining activities” and requesting “the State Party to invite a joint World Heritage Centre/IUCN mission to assess the state of conservation of the property, in particular the impacts of the mining activities”.<sup>46</sup>

The Italian Minister for the environment reacted, repeatedly requesting local authorities to halt mining operations and, finally, obtaining an order to stop the abusive extraction of pumice on Lipari Island.<sup>47</sup> The joint UNESCO/IUCN mission, however, took place few days later, from March 21 to March 28, 2007, meeting with all relevant stakeholders (representatives of Italian national, regional and local authorities, as well as environmental NGOs); it was noted that “trucks and loaders were in use, apparently working on stockpiled material”. The mission recommended that “a physical barrier be placed to stop any further illegal pumice extraction and that a firm enforceable deadline be set for termination of the removal of existing stockpiles”. The mission report also mentioned the problem of the loss of employment of approximately 40 pumice workers, recommending “that a comprehensive, well-conceived programme for re-employment and re-training be immediately implemented by the municipality of Lipari”.

At its 31<sup>st</sup> session (Christchurch, June 23 – July 2, 2007), the World Heritage Committee, noting “with serious concern” the “continued mining activity at the Pumex site within the World Heritage property”, fully endorsed the recommendations of the March 2007 mission. In particular, with respect to pumice extraction, it urged the State Party to immediately “stop all mining extractive activity in areas within and adjacent to the World Heritage property and set a deadline for removal of stockpiled pumice material”<sup>48</sup>. On January 31, 2008 the World Heritage

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<sup>46</sup> See *Decision 30.COM 7B.23*.

<sup>47</sup> The Minister first wrote on 31 October 2006 to the Mayor of Lipari requesting that illegal mining operations be stopped. On 30 November 2006, however, the Environmental Police reported that Pumex mining extraction activities were continuing. Thus, on 11 December 2006, the Minister for the Environment again requested the President of the Region of Sicily to immediately halt the extracting activities. On 31 December 2006, the regional authority actually issued an order, permitting only the “use” of already mined material by Pumex on Lipari Island. On 1 March 2007 the Environment Police reported that extraction was still going on, masked by the authorized removal and use of stockpiled material. On 6 March 2007 the regional authorities ordered the municipality of Lipari to stop all abusive mining activities. Finally, on 8 March 2007, the municipality of Lipari complied, ordering Pumex to immediately stop abusive extraction of pumice on Lipari Island.

<sup>48</sup> See *Decision 31.COM 7B.24*

Centre finally received a report from the Italian government stating that all mining activities had been halted.

At its 32<sup>nd</sup> session (Quebec City, July 2–10, 2010), the World Heritage Committee welcomed the fact “that all new mining that could affect the property ha[d] been stopped, and request[ed] the State Party, in collaboration with the World Heritage Centre and IUCN, to ensure that these mining plans will not be reopened in the future”.<sup>49</sup>

The outstanding universal value of the Aeolian Islands’ volcanic landforms was protected. The jobs of the pumice workers were not.

### **3. Concluding Remarks: the World Heritage Convention and the Procedural Model of Institutional and Legal Globalization**

#### *3.1. The Procedural Dimension of the World Heritage Convention Regime: Opening Domestic Decision-Making Processes to Foreign Interests*

The powers exercised by the World Heritage Committee in the cases described above are commonly seen as reputational compliance mechanisms. When the Committee includes or threatens to include a property on the “red list”, or when it threatens the definitive “delisting” of a property already included on the list, it publically certifies that a member State does not fully respect its international obligations to protect the heritage of humanity located in its territory. Through this technique of “naming and shaming,”<sup>50</sup> or of “global governance by information,”<sup>51</sup>

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<sup>49</sup> See *Decision 32COM 7B.18*

<sup>50</sup> See D. Zacharias, “The Unesco Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution”, 9 *German Law Journal* (2008) p. 1856 (stating that “If a property is included in the World Heritage List, the Committee can, as a measure of compliance, either inscribe it on the List of World Heritage in Danger or threaten to delete it completely from the World Heritage List. These measures have the potential to stimulate the motivation of the State Party to take the necessary steps to avert the threat to the property or to encounter its negative results not least because they are means of naming and shaming. They announce publicly that the present steps taken by the State Party in order to protect the property forming part of the world heritage are insufficient. Thus, they can be interpreted as measures of “reputation enforcement”). See also M. Macchia, “La tutela del patrimonio culturale mondiale: strumenti, procedure, controlli”, in L. Casini (ed.), *La globalizzazione dei beni culturali* (il Mulino, Bologna, 2010). More generally, see L. Casini, «“Italian Hours”: The Globalization Of Cultural Property Law», Jean Monnet Working Paper 10/2010.

<sup>51</sup> On the topic, A. von Bogdandy and M. Goldmann, “The Exercise of International Public Authority through National Policy Assessment. The OECD’s PISA Policy as a Paradigm for a New International Standard Instrument”,

the World Heritage Committee seeks to persuade the member States to respect the international treaties, in order to avoid damaging their reputations.

The exercise of such powers in this manner, however, has provoked a number of criticisms.

Many of these criticisms focus on the vagueness of the norms the World Heritage Committee is supposed to police. Compliance mechanisms are generally supposed to be directed at evaluating and guaranteeing member States' conformity with precise legal parameters. However, the kind of evaluations the World Heritage Committee is called upon to make suggest a very different aim: Is the natural and/or cultural value of a specific property or monument "outstanding" and "universal"? Under what conditions is a public works project or economic activity compatible with the protection of such natural or cultural values? What is the right balance between the urban development of a city (for example Dresden) and the conservation of its landscape? What are acceptable levels of risk for potential environmental disasters (for example the possible pollution of Lake Baikal) given the need for economic development and for energy supplies? To what extent can the protection of jobs (such as those of the pumice stone workers of Lipari) justify compromising the value of a landscape? In each of these cases, the World Heritage Committee reviews domestic discretionary choices that aim to balance competing interests. In national systems, such choices are made by political and administrative authorities. These are subject to judicial review, although the courts usually extend considerable deference to political and administrative authorities. The World Heritage Committee however is not so deferential. Unlike domestic courts, the Committee does interfere with the exercise of such powers. Nor is it composed of independent experts, who objectively ascertain whether international law has been respected; it is made up, instead, of the political representatives of national governments, mandated to pursue a specific concern of the international community, namely the conservation of natural and cultural heritage.

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IILJ Working Paper 2009/2 (Global Administrative Law Series), Finalized 03/24/2009 ([www.iilj.org](http://www.iilj.org)). See also D. Zacharias, "Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System", 10 *Max Planck UNYB* (2006), p. 281 and p. 283.

The image of an international political body that interferes with the discretionary choices of national political and administrative authorities forms the basis of many of the criticisms that have rained down upon the World Heritage Convention regime.

It is argued that this state of affairs produces the kind of accountability deficit that typically affects global regulation. The global regulatory system allegedly removes decisions regarding the government and the management of a specific territory from the authority that represents the citizens of the territory. Such decisions, instead, are given over to a remote political and bureaucratic international body. This body is not accountable to those directly affected by the administrative choice. Moreover, unlike domestic authorities, the international body protects only one specific interest, without taking into account or trying to balance any of the other concerns. It seems fair to ask, therefore, whether it is democratic that the bankruptcy of a specific Italian company and the firing of its employees, or the extremely high cost of a change in the path of a Russian oil pipeline, should depend on the delegates of 21 foreign governments (including that of a tiny Caribbean island)? For these reasons, in the United States, for example, the World Heritage Convention has led to highly-charged debates, especially in the wake of the Yellowstone Affair:<sup>52</sup> “What do the Statue of Liberty, Independence Hall, Jefferson’s Monticello and Yellowstone National Park all have in common? Each of these national treasures is now

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<sup>52</sup> The case arose in 1995 when some environmental organizations made use of the World Heritage Committee to challenge a proposed mining facility three miles from Yellowstone National Park. With the agreement of the United States Government, the Committee sent an international mission of experts. The mission revealed that the building of the facility would endanger the “outstanding universal value” of the Park. Based on the mission’s report, the Commission decided to include the Park on the List of World Heritage in Danger. A year later, the Clinton Administration negotiated a different location for the facility. Since then, the Yellowstone case has become a symbol of the foreign interference threatening the national sovereignty of the United States. This point of view has so influenced American public opinion as to lead members of Congress to write up a specific bill (“The American Land Sovereignty Protection Act - HR 3752”), which requires Congressional approval for every decision to include any portion of US territory on World Heritage List or on the List of World Heritage in Danger. On this case, and more generally on this theme, see J. Rabkin, *The Yellowstone Affair: Environmental Protection, International Treaties and National Sovereignty*, May 1997, Competitive Enterprise Institute (CEI) – Environmental Studies Program. See also B. Cimino, *Global Bodies Reviewing National Decisions: The Yellowstone Case*, in S. Cassese, B. Carotti, L. Casini, M. Macchia, E. MacDonald, M. Savino (eds.), *Global Administrative Law: Cases, Materials, Issues*, 2<sup>nd</sup> edition, 2008, available at <http://www.iilj.org/GAL/GALCasebook.asp>.



regulated according to the dictates of foreign bureaucrats rather than according to the will of the American people”.<sup>53</sup>

At the same time, however, the World Heritage Convention’s reputational compliance mechanisms are also criticized for their ineffectiveness. In arguing that the United States should not participate in the World Heritage Convention regime, Jeremy Rabkin compares the inclusion of a property on the World Heritage List to a high rating in the Michelin guide.<sup>54</sup> Can such kind of decisions seriously threaten state sovereignty? The Dresden case would suggest that the answer is no. The opinion expressed by the citizens of Dresden through a referendum and the decision of the regional government of Saxony prevailed in the end. The German Federal Government, although empowered to override a local decision thought by the World Heritage Committee to be incompatible with the “world heritage status” of Dresden<sup>55</sup>, nonetheless, respected the local decision, accepting the cost to its international reputation.<sup>56</sup> It has been observed, therefore, that “the compliance mechanisms at hand are problematic insofar as they

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<sup>53</sup> E. McGeehan, *U.S. Sovereignty Violated by Allowing U.N. to Control U.S. Historic Sites*, Knight Ridder/Tribune, June 30, 1999, quoted by Affolder, *supra* note 28, p. 35. See also Amy Ridenour, “Keep the Statute of Liberty Free: An Argument for Congressional Oversight of U.N. Land Designations in the U.S.”, (2002) National Policy Analysis 419, available at [www.nationalcenter.org/NPA419.html](http://www.nationalcenter.org/NPA419.html) (stating that “despite years of historical evidence that wealthy democratic nations accountable to voters and private owners do more to protect precious natural and cultural resources than do any hidebound, non-representative and frequently cash-crunched bureaucracies, the World Heritage Treaty and Biosphere Reserves programs place the U.N. square in the middle of the preservation process”).

<sup>54</sup> Rabkin, *supra* note 52, p. 12 (stating that the argument of increased tourist visits due to the world heritage status of a site “seems to be that World Heritage designation can serve as a lure for less well-known sites, much as a five star rating does for an out-of-the-way hotel or restaurant. But who gives out such ratings for hotels and restaurants? Anyone planning a vacation has access to a wide range of travel guides. Michelin has one set of ratings, AAA another and so on. Would these ratings have more credibility if standardized by governments? It does not seem likely”).

<sup>55</sup> Zacharias, *supra* note 52, p. 365 (stating that “there legislative as well as administrative links between the various levels in the federal structure that could ensure that local authorities do not act in a way that contravenes the Federal Republic’s duties under arts 4 and 5 of the World Heritage Convention”).

<sup>56</sup> Zacharias, *supra* note 51, p. 1863 (stating that “The national authorities [...] may consider the delisting simply as one kind of cost among others of, for instance, a measure of planning. As the German Federal Constitutional Court held in its preliminary decision of 29 May 2007 concerning the Dresden Elbe Valley where it stated that the City of Dresden, if necessary, would accept the loss of the title of world heritage when the wish of the people to construct a bridge over the Valley, as articulated in a local referendum, was to be respected; here a decision which was found on the local level by a means of direct democracy was regarded as having more weight than a decision of the autonomous, expertocratic international institution”).

cannot efficiently guarantee that the States Parties act in accordance with the Convention”<sup>57</sup>. Still, the Baikal and Aeolian Islands cases, as well as other cases in which the member States gave in to the demands of the World Heritage Committee, may not be so clear-cut. Is it plausible, for example, that Putin’s decision to modify the path of the oil pipeline, at the cost of a billion of dollars, was strictly motivated by a concern for Russia’s reputation in the event of a delisting decision by the World Heritage Committee? It would be reasonable to assume that other factors, independent of the decisions of the World Heritage Committee, were decisive in leading Russian authorities to privilege their interest in the conservation of their own natural and cultural heritage.

Ultimately, the World Heritage Convention regime is criticized both because it is not effective enough and because, when effective, it gives rise to decisions that lack accountability. It is complained of both because it does not guarantee sufficient “compliance” by the member States, and because, when ensuring such compliance, excessively compromises the autonomy of accountable domestic authorities.

This contradiction stems in part from the characteristics of this international regime, which “is marked by an unresolved tension between state sovereignty and the recognition that certain structures and properties and areas constitute the heritage not just of individual nations, but of humankind”.<sup>58</sup> However, this contradiction is also exacerbated by the way in which the World

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<sup>57</sup> Zacharias, *supra* note 51, p. 1863. On the contrary, however, other authors remark the “particular strength” of the World Heritage Convention. In this perspective, see particularly E.J. Goodwin, “The World Heritage Convention, the Environment, and Compliance”, 20 *Colo. J. Int’l Envtl. L. & Pol’y* (2009) 157 (stating that the strength of the WHC relates to its “ability to pull states towards meaningful compliance with obligations connected to protecting, conserving, presenting, and transferring to future generations the world’s natural and cultural heritage”. Such an ability is supposed to be due to “institutional arrangements devolving ultimate power over implementation from the contracting parties acting collectively to a smaller executive authority - the World Heritage Committee”. This Committee - according to Goodwin- “ultimately has the capacity to withhold substantial benefits to contracting parties in the event of non-cooperation or breach of obligations, and to take other measures that impact the contracting parties’ self-interest. Thus, even though the dominant and preferred strategy adopted by the committee is rightly one of non-confrontation, cooperation, and support, this sanctioning option remains significant. Ultimately, while it is not denied that compliance can be influenced by extra-convention factors, it is asserted that the system created under the treaty introduces significant factors into a state’s logic of consequences, exerting a pull towards action in compliance with obligations”.

<sup>58</sup> N. Affolder, “Democratising or Demonizing the World Heritage Convention?”, 38 *Victoria U. Wellington L. Rev.* (2007) 341, here at 342.

Heritage Convention's functioning is conceptualized. It is commonly argued that substantive obligations to respect the World Heritage Committee's decisions derive from the Convention itself. The Committee allegedly exercises its power of listing and delisting so as to insure "compliance" with these substantive obligations. In this framework, and with cases like those described above, there are only two possibilities: if the State does not conform to the demands of the World Heritage Committee, there is no compliance and a failure of the international regime; if instead there is compliance, then the regime works, but risks producing undemocratic outcomes, since it preempts the choices of the local, democratically accountable authorities. The previously described deficits of global regulation thus arise. This might result, as it has been remarked, both ineffective and unaccountable.

However, this conceptualization, based on an understanding of the Convention as an instrument of vertical and substantial legal integration, does not seem entirely satisfying. It neglects the procedural dimension of the World Heritage Convention, which are apparent in the foregoing analysis of its concrete functioning. The analysis above suggest a different way of conceiving of the convention, one that would emphasize the procedural nature of its obligations and would be more faithful to reality, thus mitigating the overly strict dichotomy between merely transferring to the World Heritage Committee a "substantive" right to regulate, on the one hand, and entirely leaving it to the member States, on the other. Further, this different view permits us to better grasp the actual functioning of this international regime, which can be said to be effective even in the cases where it appears to fail. Despite the fact that World Heritage Committee's "naming and shaming" powers are supposedly aimed at ensuring State compliance with substantive obligations, specified on a case-by-case basis, those powers seem to have a pretty different function in practice.

In the cases examined in the previous section, the substantial outcome have varied. In the Baikal and Aeolian Islands cases, Russian and Italian authorities, disregarding economic and social considerations, favored the protection of natural heritage, according to the WHC's directives. On the contrary, in the Dresden case, German authorities privileged the transport needs of Dresden residents, at the expenses of cultural heritage protection and disregarding the

WHC's suggestions. Therefore, from a substantial point of view, the domestic authorities have complied with their international obligations in the first two cases and have violated the Convention in the third one.

From a procedural point of view, however, such a difference is less important. In all these cases, the final decision has been reached after a very long and complex decision-making process, in which the WHC, its Secretariat, and its Advisory Bodies were fully involved. In each of these cases, as in a number of similar cases arising under the World Heritage Convention, missions of international experts have been sent on sites, in order to evaluate the situation and meet all relevant stakeholders, particularly domestic authorities as well as private affected parties. In all these cases, several formal and informal seminars or workshops have been organized, in order to find a compromise and to accommodate conflicting interests. The crucial point, here, is that the impact of the World Heritage Convention on domestic processes is more important than the substantial outcome it eventually produces, and it is this impact on the domestic setting in each country that best reveals the very role played by the World Heritage Committee in the implementation of the Convention it is called upon to administer.

Through its powers of "governance by information", the World Heritage Committee does not aim to replace domestic authorities in the making of discretionary choices relating to the regulation of conduct taking place in their respective territories. It aims, rather, to represent the interests of the global community, by intervening in the decision-making processes that lead to local discretionary choices having an impact on "common spiritual assets".<sup>59</sup> As decisions made by local and state authorities involving such "common assets" affect interests that belong (also) to citizens of other political communities, the protection of those interests is guaranteed by an international regime. This international regime thus grants foreign governments and international organizations rights to intervene in the domestic decision-making process; these rights are

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<sup>59</sup> Weiler, *supra* note 5, p. 556 (stating that "the common assets could be material such as the deep bed of the high sea, or territorial such as certain areas of space. They can be functional such as certain aspects of collective security and they can even be spiritual: Internationally defined Human Rights or ecological norms represent common spiritual assets where States can no more assert their exclusive sovereignty, even within their territory, then they could over areas of space which extend above their air-space").

analogous to those that domestic administrative law only recognizes for local or national agencies, or for private actors whose interests might be affected by administrative choices.<sup>60</sup>

A predominantly procedural view of the obligations imposed on the member States of the World Heritage Convention mitigates the conflict between state sovereignty and international power. It is true that the international authority interferes with a choice that domestic law allocates to political and administrative authorities. But the international authority does not replace domestic authorities in the decision-making. The power to make discretionary choices affecting the government of a territory stays in the hands of domestic authorities. However, in balancing the various interests involved in this choice, the local authority is bound to consider interests stemming from outside the national territory and represented by an international authority. In other words, if one looks at the way in which the regime really operates, the World Heritage Committee has not acquired the power to decide in place of the national authority. Instead, it has progressively gained the power to influence local decisions, introducing a global interest into the purview of domestic procedures.

More generally, the functioning of the World Heritage Convention could be said to exemplify a procedural model of legal and institutional integration. It addresses globalization, avoiding the main drawbacks of both independent domestic regulation (namely economic and social globalization without any institutional and legal integration) and global regulation (namely vertical and substantive integration through the transfer of the right to regulate to a higher level).

On the one hand, unlike the traditional model, based on the domestic authorities' independent exercise of the right to regulate within their respective territories, the procedural model of integration allows domestic regulation to overcome its geographical constraints: domestic authorities can reach conduct occurring beyond their borders by influencing, through international regimes, foreign decision-making processes addressing that conduct. At the same

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<sup>60</sup> See Zacharias, *supra* note 51, p. 1862 (stating that “the often intensive consultations with public authorities “at the grass roots level” like regional governments and municipalities which are regarded as “partners in the protection and conservation of world heritage” in the processes of consultation and evaluation are suited to give the World Heritage Committee and the Advisory Bodies a factual, though not legal, standing in administrative procedures on the national, regional or local level. The Committee and Advisory Bodies are known by the domestic authorities and there seems to be, thus, no psychological obstacle to involve them as experts bringing in the global perspective”).

time, however, the procedural integration tackles the accountability deficit of domestic regulation, as international regimes add a circuit of “external accountability” forcing domestic authorities to consider the interests of the wider global constituency affected by their decisions.

On the other hand, unlike vertical substantive integration, procedural integration does not interrupt the circuit of “internal accountability” linking the deciding authorities to the people most affected by their decisions. The authority that decides continues to be primarily accountable to its own “domestic constituency”, while the remote and mono-functional global bodies limit themselves to introducing into the decision-making process specific interests of a wider though often less affected community. Moreover, a procedural reading of international regimes such as the World Heritage Convention also mitigates the ineffectiveness deficits of global regulation. If the purpose of international regimes is understood as consisting in the progressive opening of domestic decision-making processes to foreign interests, then that purpose is achieved, at least in part, even in the cases in which the domestic authorities do not fully comply with the international body’s demands. Even in the Dresden case, which is considered the most striking failure in the history of the World Heritage Committee, the final decision to build the bridge was made after years of attempts at mediation, seminars and workshops, in which the World Heritage Committee and the Advisory Bodies intervened proposing alternative solutions. The intervention of the international body, ultimately, alters the balance of interests at the national and local level. As the influence of this intervention on the final decision is variable and difficult to measure, the rigid “compliance/non-compliance” alternative model offers a misleading test of the effectiveness of an international regime.

### *3.2. Conceptualizing Procedural Integration: the Role of Global Administrative Law*

In order to conceptualize the procedural model of the integration of domestic legal orders, global administrative law (GAL) could offer a more useful set of theoretical instruments than international law.

Two arguments support such a claim: the first involves the “global” nature of the integrating law, while the second relates to its “administrative” nature. To conclude this paper, both arguments can be briefly examined in turn.

With respect to the first argument, GAL seems to offer a better conceptual model, largely because it is free of the dualistic origin that still affects international law. International law is, by nature, dualistic. It carries with it a dichotomous divide between the internal and external sides of the State; that is, what belongs to the international sphere, cannot belong to the domestic one at the same time. International law, therefore, mostly happens outside states: between and above them.

Procedural integration of domestic legal orders, however, happens simultaneously inside as well as outside states. It gives rise to regulatory relationships that cannot be easily assigned to one or another part of the dichotomy, as they are neither domestic nor international. Better to say they are both domestic and international: domestic as to the deciding authorities, but international as to the actors and interests involved in the decision-making processes. The cases examined in the previous sections may be taken to exemplify regulatory choices made by domestic authorities as a result of procedures taking place both within and outside national borders. They represent the typical outcomes of the interplay of domestic and international rules, which apply to the same issues at the same time. On the one hand, for instance, the balance between the various interests of a single local or national community begins inside that community and continues outside its borders, taking place in an international forum: the conflicts between Greenpeace Russia and the Russian Government, between Italian NGOs and the mayor of Lipari, between the mayor of Dresden and the government of Saxony, are reproduced before the World Heritage Committee, the national community speaks through other voices in addition to its government. On the other hand, the evaluations expressed by the international body influence the balancing of interests inside domestic communities. The position of national and local groups, which work for the conservation of the natural and cultural heritage, are reinforced in the domestic decision-making process, thanks to the intervention of the World Heritage Committee. That intervention is often solicited by these same groups; moreover, often they are

integrated into its organizational structure. If nothing else, the international condemnation of a local decision can affect national public opinion, which does matter to local and national political authorities. The interest of the international community, represented by the World Heritage Committee, reinforces some domestic interests, while opposing and weakening others..

“Global”, therefore, could be a better concept for illustrating such phenomena than “international”. Vertical and substantive integration could be largely described as an increasing internationalization of law, because of which international law replaces domestic law. Procedural integration, however, is somehow different, as it implies a transformation rather than a replacement of domestic law. It could be more apt to conceptualize procedural integration between domestic legal orders as a growing globalization of law. Legal globalization, unlike legal internationalization, progresses by opening domestic decision-making processes up to the penetration of foreign interests. Domestic law is thus not replaced by a higher law. It progressively globalizes by increasing its permeability to external elements.<sup>61</sup>

The second argument referred above points to the “administrative” quality of the rules ensuring a procedural integration among domestic legal orders. In this regard, a GAL perspective probably is better equipped to conceptualize such kind of rules, inasmuch as it is not pervaded by the principle of consent, that is built into the DNA of international law.

International law is supposed to regulate relationships between independent status-equals, bound to respect only those rules to which they have consented. To this end, not surprisingly, international law has drawn its own grammar from domestic private law, rather than from domestic public or administrative law. International treaties have been conceptualized as voluntary private contracts between States, rather than as binding rules approved by a legislature or a public regulator. Similarly, international organizations have been conceived of as private

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<sup>61</sup> Auby, *supra* note 1, p. 116 (stating that “Dans le mécanismes qui concourent à la globalisation du droit, il y en a, et d’importance cruciale, que l’on peut regrouper autour de l’idée d’une perméabilité croissante de systèmes juridiques [...]. Ce qui se produit aujourd’hui dans l’espace de la globalisation, c’est que nos systèmes juridiques doivent accepter à un point tel, et d’une manière telle, l’intrusion d’éléments extérieurs, qu’ils s’en trouvent transformés profondément de l’intérieur, au point que leur identité même peut s’en trouver interpellée”).



associations of States, rather than as public institutions. Voluntarist contractualism, excluded from domestic public law, informs international law.

According to such a theoretical framework, there is no room for administrative law at the international level, given the absence of the equivalent of public regulators:

a) on the one hand, there are no public powers above states, as international organizations are not considered to be such, being mere projections of the Member States, based on their consent, and deprived of autonomous powers;

b) on the other hand, States themselves are not public powers, as they are supposed to lose, in foreign relations, their public quality. They present themselves as authorities only within their own territory, but are supposed not to be allowed, outside it, to exercise public power against other states without their consent.

Globalization requires a new conceptualization, opening the way to the emergence of administrative law beyond the State.

As to the first point (sub a), the increasing vertical and substantive integration stimulated by globalization has triggered the re-conceptualization of a broad part of international rules as global administrative regulation. This is the very theoretical premise of the main approach taken by GAL scholars: “we are [...] proposing that much of global governance can be understood and analyzed as administrative action: rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management. [...] Yet many of the international institutions and regimes that engage in “global governance” perform functions that most national public lawyers would regard as having a genuinely administrative character: they operate below the level of highly publicized diplomatic conferences and treaty-making, but in aggregate they regulate and manage vast sectors of economic and social life through specific decisions and rulemaking”.<sup>62</sup>

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<sup>62</sup> Kingsbury et al., *supra* note 1.

This paper, however, highlights a “somehow different but related” dimension of GAL,<sup>63</sup> which refers to the re-conceptualization of the second point (sub b), namely the public quality of States acting in their mutual relations. As globalization increases the extraterritorial impact of domestic regulation, every time the State exercises public power within its own borders, it also affects extra-territorial interests. As a consequence, the State presents itself as an authority in both domestic and foreign relations. It does not lose this public quality when it acts on the international plane, because it exercises public power in relation to other territorial communities as well as in relation to its own. This is the conceptual premise of procedural integration, as well as the premise for the emergence of a dimension of GAL linked to it. According to the procedural integration framework, each national political community has the power to regulate and administer its own territory, provided that it takes into account the interests of other territories’ political communities. As a consequence, the legal relationships between one State and all the others entail both each state’s (or each “public entity’s”, according to Benedict Kingsbury’s model of “inter-public law”)<sup>64</sup> power to regulate and its duty to take global interests into account, that is to say interests of all the different “public entities” affected by its regulation. This legal structure (recognition of the power to regulate, on the one hand, and duty of the regulator to take into account the affected interests, on the other hand) fits neatly into the very structure of administrative law, which, in effect, provides the very grammar of legal integration. It could be said that Administrative Law is called on, here, to address a new imbalance of representation, by extending the logic and the purposes of the “interest representation model”<sup>65</sup>

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<sup>63</sup> See Kingsbury *et al.*, *supra* note 1 (stating that “A somewhat different but related issue arises when regulatory decisions by a domestic authority adversely affect other states, designated categories of individuals, or organizations, and are challenged as contrary to that government’s obligations under an international regime to which it is a party. Here one response has been the development by intergovernmental regimes of administrative law standards and mechanisms to which national administrations must conform in order to assure their compliance and accountability with the international regime”).

<sup>64</sup> See B. Kingsbury, *International Law as Inter-Public Law*, in *NOMOS XLIX: Moral Universalism and Pluralis* (Henry R. Richardson and Melissa S. Williams, ed., New York University Press, 2009); see also B. Kingsbury, “The Concept of ‘Law’ in Global Administrative Law”, 20 *European Journal of International Law* (2009) 23 and B. Kingsbury, *Weighing Global Regulatory Decisions in National Courts*, *Acta Juridica* (2009).

<sup>65</sup> R.B. Stewart, “The Reformation of American Administrative Law”, 88 *Harv. L. Rev.* (1975) 1667. More recently, see also “Administrative law in the Twenty-First Century”, 78 *NYU Law Rev* (2003) 437.

beyond national boundaries. Global regulatory regimes, such as the WHC, enlarge the class of interests entitled to consideration in domestic decision-making processes, including the unrepresented interests of foreign citizens affected by national and local decisions. Administrative law principles and structures have been used, inside States, to make domestic agencies more accountable to each national citizenry. Now similar principles and structures are increasingly used, outside States, for a more demanding purpose: making each State more accountable to the citizenries of all the others. This process also entails a progressive integration of a plurality of different legal orders into a more complex and universal one. Under the pressure of globalization, legal relationships between States are regulated by a law that is increasingly less similar to domestic private law and more similar to domestic administrative law. Administrative law, therefore, is “colonizing”, as it were, the legal space traditionally occupied by international law.<sup>66</sup> It is thus becoming “a genuine law of mankind”.<sup>67</sup>

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<sup>66</sup> A different, although not opposite, way to conceptualize the same phenomenon is to note, as Benedict Kingsbury does, that international law has developed a “quality of publicness”, particularly imposing to its subjects, first of all to States in their external as well as internal action, a “publicness requirement”. See Kingsbury, *supra* note 64, p. 174 (arguing that the quality of publicness “is increasingly part of the concept of international law, and that this quality is having a transformative effect on the sources of international law, reducing the significance of voluntarism, bilaterality and opposability, and increasing the significance of generality, solidarity, and the integration of international law into a conception of world public order”). The quality of publicness – according to Kingsbury – “entails the application of typical administrative law principles such as legality, rationality, proportionality and rule of law”.

<sup>67</sup> See S. Cassese, “*Le droit tout puissant et unique de la société*. Paradossi del diritto amministrativo”, *Rivista trimestrale di diritto pubblico* (2009) 879.