
The procedural side of legal globalization: The case of the World Heritage Convention

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The conceptual premise of global administrative law (GAL) is that, in order to cope with globalization, the right of states to regulate has been increasingly entrusted to global authorities, which adopt rules and decisions best conceptualized as administrative regulation. Therefore, GAL is in response to substantial, vertical 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. With a focus on the impact of global regulatory regimes on domestic regulation, I argue 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 contributes to the development of a horizontal and procedural path to legal globalization.

This point is demonstrated by examining a single global regulatory regime—the World Heritage Convention—scrutinizing three specific cases, each referring to three different domestic administrative decisions to which the convention has been applied. The World Heritage Convention—as well as many other global regulatory 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 legacy of domestic administrative law. Thus, legal globalization progresses along a procedural path and in accordance with administrative law (rather than private law) concepts.

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1. 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 and, in particular, 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.¹ Therefore, as administrative regulation has gone global, so must administrative law, which is the law regulating administrative regulation.² 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 arises in response to substantial, vertical institutional and legal globalization, conceptualized as global administrative regulation, which is, in turn, a way to cope with social and economic globalization.

In this paper, however, I take a slightly different approach to GAL. The paper does not 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 make 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 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 substantial, vertical institutional and legal globalization. Rather, it is an alternative to that model of integration. More specifically, the application of GAL to domestic regulation creates a horizontal, 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

¹ See Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW AND CONTEMPORARY PROBLEMS* 15 (2005); Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 *NYU J. INT'L L. & POL.* 663 (2005); Benedict Kingsbury, Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 *INT'L ORGANIZATIONS L.R.* 319 (2009). See also the essays published in: 68:3–4 *LAW AND CONTEMPORARY PROBLEMS* (2005); 37:4 *NYU J. INT'L L. & POL.* (2005); 17 *EUR. J. INT'L L.* 1 (2006); 6:2 *INT'L ORG. L.R.* (2009). In a different perspective, JEAN BERNARD AUBY, *LA GLOBALISATION, LE DROIT ET L'ÉTAT* (L.G.D.J. 2010).

² “In liberal democratic societies, administrative regulation is itself regulated by administrative law”; Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 *NYU L. R.* 437 (2003).

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—and, in particular, 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, 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, could have a serious impact on the landscape of Dresden. The third decision involves an authorization to mine pumice stone in Lipari, Italy. The job of about forty 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 socioeconomic and urban development concerns, on the one hand, and the protection of natural and cultural heritage issues, on the other. However, these are also 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 nongovernmental organizations. And what makes these decision-making processes global is the World Heritage Convention. Thus, Lake Baikal (1996), the Aeolian Islands (2000), the Dresden Elbe Valley (2004), as well as more than other nine hundred other areas 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, thus, are relevant to the entire global community. For this reason, as domestic decisions having an impact on a world heritage site affect the entire global community, so the interests of the world community must be taken into account when those decisions are taken. The World Heritage Convention (WHC) 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 according to administrative rather than private law concepts.

Section 1 contextualizes the paper's thesis, examining the procedural model of integration between 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 and based on the 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 described above. The account of those cases goes into some detail, 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 actually are 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 with a suggestion for a procedural reading of the WHC's functions, arguing that the convention 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 posed by globalization must be reevaluated in the light of the development of such a model of integration, the functioning of which largely draws on administrative law concepts.

2. Regulating without borders: The double deficit of both domestic and global regulators in a globalizing context

2.1. Globalization and domestic regulation: Ineffective for citizens, lacking accountability for foreigners

International law was once called upon to govern "the relations between [. . .] co-existing independent communities."³ According to the Westphalian system, each

³ Permanent Court of International Justice, Judgment 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 7th, 1927.

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.”⁴ The various states’ independence long ensured effectiveness and accountability within the states. Domestic regulation is effective insofar as it governs all conduct occurring within the territory of the regulating state. Domestic regulators are accountable inasmuch as they represent the people affected by their decisions, meaning all the people residing in the territory of the regulating state and only those people.

International law, today, is called upon to govern the relations among increasingly interdependent communities. Globalization is progressively displacing the old Westphalian system, slowly eroding the “domestic jurisdiction” of states.⁵ 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, a disjuncture between the territory in which the regulating 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 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 may produce effects in many different and sometimes very distant places. Anticompetitive 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.⁶ The effects of posting data on a web site can

⁴ Helen Hart Jones, *Domestic jurisdiction—from the Covenant to the Charter*, 46 ILL. L. REV. 219 (1951–1952). On the concept of domestic jurisdiction and its origins, see also James L. Brierly, *Matters of Domestic Jurisdiction*, 6 BRIT. Y.B. INT’L L. 8 (1925); Lawrence Preuss, *The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT’L L. 721 (1946); Alfred Verdross, *Domestic Jurisdiction under International Law*, 3 U. TOL. L. REV. 119 (1971).

⁵ See, on the topic, Joseph H. H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZAÖRV 547, 559 (2004) (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”).

⁶ See, for example, *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), referring to the conduct of British reinsurers having had a direct negative impact on U.S. policyholders. 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, Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, SUP. CT. REV. 289 (1993).

be felt wherever people can access the internet.⁷ Economic activities occurring in one country can have an impact on the environment of other countries, due to the spread of pollution, which does not respect borders.⁸ What happens in one place, potentially, can produce 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.”⁹ 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, insofar as they can only regulate conduct taking place in their respective territories, while being unable to influence conduct outside their jurisdiction but with consequences within their own territories. Their rules and decisions do not have any binding effect outside of their borders, where occur many, if not most, of the activities that affect the lives of the citizens the domestic regulators represent.

⁷ 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, admittedly, is exceptional) domestic regulation proves ineffective.

⁸ 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, Michael J. Robinson-Dorn, *The Trail Smelter, Is What’s Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL L.J. 233 (2006).

⁹ 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.”

As foreign conduct has an increased internal impact, domestic regulators are increasingly ineffective in protecting their citizens. However, neither are they accountable to foreigners, even as their rules and decisions have an increased impact on them, in turn. Here, we see the second disjuncture “between regulatory jurisdiction and regulatory impact.”¹⁰ As human activities taking place in one country increasingly produce effects in other countries, so does the domestic regulation of those activities. Both domestic over-regulation and domestic under-regulation of transnational phenomena affect foreign interests. Strict domestic regulation of economic activities can have an impact on foreign firms that have to comply 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 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 extraterritorial impact, the more domestic regulators become unaccountable, since their legitimacy is territorially limited. As has been argued, an “external accountability gap” arises.¹¹ Therefore, in conditions of interdependence, domestic independent regulators produce, in effect, a kind of “regulation without representation.” They adopt rules and administrative decisions that have a direct or indirect outward 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.¹²

2.2. Globalization and global regulation: Ineffective against states, lacking accountability for individuals

As globalization progresses, domestic regulators become both ineffective and unaccountable. There could be an apparently easy answer to such a twofold 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

¹⁰ See Joanne Scott, *Cooperative Regulation in the WTO: The SPS Committee*, Global Law Working Paper 03/06, Hauser Global Law School Program—NYU School of Law, pp. 7–8.

¹¹ Robert O. Keohane, *Global Governance and Democratic Accountability*, in, *TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE* (David Held & Mathias Koenig-Archibugi eds., 2003); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 A.P.S.R. 29 (2005). I also refer to Stefano Battini, *The Globalization of Public Law*, 18 EUR. R. PUB. L., 27 (2006).

¹² See, on the topic, Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization and International Law*, 15 EUR. J. INT'L L. 900 (2004).

followed. Vertical and substantial integration, namely, the transfer of the right to regulate 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.”¹³ By going global, national policy makers collectively overcome the territorial limits that restrain them.¹⁴ By bringing within their purview the full geographical range of phenomena with which they must cope, regulators are supposed to be effective and accountable, once again, at least so 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 effectiveness and 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,”¹⁵ is still rooted in the principle of state sovereignty. Such a principle has impressed two features upon the international institutional system that, up to now, have curbed global regulation: institutional fragmentation, on the one hand, and, on the other hand, a dualistic view of the relationship between international and national legal orders, according to which international rules are binding for states, but not within states, unless they expressly consent by transposing those rules into their respective national legal orders.¹⁶

First of all, a community made of sovereign communities could not tolerate any kind of superstate, that is to say, a general legal order with an institutional framework representing all sorts of interests and all sorts of human societies and performing, potentially, all types of functions. In order to avoid such a threat, nation-states have built a functionally fragmented international institutional system, composed of a number of single-function 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.”¹⁷

Second, 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

¹³ Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 4 (2002).

¹⁴ See Robert O. Keohane, Stephen Macedo, & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, ILLJ Working Paper 2007/4, Global Administrative Law Series.

¹⁵ Following the metaphor used by Joseph H.H. Weiler, *supra* note 5.

¹⁶ On the topic, let me refer to AMMINISTRAZIONI SENZA STATO (Giuffrè 2003) and to *Il sistema istituzionale internazionale dalla frammentazione alla commissione*, RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 969 (2002).

¹⁷ Martti Koskenniemi, *International Law: Between Fragmentation and Constitutionalism*, available at http://cigj.anu.edu.au/cigj/link_documents/KoskenniemiPaper.pdf

without the mediation of the state. Moreover, 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 then reach the troops.¹⁸ 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 reach private actors directly, has increased enormously in recent times.¹⁹ 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,²⁰ as states and even private subjects often have no choice but to follow it. The harder this impact becomes, however, the more sensitive appear the accountability drawbacks of global regulation.

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, 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, 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.²¹ Moreover, global regulation might suffer from a sort of imbalance in representation. It is true that conduct occurring in a given place produces effects everywhere; however, it is also true that its impact is often harder in the place in which the conduct occurs 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 conduct gives the representatives of every country 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, namely regulation of the regulators by means of administrative law, 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

¹⁸ HEINRICH TRIEPEL, *VOLKERRECHT UND LANDESRECHT* (C. L. Hirschfeld, 1899).

¹⁹ 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>.

²⁰ Anne M. Slaughter, *The Real New World Order*, 76 *FOREIGN AFF.* 183 (1997). See also on this topic David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 *CHICAGO J. INT'L L.* 547 (2005).

²¹ See Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 *EUR. J. INT'L L.* 916 (2004); ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004), as reviewed by Kal Raustiala, *Book Review: The Democracy Deficit by Alfred C. Aman*, 55. *J. LEGAL EDUC.* 446 (2005).

of the executive with regard to matters of international relations; for instance, the English doctrine of “royal prerogative power over foreign affairs,” the French doctrine of *acte de gouvernement*, or the “foreign affairs exception” included in the Administrative Procedure Act in the United States.²² 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.²³ 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 a global decision needs to be transposed or enforced inside a 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, would be needed to fill the gap. And global administrative law (GAL), in fact, is 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 judiciary 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.”²⁴ 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 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 single-function global regulator, escaping domestic administrative laws, might maximize interest in the conservation of cultural and natural properties, which is

²² 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 closes off access by international law to the domestic legal orders, so the former closes the door to domestic administrative laws through which the international order might have entered. Globalization, not surprisingly, tends to open both kinds of doors. On the foreign affairs function in the age of globalization, see C. Jeffrey Tibbels, *Delineating the Foreign Affairs Function in the Age of Globalization*, 23 SUFFOLK TRANSNAT’L L. REV. 389 (1999).

²³ See Judgment of The European Court of Justice (Grand Chamber), 3 September 2008, in Cases C-402/05 P and C-415/05.

²⁴ See Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT’L L. 270 (2006).

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 section 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 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 various 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.

3. The World Heritage Convention regime and its functioning

3.1. The World Heritage Convention: Principles, organization, and powers

The fundamental principles of the World Heritage Convention are established by its fourth and sixth articles.

Article 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 article 6, “whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage [...] is situated, and without prejudice to property rights 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 is to manage a “world heritage,” as article 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 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; it is, however, a secondary and auxiliary one. The international community, in fact, supports action by the states but does not substitute for them. Based on article 6, the international community gives its "help" and intervenes only if the state "so requests." Article 7 of the WHC is even clearer about this. It defines the role assigned to the international community 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.

The WHC has three components: a decision-making organ, an administrative secretariat, and various consultative organs. The decision-making organ, called the World Heritage Committee, is intergovernmental in nature. It is composed of the representatives of twenty-one 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 connected, administratively, 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 (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 generally confined to observer status. IUCN and ICOMOS are fully involved in the organizational texture of the international regime. They are nongovernmental organizations that are entitled to perform global functions, entrusted by states to an international organization, even

if only in a purely consultative way. These 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 the natural and cultural heritages of the various states while remaining independent of the state governments. At the same time, the nongovernmental 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 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 their territory and suitable for inclusion in a list of places 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. 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 anticipated for its protection and management. When deciding to add a property on the World Heritage List, the committee adopts a “Statement of Outstanding Universal Value,” which recognizes its exceptional worth. 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 assistance” from the interested state, authorizing the World Heritage Committee to take direct initiatives and to ensure 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 article 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 also 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.

However, if one considers the way in which the WHC has been interpreted and applied, especially recently, 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, there is the interest of the international community in caring 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.”²⁵ Moreover, the secretariat may also receive information about the state of a property’s conservation “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.

Second, on the basis of a rule introduced in 1994 in the Operational Guidelines, 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 article 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,

²⁵ See *Operational Guidelines for the Implementation of the World Heritage Convention*, art. 172.

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.”

Reactive monitoring and inclusion without consent on the red list have profoundly modified the original sense of the convention,²⁶ provoking negative reactions on the part of some member states and triggering a deeper analysis of the legal status of the convention by the advisory bodies²⁷ and by UNESCO.²⁸

The List of World Heritage in Danger has progressively changed its function. It came into 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 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 preservation of natural and cultural heritages believed to have “outstanding universal value.” The cases recounted in some details in the succeeding section are testimony to this.

3.2. 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.

3.2.1. 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 two kilometers (about a mile and quarter) from Lake Baikal. In light of this information, the committee asked Russia to invite a joint mission of the World Heritage Centre and IUCN to the property; it decided that, on the

²⁶ See Natasha Affolder, *Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance*, 24 PACE ENVTL. L. REV. 35 (2007).

²⁷ IUCN, *Analysis of the legal issues in the Draft Operational Guidelines*, WHC-02/CONF.202.INF.12.

²⁸ 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.

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.²⁹

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 coastline of Lake Baikal, in some places as close as 800 meters (about 875 yards), 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 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 entering the site on the List of World Heritage in Danger.³⁰

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 authority competent for the environmental impact assessment, 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.³¹ 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. On March 29, the director general of UNESCO sent a similar letter to the Russian prime minister. Then, 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.

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 were possible. Before he could reply, Putin continued, “from the moment that you hesitate, it means that this possibility exists.” Therefore, “wielding a pen in front of an oversized map of the Baikal region”, Putin “swept aside the decisions of several government agencies” and ordered that the new route must be moved to at least 40 kilometers (close to twenty-five miles) distant from Lake Baikal: “[I]f there is even a

²⁹ Decision 29 COM 7B.19.

³⁰ See P. Rosabal (IUCN) & 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>.

³¹ 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).

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.”³²

At its thirtieth 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 rerouting of the pipeline has cost one billion dollars in additional construction.³³

3.2.2. *Dresden Elbe Valley*

The Waldschlösschen Bridge project, based on the traffic assessments undertaken by the municipality of Dresden indicating the need for an additional river crossing, had 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 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 thirtieth 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 31st session in 2007, if the plans are carried out.”³⁴

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

³² 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>).

³³ *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>).

³⁴ *See Decision 30COM7B.77.*

compromise, organizing meetings and workshops in order to evaluate alternative solutions, such as a lighter bridge and a tunnel.

At its thirty-first session, the World Heritage Committee (Christchurch, New Zealand, 23 June 23–July 2, 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 impact on the outstanding universal value of the property.” Meanwhile, Dresden Elbe Valley was kept on the List of World Heritage in Danger.

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 work 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 thirty-second 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.³⁵ 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 meeting did not produce any concrete results. By mid-November, the foundations for the Elbe Bridge were completed. At its thirty-third session (Seville, 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.”³⁶

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

3.2.3. *The Aeolian Islands case*

The addition of the Aeolian Islands to the World Heritage List in 2000³⁷ 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

³⁵ See Decision 32COM 7A.26.

³⁶ See Decision: 33 COM 7A.26.

³⁷ See Decision 24.COM-XA.1.

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 percent of the area of Lipari Island had been quarried for the extraction of pumice stone. At its twenty-sixth session (Budapest, June 24–29, 2002), therefore, the committee urged Italy “to prohibit expansion of pumice extraction, as it may impact on the values for which the site was inscribed on the World Heritage List.”³⁸

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 enabled Pumex to obtain temporary extensions of its licenses.

The World Heritage Committee, at its twenty-seventh 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.”³⁹

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,⁴⁰ the World Heritage Committee, at its thirtieth 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 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.”⁴¹

The Italian minister for the environment reacted, repeatedly requesting local authorities to halt mining operations and, finally, obtaining an order to stop the

³⁸ See *Decision 26COM-21 (b)13*.

³⁹ See *Decision 28.COM 15B.26*.

⁴⁰ In its state-of-conservation report for the 30th session of the committee (Vilnius, 9–16 July 2006), the IUCN stated, on the basis of regular reports received from local NGOs and individuals, accompanied by photographic and audiovisual material, 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.”

⁴¹ See *Decision 30.COM 7B.23*.

abusive extraction of pumice on Lipari Island. The joint UNESCO/IUCN mission 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 forty 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 thirty-first session (Christchurch, June 23–July 2), 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 immediately to “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.”⁴² On January 31, 2008, the World Heritage Centre finally received a report from the Italian government stating that all mining activities had been halted.

At its thirty-second session (Quebec City, July 2–10, 2010), the World Heritage Committee welcomed the fact “that all new mining that could affect the property [had] been stopped, and request[ed] the State Party, in collaboration with the World Heritage Centre and IUCN, to ensure that these mining activities will not be reopened in the future.”⁴³

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

4. Concluding remarks: The World Heritage Convention and the procedural model of institutional and legal globalization

4.1. 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 understood as achieving compliance by calling reputations into question. When the committee includes or threatens to include a property on the so-called 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.

⁴² See Decision 31COM7B.24.

⁴³ See Decision 32COM 7B.18.

Through this technique of “naming and shaming,”⁴⁴ or of “global governance by information,”⁴⁵ 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. Mechanisms to encourage compliance 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 urban development (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.

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,

⁴⁴ See Diana Zacharias, *The Unesco Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution*, 9 GERMAN LAW JOURNAL 1856 (2008); see also Marco Macchia, *La tutela del patrimonio culturale mondiale: strumenti, procedure, controlli*, in *LA GLOBALIZZAZIONE DEI BENI CULTURALI* (Lorenzo Casini ed., 2010). More generally, see Lorenzo Casini, “Italian Hours”: *The Globalization Of Cultural Property Law*, 9 INT’L J. CONST. L. (I·CON) 369 (2011).

⁴⁵ On the topic, Armin von Bogdandy & Mathias 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*, IILJ Working Paper 2009/2 (Global Administrative Law Series), Finalized 03/24/2009 (www.iilj.org). See also Diana Zacharias, *Cologne Cathedral versus Skyscrapers—World Cultural Heritage Protection as Archetype of a Multilevel System*, 10 MAX PLANCK UNYB 281, 283 (2006).

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 twenty-one 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.⁴⁶

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.⁴⁷ Can such 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 Dresden's "world heritage status,"⁴⁸ nonetheless, respected the local decision, thereby accepting the cost to its international reputation.⁴⁹ It has been observed, therefore, that "the compliance mechanisms at hand are problematic insofar as they cannot efficiently guarantee that the States Parties act in accordance with the Convention."⁵⁰ Still, the Baikal and Aeolian Islands cases, as well as other cases in which

⁴⁶ On this case, and more generally on this theme, see JEREMY RABKIN, *THE YELLOWSTONE AFFAIR: ENVIRONMENTAL PROTECTION, INTERNATIONAL TREATIES AND NATIONAL SOVEREIGNTY* (1997). See also Benedetto Cimino, *Global Bodies Reviewing National Decisions: The Yellowstone Case*, in *GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES* (Sabino Cassese, Bruno Carotti, Lorenzo Casini, Marco Macchia, Euan MacDonald, Mario Savino eds., 2nd ed. 2008), available at <http://www.iilj.org/GAL/GALCasebook.asp>.

⁴⁷ Rabkin, *supra* note 46, at 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").

⁴⁸ Zacharias, *supra* note 45, at 365.

⁴⁹ Zacharias, *supra* note 44, at 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").

⁵⁰ Zacharias, *supra* note 44, at 1863. On the contrary, however, other authors remark the "particular strength" of the World Heritage Convention. In this perspective, see particularly Edward J. Goodwin, *The World Heritage Convention, the Environment, and Compliance*, 20 *COLO. J. INT'L ENVTL. L. & POL'Y* 157 (2009).

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 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 critiqued on both counts because it does not guarantee sufficient "compliance" by the member states, and because, when ensuring such compliance, it 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."⁵¹ However, this contradiction is also exacerbated by the way in which the World Heritage Convention's function 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 ensure 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.

However, this conceptualization, based on an understanding of the convention as an instrument of vertical and substantive legal integration, does not seem entirely satisfying. It neglects the procedural aspects of the World Heritage Convention, which are apparent in the foregoing analysis of its concrete functioning. The analyses 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.

⁵¹ Natasha Affolder, *Democratizing or Demonizing the World Heritage Convention?*, 38 VICTORIA U. WELLINGTON L. REV. 341, 342 (2007).

In the cases examined in the previous section, the substantial outcomes have varied. In the Baikal and Aeolian Islands cases, Russian and Italian authorities, disregarding economic and social considerations, favored the protection of natural heritage, in apparent accord with the WHC's directives. On the contrary, in the Dresden case, German authorities privileged the transport needs of Dresden residents, at the expense 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 site 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."⁵² 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 analogous to those that domestic administrative law only recognizes for local or national agencies or for private actors whose interests may be affected by administrative choices.⁵³

⁵² Weiler, *supra* note 5, at 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").

⁵³ See Zacharias, *supra* note 44, at 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").

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 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 time, however, the procedural integration tackles the international 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 single-function 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 effectiveness deficit 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.

4.2. 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 (or 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.

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 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; 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 the 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, 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, where 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 term 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, since it implies a transformation rather than a replacement of domestic law. It would be more apt to conceptualize the procedural integration among 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.⁵⁴

The second argument, mentioned above, points to the administrative quality of the rules ensuring a procedural integration between domestic legal orders. In this regard, a GAL perspective probably is better equipped to conceptualize such 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 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 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 or authorities superior to states, as international organizations are not considered as such. They are the creatures of the member states, based on their consent and deprived of autonomous powers. On the other hand, (b) states themselves are not “public powers”, as they are supposed to lose, in foreign relations, their public quality. They may present themselves as authorities only within their own territory and are not allowed, beyond that territory, to exercise public power over and above other states without their consent. Now, however, globalization requires a new conceptualization, opening the way to the emergence of administrative law beyond the state.

⁵⁴ Auby, *supra* note 1, at 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”).

As to point (a), the increasing vertical and substantive integration stimulated by globalization has triggered a reconceptualization of a broad segment of international rules as a form of 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.”⁵⁵

This paper, however, highlights a “somehow different but related” dimension of GAL,⁵⁶ which refers to the reconceptualization of the second point (b), namely, the public quality of States acting in their mutual relations. As globalization increases the extraterritorial impact of domestic regulation, every time a state exercises public power within its own borders, it also affects extraterritorial 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 its power, in whatever degree, 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 power⁵⁷ to regulate and its duty to take global interests into account, which is to say, the 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 the duty of the regulator to take into account affected interests, on the other—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

⁵⁵ Kingsbury et al., *supra* note 1.

⁵⁶ 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”).

⁵⁷ Or each “public entity’s” power, according to Benedict Kingsbury’s model of “inter-public law.” See Benedict Kingsbury, *International Law as Inter-Public Law*, in *MORAL UNIVERSALISM AND PLURALISM: NOMOS XLIX* (Henry R. Richardson & Melissa S. Williams eds., 2009); see also Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 *EUR. J. INT’L L.* 23 (2009) and Benedict Kingsbury, *Weighing Global Regulatory Decisions in National Courts*, *ACTA JURIDICA* (2009).

the “interest representation model”⁵⁸ 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 is colonizing, as it were, the legal space traditionally occupied by international law.⁵⁹ It is thus becoming “a genuine law of mankind.”⁶⁰

⁵⁸ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). More recently, see also *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003).

⁵⁹ 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 on its subjects, first of all to States in their external as well as internal action, a “publicness requirement.” See Kingsbury, *supra* note 57 (*International Law as Inter-Public Law*,), at 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.”

⁶⁰ See Sabino Cassese, *Le droit tout puissant et unique de la société. Paradossi del diritto amministrativo*, RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 879 (2009).