

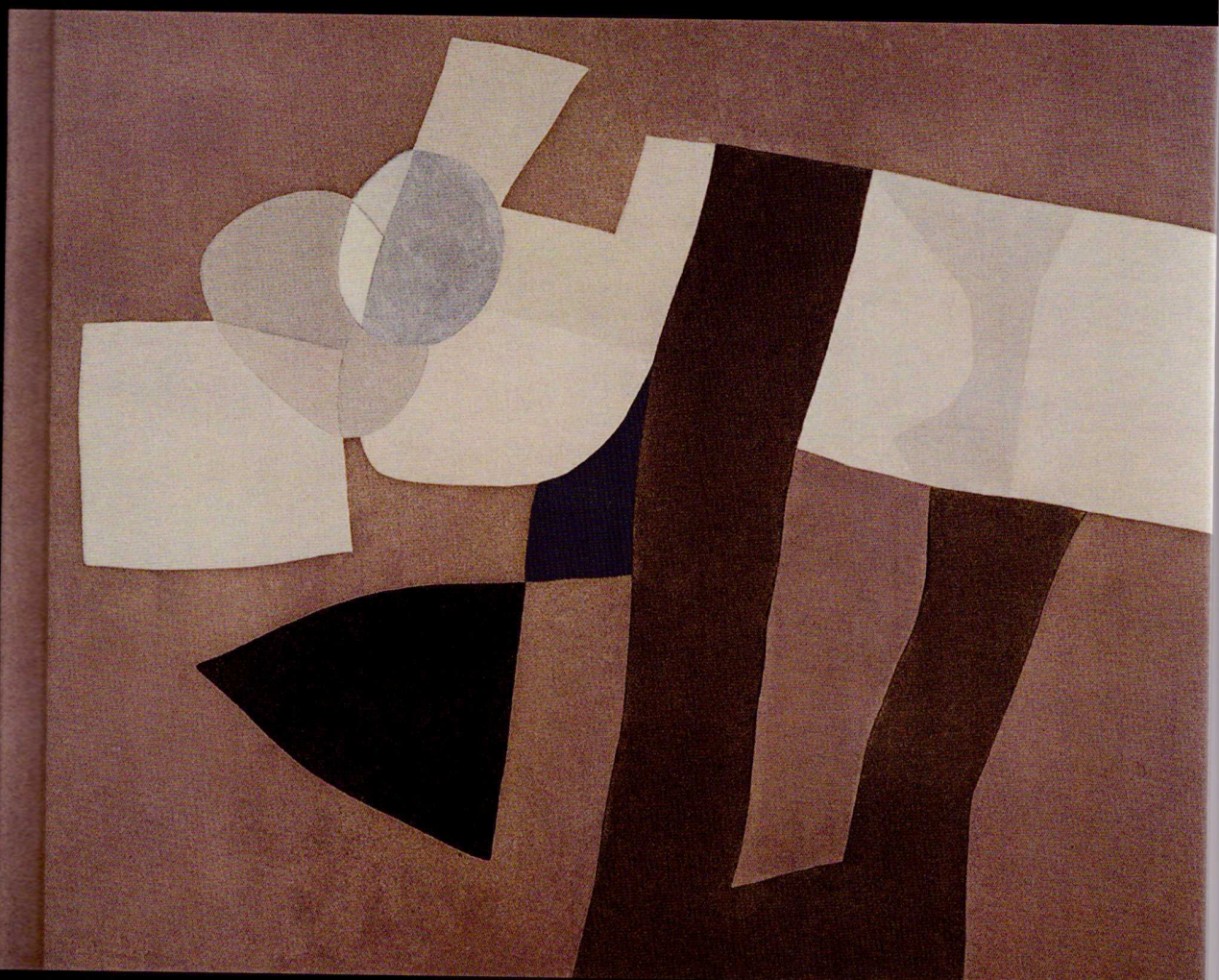


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# RESEARCH HANDBOOK ON **Global Administrative Law**

Edited by  
**Sabino Cassese**



RESEARCH HANDBOOKS ON GLOBALISATION AND THE LAW

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## 23. Governing the world

Sabino Cassese

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### 1 THE PARADOXES OF GLOBALIZATION

The contemporary, now global Westphalian system – what colloquially is called the world community – has striven to curtail the anarchical nature of the world with an extensive network of international legal and organizational structures designed to foster open trade and a stable international financial system, establish accepted principles of resolving international disputes, and set limits on the conduct of wars when they do occur. This system of states now encompasses every culture and region. Its institutions have provided the neutral framework for the interactions of diverse societies – to a large extent independent of their respective values.<sup>1</sup>

The international economic system has become global, while the political structure of the world has remained based on the nation-state.<sup>2</sup>

[T]he nature of the state itself – the basic formal unit of international life – has been subjected to a multitude of pressures: attacked and dismantled by design, in some regions corroded from neglect, often submerged by the sheer rush of events.<sup>3</sup>

These three quotations from the latest book written by the political scientist and diplomat Henry Kissinger highlight the basic dilemma of the contemporary world: a process of globalization is developing, a process that is binding on national governments, but also one that is mainly economic; in the meantime, the old sovereigns – the States – are no longer in command. Thus arises a question: who runs the world – strong multinationals, States, or global regulators?<sup>4</sup> Is there a world government, or there is governance without government?<sup>5</sup>

This examination will commence with some empirical evidence. In 1453, it took 40 days for the Pope to learn that Constantinople had fallen to the Turks. In 2001, by

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<sup>1</sup> Henry Kissinger, *World Order* (Penguin 2014) 7.

<sup>2</sup> Ibid 368.

<sup>3</sup> Ibid 367–368.

<sup>4</sup> This question was first asked by José Ortega y Gasset in 1930. In his famous book entitled *La rebelión de las masas*, in the second part of which he raised the question ‘Quién manda en el mundo?’ (José Ortega y Gasset, *La rebelión de las masas* (Espasa Calpe 1930), Italian tr: *La ribellione delle masse* (Il Mulino 1962)). Recent analyses are available in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009); Deborah D Avant, Martha Finnemore and Susan K Sell (eds), *Who Governs the Globe?* (Cambridge University Press 2010); and Tim Büthe and Walter Mattli, *The New Global Rulers. The Privatization of Regulation in the World Economy* (Princeton University Press 2011).

<sup>5</sup> As suggested in a well-known book edited by James N Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government. Order and Change in World Politics* (Cambridge University Press 1992).

contrast, the Twin Towers of the World Trade Center in New York fell during a live television broadcast.<sup>6</sup> A Nokia telephone is made up of 900 parts produced in 40 different countries, and is sold in 80 different national markets. Poliomyelitis, which caused millions of deaths in the last century, was eradicated thanks to a campaign launched by the World Health Organization in 1988; in 2011 and 2012 not a single case of polio was reported in India. It can thus be concluded that national barriers to the economy are being destroyed and that world policies are successful.

However, on the other hand, globalization is not equally distributed. As regards the population, only 2 per cent of people live outside their country of birth. Only 2 per cent of students attend universities outside their home countries. Only 7 per cent of the directors of Standard and Poors 500 companies are foreigners. As regards trade and investment, exports are equivalent to only 20 per cent of global GDP. Foreign direct investment accounts for only 9 per cent of all fixed investment. Less than 20 per cent of venture capital is deployed outside the fund's home country. Only 20 per cent of shares traded on stock markets are owned by foreign investors. Only 7 per cent of rice is traded across borders. The level of concentration in vital industries has fallen since 1950, and has remained constant since 1980.<sup>7</sup> Therefore, it can be concluded that globalization should not be overestimated (because we live in an era of semi-globalization) and that the world is not being taken over by a handful of giant companies.

The internal fabric of globalization is complex. Consider that, in a world with 7 billion inhabitants, 7,000 languages and 193 States, there are 60,000 global non-governmental organizations and approximately 2,000 global regulatory regimes. Moreover, there is 'an array of partially overlapping and non-hierarchical institutions governing a particular issue area'.<sup>8</sup> '[R]egime complexes, including different mixes of states, sub-state units, international organizations, civil society organizations and private actors, have in various issue areas replaced more tightly integrated international regimes. Regime complexes have been identified in the areas of climate change, food security, refugee policy, energy, intellectual property and anti-corruption.'<sup>9</sup> Therefore, what we call 'globalization' consists in fact of a plurality of phenomena.

Another paradox of globalization is that it opens the way to new exploitations: between 15 and 20 million hectares of African land are owned or used by foreign firms, which produce fruit and vegetables for their own markets, for consumption or for biofuel (and several examples of such 'exploiting' firms come from South Korea or

<sup>6</sup> Nayan Chanda, *Bound Together. How Traders, Preachers, Adventurers, and Warriors Shaped Globalisation* (Yale University Press 2007).

<sup>7</sup> Pankaj Ghemawat and Steven A Altman, *DHL Global Connectedness Index 2014: Analyzing global flows and their power to increase prosperity* (2014) NYU Stern School of Business and IESE Business School <[http://www.dhl.com/content/dam/Campaigns/gci2014/downloads/dhl\\_gci\\_2014\\_study\\_low.pdf](http://www.dhl.com/content/dam/Campaigns/gci2014/downloads/dhl_gci_2014_study_low.pdf)> accessed 4 June 2015; see also 'The Case Against Globaloney', *The Economist*, 23 April 2011 <<http://www.economist.com/node/18584204>> accessed 4 June 2015.

<sup>8</sup> Kal Raustiala and David G Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization* 277.

<sup>9</sup> Gráinne de Búrca, Robert O Keohane and Charles Sabel, 'Global Experimentalist Governance' (2014) 44 *British Journal of Political Science* 477, 481.



Saudi Arabia). This brings financial resources to Africa, but also strips it of its natural resources (mainly water), relocates people, affects local customs, and obliges the Food and Agriculture Organization of the United Nations (FAO) to provide more food to local populations through the World Food Programme (WFP).<sup>10</sup> Thus, it can be concluded that globalization is a process replete with ambiguities.

If the extent of globalization is limited and its internal fabric is composite, is it possible to say that national governments are still in command? This aspect too is contradictory. Europe is attempting to transcend the Member States by means of the Union (and the same may happen soon in Africa, North America, South America and Southeast Asia too). Parts of the Middle East, the Far East and Africa have dissolved into ethnic components that conflict with one another, producing the well-known phenomenon of 'failed States', the territories of which are ungoverned (think, for example, of Libya). Most States are self-established, but some are not: they may be the product of international action, not being established from below, but from above. It can be concluded that it is not the State as such, but only a few States (today mainly the United States, Russia and China) that play a dominant role in the world; and that many States are experiencing a period of crisis.

## 2 GLOBALIZATION AS SHARED GOVERNANCE

In such a context, it can no longer be said that the world is run by national governments according to the Westphalian model, nor that the rulers of the world are to be found beyond the States, in the global space. It can only be concluded that power is shared between national and supranational rulers.<sup>11</sup> A few examples from the fields of environmental protection, oil and gas exploitation in the Arctic, and global health security can demonstrate this conclusion.

To control global warming, the 1997 Kyoto Protocol (which entered into force in 2005) conferred upon the United Nations Framework Convention on Climate Change the power to set caps for each nation, which are basically limits on the amount of pollutants that can be emitted. Countries that emit less than their quota of greenhouse gases can sell emission credits to polluting countries. This system requires the collaboration of global regulators, national governments (acting as co-regulators and implementers) and civil societies (i.e. polluters that buy or sell emission credits). Soon

<sup>10</sup> Joachim von Braun and Ruth Meinzen-Dick, "'Land Grabbing" by Foreign Investors in Developing Countries: Risks and Opportunities', International Food Policy Research Institute Policy Brief, 13 April 2009.

<sup>11</sup> On the interactions between the global and the national level, see the seminal works by Stefano Battini: 'Taking Outsiders' Interests into Account: il diritto amministrativo come Costituzione materiale dell'interdipendenza globale', in (2014) 4 *Rivista trimestrale di diritto pubblico* 927; 'Extraterritoriality: an Unexceptional Exception', in Tom Zwart, Gordon Anthony, Jean Bernard Auby and John Morison (eds), *Values in Global Administrative Law* (Hart Publishing 2011), 61–80; 'The Procedural Side of Legal Globalization: The Case of the World Heritage Convention' (2011) 9 *International Journal of Constitutional Law* 340; 'Il diritto amministrativo internazionale, oggi' (2010) 6 *Rivista italiana di diritto pubblico comunitario* 1405; *Amministrazioni nazionali e controversie globali* (Giuffr  2007).



after this programme began, managing emissions became one of the fastest-growing specializations in financial services.

The Arctic, the region around the Earth's North Pole, is surrounded by five States: Russia, the United States, Canada, Norway and Denmark. When a country ratifies the United Nations Convention on the Law of the Sea, it enjoys special rights over the exploitation and use of marine resources in the Exclusive Economic Zone (EEZ), which extends to a distance of 200 nautical miles (370 kilometres) adjacent to their coasts. The five countries launched projects to establish claims over parts of the Arctic, but in 2008 met and pledged to strive for 'the orderly settlement of any possible overlapping claims'. From then on, the five countries have tried to find a solution to their problems through regional cooperation and multilateral coordination.

The *World Health Report 2007 – A Safer Future: global public health security in the 21st century* noted that 'new diseases are emerging at the historically unprecedented rate of one per year. Airlines now carry more than 2 billion passengers annually, vastly increasing opportunities for the rapid international spread of infectious agents and their vectors.' 'Vulnerability is universal.' 'A more secure world ... requires global partnerships that bring together all countries and stakeholders in all relevant sectors.'<sup>12</sup> This requires global cooperation in surveillance, sharing of knowledge, and cross-sector collaboration.

These examples share some features. In all three cases, they present global problems that cannot be solved nationally. They require the establishment of global rules and regulatory bodies. As observed by Robert Howse:

[S]ome of today's most pressing problems ... are problems that cannot be solved by the uncoordinated exercise of sovereignty by strong individual nation-states. The most obviously serious is climate change; another example is biodiversity. A national interest model of sovereign regulation, where the state is free to regulate to satisfy the balance of diverse constituencies within its borders without regard to external effects, does not take into account these kinds of global 'commons' problems.<sup>13</sup>

However, global rules and global regulators alone are not sufficient: national cooperation is also necessary, both among States and between States and global regulators, because global regulations cannot be implemented or enforced without local or national cooperation. New regulatory machineries are established, but without a constitutional basis.

<sup>12</sup> WHO, *The world health report 2007 – A safer future: global public health security in the 21st century* (World Health Organization 2007), 2, 6, 8 and 19, <<http://www.who.int/whr/2007/en/>> accessed 4 June 2015.

<sup>13</sup> Rob Howse, 'The End of the Globalization Debate: a Review Essay' (2008) 121(6) *Harvard Law Review* 1531. Howse also observes that 'the recognition of the inherent inseparability today of national security and global security illustrates the end of the globalization debate: national security cannot protect people against global insecurity', 1542.

### 3 THE 'MARBLED' STRUCTURE OF GLOBAL GOVERNANCE

In this new context, States cooperate by signing treaties and establishing global regulators, but are also obliged to cooperate as implementers and enforcers of global regulations. This occurs not only in the area of global warming, Arctic exploitation or health security, but in several other areas too, such as the fight against global terrorism, the control of the fishing of highly migratory sea species, and the regulation of nuclear waste transportation.

The interaction between States and global regulators is very complex. National governments negotiate, establish global regulators, confer upon them public tasks, and control them, but at the same time are controlled by them, and act as their agents, implementers or enforcers. Therefore, States have a triple role vis-à-vis global regulatory regimes. They are fragmented: they are both masters and servants.

Another factor contributing to the fragmentation of national governments is the result of their contradictory behaviours: under pressure from their multinational corporations, countries such as the United States fostered the establishment of the World Trade Organization (WTO), to impose upon other States obligations to lower trade barriers; however, they thus became obliged to submit to the WTO Dispute Settlement Body.

Principles of global law percolate into national legal orders and are as a rule limited to a specific area (health, trade, labour). However, they can – and are – easily transplanted to adjacent areas (pursuant to the impact of the equal treatment standard) and influence the entire national legal order. States are masters of their own competences, but they cannot avoid shaping them according to global standards.

The new world order brings together components that originated as different and separate. Now, they are combined and interpenetrated. Therefore, shared power is the rule. The overall picture is not hierarchical because there are no multiple layers in which fields are exclusive and interference between two arenas does not exist. Rather, it resembles a marble cake, in which global and national powers mix. The global legal space is not an additional layer with respect to the national level. The two 'levels' are not distinct, but rather intertwined. States are not the only subjects, but combine with other subjects and thus lose their unity.

States are at the same time both stronger and weaker: stronger, because they operate in the global space, beyond their own territory; weaker because, within international organizations, they must share power with other States and with non-State institutions, and because global rules directly impact national legal systems without any need for State intermediation.

State sovereignty has neither disappeared nor been surrendered to global actors or forces; rather, sovereignty has been re-shaped by globalization, and its exercise occurs in tandem and interconnection with global actors and forces; ... the real issue is how the state has been remade and reordered and the resulting degree of tractability of the new or emerging state and its institutions to the underlying normative agenda of the anti-globalizers.<sup>14</sup>

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<sup>14</sup> Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006), as summarized in Rob Howse (n 13) 1546.



How can the combination of national and supranational be explained? Along which lines are national and global governments divided? One is the high politics/low politics split. The first remains under the control of the States, while the second is delegated to global regulatory regimes. An example is the situation in Ukraine. The European Union and the Organization for Security and Co-operation in Europe have been active, imposing standards and economic and financial sanctions upon Russia. However, when the military aspect emerged, it was not the Union, but rather the French and German national governments that took the lead. At this point, States return to the stage. Therefore, the conferral of national competences to supranational bodies is area-sensitive.

Another is the economics/politics divide. There is a division between the former and the latter, with economics in the domain of global regulators, and politics in the hands of States. As observed by Stiglitz:

[I]n effect, economic globalization has outpaced political globalization. We have a chaotic, uncoordinated system of global governance without global government, an array of institutions and agreements dealing with a series of problems, from global warming to international trade and capital flows. Finance ministers discuss global finance matters at the IMF, paying little heed to how their decisions affect the environment or global health. Environment ministers may call for something to be done about global warming, but they lack the resources to back up those calls.<sup>15</sup>

Therefore, State control of the economy is very difficult.

This produces responses: '[t]he international order thus faces a paradox: its prosperity is dependent on the success of globalization, but the process produces a political reaction that often works counter to its aspirations. The economic managers of globalization have few occasions to engage with its political processes.'<sup>16</sup>

## 4 THE GLOBAL SPACE

At the centre of national public powers is the government, also known as the executive power. In the global legal space, there is no one supreme authority, nor the hierarchy peculiar to States, nor a body of general rules that can endow uniformity upon its structure and operation. So, how can the global administrative machine operate?

The first condition of its very existence and operation is transnationalism. The global legal space has developed not only along vertical lines – from the national to the global level – but also along horizontal lines, connecting national authorities and global agencies, and global agencies to each other. The system is based largely on cooperation at both inter-State and global levels. Cooperation between national authorities is an essential element of the global system. Two examples are the consultative and deliberative committees of international organizations, and mutual recognition agreements.

<sup>15</sup> Joseph E Stiglitz, *Making Globalization Work* (Norton 2006) 21.

<sup>16</sup> Kissinger (n 1) 369.



As occurs in the European Union, in which the strictly European component is accompanied by a multinational one (the intergovernmental bodies and the Comitology committees), the global legal space presents several committees of international organizations, with representatives of national administrations. These representatives perform a threefold role: they are an instrument for informing global bodies, a conduit for transmitting the decisions of the latter to the national level, and a means to ensure dialogue and negotiation between national administrations.

The transnational component of the global legal space originates from the very limitations of legal globalization. The more national markets open to one another, the more conspicuous the asymmetries and contrasts become. To reduce them and level the playing field, global rules establish general principles, but cannot govern every detail: this leaves room for mixed transnational committees and mutual recognition agreements to develop.

This component of the global legal space reduces its verticality, as the *superioritas* of global authorities is based on a dense network of horizontal relations of a contractual nature. The network facilitates the transfer or transplant of institutions from one national legal system to another, and stimulates the quest for the functional analogies concealed by the formal differences between national systems. Finally, the transnationalism of the global legal order suggests the need for caution before proclaiming the crisis of the State and a flight towards the global level: the dynamics of the global administrative system are largely dependent on the State or its fragments.

The multinational component of the global space is connected to two of its characteristics, the first relating to its mode of operation, and the second to its decision-making processes. The first characteristic is that of transactionalism, meaning that the global system's operation is based on transactions. For example, several international treaties prescribe that conflicts between national administrations must be solved through negotiations, inquiries, mediation, conciliation, arbitration, judicial decisions or other peaceful means of dispute resolution. In other words, treaties establish other contractual or semi-contractual means to solve conflicts.

A strict application of the transnational principle would require global decisions to be taken unanimously. However, although expressly required in certain treaties, unanimity is tempered in various ways. International norms establish that collegial organs must make every effort to reach an agreement through 'consensus'. Should this not be possible, the decision can be taken through a two-thirds or simple majority vote of the parties present.

The horizontal relations that compose the global system are accompanied by vertical ones. However, these too are not hierarchical and are not based on a strict separation, but rather on the logic of collective action.

First, vertical relations are established in the case of concurrent competences, which require mixed procedures. For example, the Patent Cooperation Treaty of 1970 provides for the possibility to request a preliminary international examination, which is undertaken jointly with the requester. The request results in an investigation, which is transferred to the national authority; this authority then takes the final decision. The proceedings are, therefore, half global and half national. The two 'levels of government' share powers.

Second, the heterogeneity of the various sector-based regimes and the inherent complexity of relations within the global space require the establishment of functionally different relations depending on the sphere of activity (defence, the environment, or food safety) and, often, on the nature of the national parties involved (for example, the States' degrees of development), also in relation to the existing structures at the global level.

This latter variable is extremely interesting. Contrary to the traditional description, there are several different types of global administration. In addition to the bodies which are formally constituted as international organizations and employ their own staff, there are those that consist of networks of national authorities, and that operate collectively through national officers; distributed administrations led by national regulating bodies that are based on cooperation and mutual recognition agreements; hybrid, semi-public administrations founded on private-type structures; and private administrations performing regulatory functions that are recognized as public.

In conclusion, while national governments are unitary and have an executive body at their centre, in the global space there are several different regulatory regimes, and there is no single executive.

In national legal orders, a central executive is accompanied by a body of general rules, which is then divided into sector-specific norms. The former confer coherence and uniformity upon the latter. At the global level, the situation is different. Almost all human activities are regulated by global norms. These are highly diverse. Some establish only framework legislation for States to flesh out through regulatory activity; some provide guidelines for national authorities; others directly impose certain obligations upon private parties; others may rely on global authorities for implementation or for controlling their implementation; some rely on national authorities for these activities; some provide instruments for judicial conflict resolution, while still others do not have such mechanisms and resort only to negotiation or national judges. However, they do present a common trait, outlined above: these normative entities are all sector based; there is no general set of rules (or meta-rules) that operates as a unifying element.

The global legal space compensates for the disadvantages of this sectoralism in several ways. The first and most common course is a process of accretion and accumulation of legal principles, as highlighted by the first decision issued by the Arbitral Tribunal established by the Convention on the Law of the Sea.

The second is the establishment of horizontal connections between different normative bodies. For example, prior to 1995, the standards established by the Codex Alimentarius Commission were voluntary, but have since acquired legal force because the WTO required the parties that did not wish to observe them to prove their capacity to guarantee an adequate level of protection. These connections are usually established starting from, and surrounding, the most important global normative bodies, such as that on trade; these, due to their scope, exert a strong gravitational pull on other sector-based regulations.

Thus, the various regulatory bodies are distinct but not separate. As established by the first decision issued by the Appellate Body of the WTO, the global laws on trade are not to be interpreted in isolation, separate from general international law. This gave



rise to the ever closer interconnections between rules on trade on the one hand, and those on environmental protection, worker protection standards etc. on the other.

The rules produced by global institutions address national administrations or national civil societies directly. In the former case, global institutions take on the task of keeping national administrations in check. For example, the WTO imposes various obligations upon national administrations, such as that of transparency and equivalence, and of introducing consultation procedures.

When global norms address private subjects, compliance with global standards is ensured in various ways. The national administration can be used as a tool for implementation through coercion or sanctions. Otherwise, spontaneous implementation can occur, prompted by market-based incentives.

Although the global legal space does not possess a set of general and common rules, is it nevertheless subject to general principles, such that the global governance system cannot be considered a system of absolute government? In other words, is there a global rule of law?

## 5 LOOKING TO THE FUTURE

In the final pages of Mazower's *Governing the World*, one may read a sceptical and critical evaluation of the present situation of the globalized world:

That international institutions may not be internally democratic in their workings has been known for some time and does not appear particularly surprising. They are, after all, chiefly executive bureaucracies, ... . What does seem novel, in historical terms, is the collapsing importance of the public bodies that give national sovereignty meaning and the way that organs of international government and regulation have come to assail the internal legitimacy, capacity, and cohesion of individual states. ... international institutions and norms have developed into means of curtailing sovereignty rather than enhancing it, trends that could not but affect the standing of international bodies themselves and undercut their ability to command continued support.<sup>17</sup>

Also, '[o]ur representatives continue to hand over power to experts and self-interested self-regulators in the name of efficient global governance while a skeptical and alienated public looks on. The idea of governing the world is becoming yesterday's dream.'<sup>18</sup>

This point of view cannot free itself from the Westphalian approach to international law as a rule for a community of sovereign States. The reality has changed. National governments are part of the global space and play an important role in it, while being constrained by global rules that oblige them to negotiate and to comply with global judicial and quasi-judicial bodies. National governments can reach new areas and

<sup>17</sup> Mark Mazower, *Governing the World. The History of an Idea, 1815 to the Present* (Penguin 2012) 421–422.

<sup>18</sup> Ibid 427.



control new phenomena, while their sovereignty is increasingly limited. Kissinger is correct in noting that '[a] reconstruction of the international system is the ultimate challenge to statesmanship in our time'<sup>19</sup> and that a new culture is necessary 'to translate divergent cultures into a common system'.<sup>20</sup>

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<sup>19</sup> Kissinger (n 1) 371.

<sup>20</sup> Ibid 373.