The Seventh Global Administrative Law Seminar

Private and Public-Private Global Regulation:
Global Administrative Law Dimensions

On 10-11 June 2011 the University of Viterbo (Università degli Studi della Tuscia) hosted the seventh annual Global Administrative Law Seminar, which focused on "Private and Public-Private Global Regulation: Global Administrative Law Dimensions". The Seminar Steering Committee included Professors Giulio Vesperini, Stefano Battini, Edoardo Chiti, Mario Savino and Lorenzo Casini, while the Organizing Team was composed of Giulia Bertezzolo, Eleonora Cavalieri, and Elisabetta Morlino. The Seminar was sponsored by the Department DISTU of the University of Viterbo, the Institute for Research on Public Administration (IRPA), the International Fund for Agricultural Development (IFAD) and Cleary Gottlieb Steen & Hamilton.

The GAL Seminars are the result of collaboration between the University of Viterbo (Professors Giulio Vesperini and Stefano Battini), the University of Rome Sapienza (Professor Sabino Cassese) and the New York University School of Law (Professors Benedict Kingsbury and Richard B. Stewart). They were created as a forum for discussion of issues in the field of Global Administrative Law, in particular the increasing use of administrative law-type mechanisms in global governance. Since 2005, a call for papers has been issued every year inviting scholars from all over the world to submit paper proposals on selected topics: "Global Administrative Law and Global Governance" (2005), "Accountability within the Global Context" (2006), "Participation of Private Actors in Global Administrative Law" (2007), "Global Administrative Law: From Fragmentation to Unity?" (2008), "Legality Review in the Global Administrative Space" (2009) and "The Financial Crisis and Global Regulatory Governance" (2010).

Global regulation is one of the central themes of GAL. Research to date has highlighted the variety of subjects involved (international organizations, transnational networks, private or hybrid bodies and others), the particular techniques which are employed (such as standards, guidelines and indicators), the effectiveness of such instruments and, when available, their forms of review. This year's seminar focused on the role of private and public-private bodies in global regulation.

The first session, chaired by Sabino Cassese (Judge of the Italian Constitutional Court) and titled **"Rationales and Instruments for Public-Private Partnership"**, included four papers: "Innovations in Governance: Global Health vs. Global Environment", by Kenneth W. Abbott and David Gartner (Professor of Law and Associate Professor of Law at the Arizona State University), "Private Ordering and Expertise Legitimacy", by Alberto Biasco and Alessandra Quarta (PhD candidates at the Universities of Torino and Foggia), "Delegation to Private Actors of the Competences in Validation and Verification in the Kyoto Protocol Flexibility Mechanisms: Accountability Issues and the Role of the Public", by Sébastien Duyck (PhD candidate at the Northern Institute for Environmental and Minority Law), and "About a Two-fold Institution: The Global Water Partnership between Institutional Flexibility and Legal Legitimacy", by Edouard Fromageau (PhD candidate at the University of Geneva). The papers were discussed by Laurence Boisson de Chazournes (University of Geneva) and Lorenzo Casini (University of Rome Sapienza).

Abbott and Gartner presented a comparative analysis of the diverging approaches to non-state actor participation in key global health and global environmental institutions. The paper offers various explanations for the difference between the more participatory approach in global health governance and the more consultative approach in global environmental governance. It then argues in favor of more robust participatory models on the basis that such models, according to the authors, have a variety of benefits beyond institutional accountability, including increased stakeholder ownership, more effective resource mobilization and implementation, and expanded civil society capacity. Biasco and Quarta analyzed the increasing role of private regulatory bodies in sectors that require high degrees of expertise and technical knowledge, focusing in particular on the Codex Alimentarius Commission. Their paper emphasizes that such forms of governance base their legitimacy on expertise, scientific development and efficacy, leading to the emergence of a new rule of science, opposed to the traditional rule of law. The authors recognize that private and hybrid forms of regulation are necessary, but argue that public institutions, based on political legitimation, must retain a role in coordinating the activity of regulatory bodies and defining the means of such regulation. Duyck analyzed the delegation by States to private entities of oversight administrative functions within the Kyoto Protocol flexibility mechanism, noting that the role of for-profit companies in ensuring the integrity of the mechanism raises legitimacy and credibility issues. He also argued that although the introduction of more transparent procedures and the involvement of stakeholders have increased the accountability of the private actors involved, the absence of a formal review process impairs civil society's control and its capacity to raise project-affected communities' concerns. Fromageau analyzed the Global Water Partnership (GWP), a network supporting sustainable development and management of water resources and integrated water resources management. The GWP was initially open to all public and private entities involved in water resources management until concerns about its political and legal legitimacy led to the creation, in 2002, of a new international organization that co-exists with the original network. The paper argues that the GWP is a unique institution and a new kind of international organization, with influences coming from both the public and private sectors, and analyzes it from the point of view of legitimacy, accountability and transparency, emphasizing various limits to the realization of such principles.

Laurence Boisson de Chazournes warned against the dangers of generalization, as each case has its own specificity, but observed that, in the first place, there appears to be a weight-counter weight dimension in all participation structures. For example, NGOs' high standing in the health sector represents a counter-weight to the role of private companies and foundations. Secondly, an interplay of legitimacies also emerges, as there is the need to complement State-centered legitimacy with other forms of legitimacy based, for example, on efficacy or knowledge; new governance structures should therefore deal with such complexity and promote a dialogical approach in order to ensure that all interests and actors are heard. Thirdly, while GAL studies put an emphasis on soft law in creating new governance structures, more orthodox international law instruments – like treaties – should not be disregarded: on the one hand, hard law instruments can also be very flexible, while on the other hand, soft law's flexibility can sometimes give rise to a dilution of responsibility. In any case, in relation to the variety of legal processes in place, a new legal taxonomy might be needed, as the notion of "soft law" seems too generic.

Lorenzo Casini observed that the common thread running through all the papers is "hybridism" between public and private actors, and underlined the need to support the authors' analyses with more practical examples and data. He also highlighted the risk of falling into three global administrative law "traps". The first trap is the risk of being too descriptive, without sufficiently analyzing the reasons behind the emergence of new global governance structures. The second "trap" may be called "GAL labeling", and consists in searching for examples of GAL principles in global governance, without analyzing what underlies them. The third trap is the problem of undervaluing the administrative dimension of GAL: administrative law scholarship has been concerned with the public-private divide for many years, developing concepts which should be recuperated, as they constitute the real added value of the global administrative law approach.

During the discussion, Mario Savino noted that openness to private participation, advocated by Abbott and Gartner, can clash with a series of normative values, if it means allowing private funders to *de facto* "buy" participation rights in global bodies. Richard B. Stewart (New York University) observed that while in the health sector NGOs are fundamental in involving affected people, in the environmental sector, where much depends on negotiations between developed and developing countries, NGOs are perceived as interfering; he then called for a more fine-grained analysis of the differences between the health and environmental sectors and of the various added values of participation. Eelco Szabó (GAVI Alliance) suggested that there may be differences among organizations within the health sector itself, for example between organizations like the Global Fund – in which CSOs are fundamental in reaching vulnerable populations, neglected by governments – and organizations like GAVI, dealing with vaccines. Jonathan Wiener (Duke University) added that, in the environmental field, the variation in affected parties' involvement is not limited to the distinction between State and non-State actors; moreover, another normative reason for involving civil society actors is that they can help educate civil society on the difficult trade-offs that decision-making entails. David Zaring (University of Pennsylvania) remarked that, in comparing the various institutions, attention should be also paid to their aid-granting nature and to their differing status under international law. Sabino Cassese stated that, first of all, Abbot and Gartner's paper interestingly implies that civil society participation at the local level can also be influenced by global factors, such as an organization's institutional context and path-dependence. In relation to Biasco and Quarta's paper, perhaps the reason why the "rule of science" plays such a central role at the global level is that there is a need to find a common language, which only science is capable of providing. Finally, while the papers all focus on legitimacy as a bottom-up process fostered by civil society participation, it is worth exploring how, at the global level, legitimacy might also flow horizontally, from one structure to another.

The second session, titled **"Coordination, Separation and Conflicts between Public and Private Regulation"**, included the following papers: "Informal Co-Regulation among Public and Private Regulators: Lessons from the Payment Systems", by Agnieszka Janczuk Gorywoda (PhD candidate at the European University Institute), "What If Publicness Is the Problem? On the Ultra-Hybrid Regulation across the Taiwan Strait and the Functional Limits of Global Administrative Law", by Ming-Sung Kuo (Assistant Professor at the University of Warwick School of Law), "Public and Private Partnerships in Cross-border Policing: The Evolving Role of Private Entities" by Wui Ling

Cheah (Assistant Professor at the National University of Singapore Faculty of Law), and "Law as a Registered Designation of Origin: The Case of Financial Law", by Bertrand du Marais (Conseilleur d'État and Professor at the Université Paris Ouest Nanterre La Défense). The papers were discussed by Susan Rose-Ackerman (Yale Law School) and David Zaring (University of Pennsylvania).

Janczuk Gorywoda analyzed the Single Euro Payments Area (SEPA), qualifying it as an instance of "informal co-regulation", a specific regulatory strategy characterized by: simultaneous rule-making by both public and private regulators, minimal or non-existent formal relationships between public and private regulators, the sharing of the same general regulatory goal, complementarity of public and private regulation, and the exercise of discretion by both regulators. The paper argues that the model provides several benefits, namely expertise and flexibility (brought in by private regulators), a certain degree of oversight over the pursuance of the public interest and over the effectiveness of regulation (assured by public regulators), and flexibility in public-private interactions - while the main drawbacks are diluted accountability and a limited degree of control over private regulators. Ultimately, emphasizing the public-private partnership in the regulatory enterprise might help conceptualize more appropriate accountability regimes, and the concept of informal co-regulation could be usefully applied to other sectors as well. Kuo, in contrast, analyzed the peculiar cross-straits relationships between Taiwan and China that, for political reasons related to China's refusal to recognize Taiwan as an autonomous entity, have been delegated to two private legal persons, the Straits Exchange Foundation (SEF) and the Association for Relations Across the Taiwan Straits (ARATS), acting on behalf of Taiwan and China respectively. The paper discusses the ways in which global administrative law can keep private or hybrid administration in line with the public interest and argues that, in this case study, the effectiveness of public law instruments – namely parliamentary control, executive oversight, or self-imposed requirements of transparency, impartiality and fairness – is diminished. The paper concludes that global administrative law reaches its limit when a regulatory body is deliberately designed by public authorities to avoid publicness, and non-publicness constitutes an end in itself. Cheah analyzed the data processing arrangements that Interpol has concluded with a variety of public and private entities in order to pursue its mandate of crime prevention and suppression, examining Interpol's move towards legalization and its development of data processing frameworks. The paper addresses the question of Interpol's legal accountability to entities and individuals affected by its data processing decisions, focusing on dispute resolution procedures and on the supervisory role of the Commission. The author argues that, while significant improvements have been made in recent years, particularly with respect to the Commission, claim procedures are still primarily State-centric and do not adequately distinguish between the organization's different stakeholders, finally suggesting that there is a need for Interpol to tailor more closely its "*post facto* accountability" mechanisms. Lastly, Du Marais analyzed the use of UK-US financial law as a sort of technical standard for the financial industry, and the way in which the spread of UK-US law has driven a growing trend towards implicit vertical integration. According to the author, this phenomenon – the result of an excessive reliance, by public regulators, on industry self-regulation – may explain some causes of the current financial crisis, or at least the reasons for its magnitude. Contrary to the "law and finance" theory, which argues for the existence of a legal framework that is more efficient than others in promoting the development of financial markets, the author argues that this

standardization has limited financial innovation and reinforced the market position of a limited number of operators. The standardization of the legal model has also contributed to the standardization of financial products, exposing the industry to the flaws of the dominant model, whereas a certain degree of "juridiversity" would have helped to spread the risks.

Susan Rose-Ackerman commented on some of the more engaging issues that emerged from the papers. In the case of Interpol, she suggested that there is a tension between the technical nature of the organization and the legal and political implications of its activities, so it will be interesting to verify States' willingness to set up formal legal frameworks for such action. The papers by Janczuk Gorywoda and du Marais are in a way complementary, underlining, in one case, the advantages of standardization and uniformity in financial markets and, in the other case, their possible risks. However, it might be important to analyze further the role of the British-American model in the financial crisis and to ponder whether the crisis could also have a constructive effect, by stimulating the emergence of new legal standards. The Taiwan-China case is fascinating as it shows private organizations being used by governments as proxies for inter-State negotiations; this mechanism strips the ordinary organs of State of their functions, and ends up being very opaque. Another interesting field of study could be found in anticorruption institutions, which pose many legal and political issues analogous to those that have emerged in the papers. David Zaring commented on the fact that some of the challenges and constraints faced by global organizations are very similar to the ones tackled by domestic administrative law: the Interpol case constitutes an interesting instance of principal-agent issues (i.e. how to control the agent's use of data provided to it), Kuo's paper shows the use of private entities in implementing matters of public interest, du Marais highlighted issues of capture and entrenchment in the financial field, while Janczuk Gorywoda focused on another problem of the public-private dichotomy in regulatory systems, namely how to deal with technical expertise and with the possible creation of barriers to entry. Therefore, at the global level, when public international law instruments are not available, the use of administrative law mechanisms could perhaps help in solving some of these problems and making global institutions more legitimate. With regard to SEPA, on the other hand, it would be interesting to further analyze to what extent the involvement of private subjects could lead to collusion, price fixing and barriers to trade. In relation to du Marais' analysis, it would be interesting to clarify whether the emergence of network effects was casual or orchestrated. Finally, in the case of Interpol there is a tension between the need to make the organization more effective and the need to ensure data privacy; the question is to what extent the bespoke contracts which Interpol has adopted up to now, in the place of of more traditional rule-making, will be sufficient.

The third session, chaired by Richard B. Stewart and titled **"The Interplay between National and Supranational Levels in Private Regulatory Intervention"**, included the final group of papers: "The Global Fund to Fight AIDS, Tuberculosis and Malaria: A New Type of International Organization", by Gülen Newton (Legal Counsel and Director of the Legal Services Unit of the Global Fund to fight HIV/AIDS, Tuberculosis, and Malaria), "The Role of Domestic Administrative Law in the Accountability of Transnational Regulatory Networks", by Ayelet Berman (Research Assistant at the Centre for Trade and Economic Integration and PhD Candidate at the International Law Unit of the Graduate Institute of International and Development Studies of

Geneva), “The International Conference on Harmonization of Technical Requirements for the Registration of Pharmaceuticals (ICH), Multinational Corporations and National Agencies: Who is Doing What in the Field of Pharmaceutical Regulations?”, by Stéphanie Dagron (*chercheur* at the Institute of Biomedical Ethics of the University of Zurich), and “Going Against the Grain: When Private Rules Shouldn’t Apply to Public Institutions”, by Rutsel S.J. Martha and Sarah Dadush (General Counsel and Counsel of the International Fund for Agricultural Development - IFAD). The papers were discussed by Eelco Szabó (GAVI Alliance) and Ingo Venzke (University of Amsterdam).

Newton analyzed the Global Fund to Fight AIDS, Tuberculosis and Malaria in order to address the questions raised by some governments regarding whether the Fund is an international organization (IO) or not. After tracing the genesis of the establishment of the Global Fund, the paper emphasizes that being qualified as an IO is fundamental, as such a definition implies the recognition of privileges and immunities which are necessary for fulfilling efficiently the institution’s mandate. To this end, the author underlines a series of factors that make a persuasive case for the characterization of the Global Fund as an IO: namely, States implicitly recognize the Global Fund as an IO, the Global Fund has international legal personality, its structure is analogous to other IOs, it is established to fulfill a public mandate, flowing from international political and governmental commitment, and it holds relationships with other IOs. Berman examined the role of domestic law in ensuring the accountability of “transgovernmental regulatory networks” (TRNs), focusing on the International Conference on the Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH) – a public-private network of drug regulatory authorities and industry associations from the US, EU and Japan, that harmonizes drug registration rules – and on US administrative law. The author concludes with a series of findings: on the one hand, domestic law has an important role in enhancing TRN accountability, for example by imposing on domestic regulators procedural or substantive requirements (which, if the concerned member is a powerful State, end up being *de facto* imposed to the network as a whole), or by developing notice and comment procedures. On the other hand, however, domestic administrative law is less effective in ensuring accountability towards external stakeholders (non-member countries and other affected entities), and must therefore be complemented with mechanisms at the global level. Dagron’s paper, too, focused on the ICH, in order to identify mechanisms and procedures that could make the ICH more accountable and legitimate given the *de facto* effectiveness of its standards also in non-participating States. The author finds that ICH decision-making procedures are still restrictive with respect to non-participant regions and raise transparency concerns. The ICH has already made some steps to promote the participation of non-members, and has strengthened the public element of its hybrid (public-private) nature, by reinforcing cooperation with the WHO. However, various problems still remain, like the need to guarantee the effective participation of developing countries, given their frequent lack of expertise, and to promote more transparent procedures. Finally, Martha and Dadush analyzed the problems generated by applying to the International Fund for Agricultural Development (IFAD) – an inter-governmental organization dedicated to development finance – the accounting standards developed by the International Accounting Standards Board (IASB), namely the International Accounting Standards, and the International Financial Reporting Standards. In particular, loan portfolio valuation standards require using fair market value (rather than nominal

value) measurement techniques, which are incompatible with IFAD loans and provide its governing bodies with non-relevant financial information, eventually causing them to adopt a double accounting mechanism, leading in turn to "institutional schizophrenia". At the same time, however, abandoning the standards would have detrimental reputational effects. The authors emphasize that best practices are not universally applicable and recommend more critical institutional approaches in adopting them; they also advocate more robust governance structures, to avoid institutional digressions and strengthen the organization's position *vis-à-vis* external standard setters, which could eventually lead to the adoption of better, more tailored standards.

Eelko Szabó commented on IFAD's case, reflecting on whether abandoning IASB standards would really affect its reputation and on what are the real interests in following them. Instead, with regard to the problem of private sector participation and accountability in the ICH, he underlined the fact that private company involvement is fundamental for organizations in the health sector to work properly, and emphasized the need to find ways to contain and manage their conflicts of interests. He also reflected on the difficulties, identified by Dagron, which developing countries encounter in following ICH standards, and reflected on their trade implications. He also wondered whether, because of the developing countries' weak position in international negotiations, the WHO could really help their situation. Perhaps the bottom-up approach, suggested by Berman, could be more useful in keeping the network in tow; however, external stakeholders could still have difficulties, as participation rules in the various countries could differ quite a lot. Finally, in relation to the Global Fund, he reflected on the type of message the organization would be sending by asking for privileges and immunities, and remarked that, in any case, such immunities could not derive from customary international law, but would have to be expressly granted to it through a treaty. He also observed that States, by according privileges to the Fund, would be also granting indirect privileges to the organizations that receive its funding. Ingo Venzke commented that, in relation to the Global Fund, privileges and immunities would not necessarily follow from its qualification as an international organization, but would have to be explicitly granted. What could be more stressed, instead, among the various arguments in favor of granting such immunities, is independence from the member States, rather than mere operational necessity. Finally, it would be interesting to know more about the practical difficulties encountered by the Fund. In relation to Berman's paper, he underlined the need to explore further the interaction between the national and the international level: analyzing the difficulties that national actors face in feeding into international processes, being aware that national actors often seek international commitments to overcome their domestic competitors, considering that processes aimed at consensus require largely unconstrained actors at the national level, and, finally, keeping in mind the very different weight of national constituencies in developed and developing countries. Dagron's paper effectively highlights the underlying elements of normative choice in private participation, and the tension between the interests of private companies and the value of consumer protection. What could be further explored are the trade implications of ICH standards and their relation to the WTO BTB Agreement, which could add to their *de facto* authority, thus enhancing the network's legitimacy. In relation to IFAD's case, Venzke agreed with Szabó in questioning the reasons that lead to the adoption of IASB standards, but still defended the usefulness of the fair market value standard (for example, in relation to possible financial instability of States receiving IFAD funding). Finally, he stressed the need to be

more critical about the use of non-binding norms at the international level, as they often constitute attempts of the more powerful to avoid scrutiny: it would therefore be necessary to consider more closely the promoters of these forms of regulation, and their beneficiaries.

During the discussion that followed, Susan Rose-Ackerman, agreeing with Venzke, defended the usefulness of adopting the fair market value accounting approach in IFAD's operations. Maurizia De Bellis (University of Rome, Tor Vergata) remarked that the ICH should perhaps be categorized as a hybrid network rather than as a transnational regulatory network, since it represents a public-private partnership. She also emphasized the need to clarify whether the domestic accountability mechanisms described by Berman have been used in practice and whether they have been effective, and to consider the possible trade-offs of notice and comment procedures (in the Basel Committee, for example, such procedures led to differentiated applications of the standards, ultimately impairing harmonization). Finally, she mentioned the need for IFAD to voice its concerns in order to influence the standard adoption process, and to do so within the IPSAS, rather than the IASB. Mario Savino appreciated Berman's highlighting of the importance of transnationalism, which is currently underestimated by many governments, but also observed that domestic controls over transnational processes come at a cost (for example, constraints on actors at the national level could hinder their effectiveness at the transnational level). Savino remarked that the practice of *consensus* could lead to a "joint decision trap"; the tension between accountability and efficacy in decision-making processes should therefore be further explored.

At the end of the seminar, the organizers assigned a prize to the most promising paper: Ayelet Berman's "The Role of Domestic Administrative Law in the Accountability of Transnational Regulatory Networks". It was also decided that selected papers from the seminar will be published as GAL working papers.

The floor was then opened to updates and reports from the participants.

First of all, participants were reminded that the eighth GAL Seminar will take place in Viterbo on June 15-16, 2012. The selected topic is "*Indicators as a Technology of Global Governance*", and the aim is to examine the problems posed by the growing use of indicators in global governance, focusing on the possibility of designing legal frameworks in this field. Such issues have been the designated subject of the prominent New York University School of Law project on *"Indicators as a Global Technology/Governance by Information*", directed by Kevin Davis, Benedict Kingsbury, and Sally Engle Merry, working closely with Angelina Fisher, Richard Stewart, Meg Satterthwaite and other NYU faculty (http://www.iilj.org/research/IndicatorsProject.asp). Applicants for the GAL Seminar are thus invited to send abstracts by November 30, 2011, and those selected for the presentation will have to provide full papers by May 10, 2012 (more information is available at http://www.irpa.eu/gal-section/gal-seminars/1910/viterbo-viii-2012/).

Several papers on GAL and governance issues, drawn from the 2010 World Bank Law, Justice and Development Week symposium, have recently appeared in a special edition of the *World Bank Legal Review* devoted to "International Financial Institutions and Global Legal Governance" and edited by Hassane Cissé, Daniel B. Bradlow and Benedict Kingsbury.

In addition, the third edition of the *GAL Casebook* (edited by Sabino Cassese, Lorenzo Casini, Mario Savino, Marco Macchia, Euan MacDonald and Bruno Carotti, with the cooperation of Eleonora Cavalieri) is now forthcoming.

Several other publications and projects are also underway: "*Beyond Dispute: International Judicial Institutions as Lawmakers*", the results of research undertaken under the auspices of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, will be published in the *German Law Journal*. The University of Amsterdam has launched a research project on post-national rulemaking, coordinated by Deirdre Curtin, Martijn Hesselink and André Nollkaemper, and the Hague Institute for the Internationalisation of Law is following projects on "*Informal International Law-making*", coordinated by Joost H.B. Pauwelyn, Gabrielle Marceau, Jan Wouters and Ramses A. Wessel, and on "*Private Transnational Regulation*", coordinated by Fabrizio Cafaggi. Richard B. Stewart then indicated a series of projects at the New York University School of Law – on "*International Climate Finance*", "*Investment Law*" and, as mentioned previously, *"Indicators as a Global Technology/Governance by Information*".

With this the seminar was closed; organizers and participants look forward to next year's event.

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