

GLOBALIZATION AND ITS IMPACT ON INTERNATIONAL LAW: TOWARDS AN INTERNATIONAL RULE OF LAW?

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“The expansion of the rule of law in international relations has been the foundation of much of the political, social and economic progress achieved in recent years. (...) The new millenium is an appropriate occasion to reaffirm the primary objectives of our Organisation and to focus on them anew. Establishing the rule of law in international affairs is a central priority.”

Kofi Annan

Introduction

1. The historical roots of the rule of law

The 17th century has witnessed the birth of both the modern State, on the one hand, and the International (Westphalian) society and International law¹, based

¹ For this view on the relationship between the Peace of Westphalia (and the ensuing society of nations) and International Law, see John Westlake, *Chapters on the Principles of International Law*, Cambridge, 1894, pp. 54-59; Antoine Hobza, “Questions de droit international concernant les religions”, *RCADI*, 1924, vol. IV, t. 5, pp. 377-379; Arthur Nussbaum, *A Concise History of the Law of Nations*, New York, 1954, Macmillan, pp. 115-118; Leo Gross, “The Peace of Westphalia”, *AJIL*, 1948, vol.42 pp. 20-41.

on that modern State^{2, 3}, on the other hand.

Since then the principle of the rule of law⁴ has emerged as well: as a principle strictly connected with the modern State. The principle of the rule of law is applied within the State and its legal order.

Simultaneously, the principle of sovereignty became the central legal principle of International Law, ruling over the relations between the modern States⁵.

The former principle, in its domestic camp, appeared as an evidence of the superior, “vertical”, hierarchical, coercive power of the State and its representatives as well as law over the national civil society. State organs would also be entrusted with making it come true, by enforcing the commands set by the ruler or the legislator.

The principle of sovereignty, on its international side, stood as the normative description of a “horizontal” society, one where there is no ‘*suprema potestas*’, no supreme power over the State. The principle was devised precisely to protect that entity and its liberties. The relationship between sovereignty and the State became so “compelling”, that, as a contrast thereto, not few equated the international society with a state of anarchy⁶ or a billiard-board⁷, where the States, the opaque “balls” in the game of the international society, would regularly clash and sometimes annihilate each other⁸, in their constant struggle for power⁹. Simultaneously, in their very

² The State is conceived as the sole holder of public authority (‘*Hoheitsgewalt*’) seen as original, supreme, singular, and indivisible. See Georg Jellinek, *Allgemeine Staatslehre*, 3rd ed., Bad Homburg, 1960, pp. 427-504. See also Hans Schneider, “Gewalt, öffentliche”, in Roman Herzog *et al.* (eds.), *Evangelisches Staatslexikon*, vol. 1, 3rd ed., Stuttgart, 1987, Kreuz Verlag, cols. 1123-1125.

³ For an analysis of the legal and political status of states in the earlier times of the international system, see Wilhelm G. Grewe, *The Epochs of International Law* (translation by Michael Byers), Berlin, 2000, Walter de Gruyter; Jost Delbrück and Rüdiger Wolfrum (eds.), *Völkerrecht*, Bd I/1, 2nd ed., Berlin, 1989, Walter de Gruyter, pp. 2-21.

⁴ Vide Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, 5th ed., Coimbra, 2002, Almedina, pp. 93-100 and 243-281; Ulrich Karpen, *Der Rechtsstaat des Grundgesetzes*, Baden-Baden, 1999, Nomos; Philip Kunig, *Das Rechtsstaatsprinzip. Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland*, Tübingen 1986, Mohr.

⁵ See Hans Kelsen, “Théorie générale du droit international public: problèmes choisis”, *RCADI*, 1932, vol. IV, t. 42, pp. 121-351.

⁶ Hedley Bull, *The Anarchical Society. A Study of Order in World Politics*, 2nd ed., New York, 1995, Columbia University Press.

⁷ Georges Abi-Saab, “Preface”, in M. Bossuyt, *L’interdiction de la discrimination dans le droit international des droits de l’homme*, Brussels, 1976, Bruylant, p. viii.

⁸ A. Cassese, *International Law in a Divided World*, Oxford, 1991, Oxford University Press.

⁹ This is the view of the Realists (and, for this purpose, also of the neo-realists, or structural realists, namely Kenneth Waltz). The seminal work of reference is still H. J. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*, New York, 1948, A.Knopf. For other more recent contributions, one may see the summaries or references in Oona A. Hathaway and Harold Hongju Koh, *Foundations of International Law and Politics*, New York, N. Y., 2005, Foundation Press, pp.

“roundness”, they also amount to a good, “geometrical” image of perfection, as well as the right representation of the fact that the structure encapsulated the citizens. The State was a round black box, casting a non-pierceable veil over the societal realm, by then devoid of practically any legal subjectivity.

National law, progressively based on the rule of law and supported by the State authorities as the armed arm which would make it come true, quickly fared well, developed and managed to rule basically every mode of life within the confines of the State.

By contrast, International Law came to correspond to a minimal and sporadic, contingent law, since it is based on the variable will of the States¹⁰ (it is nothing more than the “*Law of Nations*”¹¹) and regulates nations’ interactions with each other and, scarcely, with foreign nationals, touching only some discreet domains, such as the war and peace, sea navigation, commerce, diplomacy and the attributes of the States. It is a Law only devoted to ensuring coexistence¹² between States enclosed in themselves and back to back to the neighboring ones.

Furthermore, this was a “toothless” law, a tiger which would just roar but not really bite, due to its systemic properties, namely the lack of institutions capable of adjudicating conflicts and enforcing the block of legality in case of non-compliance, particularly if this lack of compliance was due to the powerful States. At the level of implementation, it was negotiation, politics, will of States, which would resurface and, ultimately, determine the facts, not Law. Law lacked distinctiveness *vis-à-vis* the political realm, that of the club of some European (Christian) States, which only progressively co-opted other States to join this restrict society. International Law mirrored reality. It was nothing else than a ‘*post hoc*’ condoning of the balances of power formerly struck in the battlefield or in diplomatic settings. Its basic principle, that of sovereignty, amounting to nothing else than, in this sense, a permit to act, is thus equivalent, as Stephen Krasner denounced, to “*organized hypocrisy*”¹³.

42-48 and David Held and Anthony McGrew (eds.), *Governing Globalization – Power, Authority and Global Governance*, Cambridge, 2002, Polity, pp. 237-248.

¹⁰ As Ivan Shearer, “In Fear of International Law”, *IJGLS*, 2005, vol. 15, n°1, p. 346, put it, “*international Law is essentially a voluntarist system of law*”.

¹¹ This was still the lesson by J. Brierly in his acclaimed manual, in the sixties. See J. L. Brierly, *The Law of Nations*, 6th ed., Oxford, 1963, Clarendon Press (Reprint 1967).

¹² The category, related to the traditional understanding of international law is usually opposed to the one of “*cooperation*”, “promoted” in the international legal scholarship by the seminal work by Wolfgang Friedmann, *The Changing Structure of International Law*, London, 1964, Stevens. For other concepts trying to capture the polarized trends of evolution of International Law, permit us to refer to Paulo Canelas de Castro, *Mutações e Constâncias da Neutralidade*, Coimbra, 1994, *Mimeo*.

¹³ Stephen D. Krasner, *Sovereignty. Organized Hypocrisy*, Princeton, NJ, 1999, Princeton University Press.



In any event, both these principles are indispensable to convey the traditional century-long image of the State and its (dual) Law.

Domestic law or ‘*inneres Recht*’, on the one side, is strong, as the State is strong towards its citizens and other “powers” within its territorial confines.

International Law or ‘*äusseres Recht*’ instead, as an expression of the sum of the wills of the States, in principle sovereign or free, was weak, as weak is the State’s readiness to be bound or restricted in its fundamental freedom. It does not surprise therefore that for so many centuries, up to the end of the XX really, the pattern was that the States would act arbitrarily and would even react to the gradually agreed upon limitations set on the very use of the individual force (a progressive but also slow and difficult input of the whole XX century).

International Law was not only accidental and structurally weak. Due to the lack of centralized institutions, equivalent to those of the State in the domestic realm, it also depended on the very addressees of its rules, the States, on their goodwill, to exert any effect, albeit a minimal one. Or, as Triepel¹⁴ so suggestively put it, this general was rather powerless, depending on the chieftains to have his war won. The reigning dualism, which conceptually and normatively for long presided over the relations between International law and domestic law¹⁵, was hence nothing else than a well-founded description of a fact of life.

This image basically remained true until the end of the eighties in the last century, in spite of the two dramatic moments of hope and dreaming associated with the end of the two World Wars, two periods of high expectations^{16 17}, however

¹⁴ Heinrich Triepel, “Les rapports entre le droit interne et le droit international”, *RCADI*, 1923, vol. I, p. 106.

¹⁵ One of the most representative names of this reading of the relationship between international law and national law, depicting them as separate spheres of a world based on sovereign statehood, is of course Heinrich Triepel. Apart from the work mentioned in the previous footnote, see also *Völkerrecht und Landesrecht*, Leipzig, 1899, Hirschfeldt.

¹⁶ It goes without saying that we do not intend to diminish the significant developments of international law associated with these periods, in which the changes we shall subsequently address actually seek inspiration and of which they are a continuation. Indeed, in many ways they were even more momentous or more perceptible than the current ones, resulting more from an interpretative, reconstructive work than from the actual enactment of new positive law. We had been trying to capture several mutations (along with continuities) introduced by that period of rethinking of international law in former works, such as Paulo Canelas de Castro, *Mutações e Constâncias do Direito da Neutralidade*, Coimbra, 1994, *Mimeo*; “Mutações e Constâncias do Direito Internacional do Ambiente”, *Revista Jurídica do Urbanismo e do Ambiente*, 1994, n° 2, pp. 145-183; “Sinais de (nova) Modernidade no Direito Internacional da Água” (Signs of (a new) Modernity in International Water Law), *Nação e Defesa*, 1998, n° 86, 101-129; “De quantas Cartas se faz a paz internacional?”, in Antunes Varela, Diogo Freitas do Amaral, Jorge Miranda e J. J. Gomes Canotilho (eds.), *Ab Uno Ad Omnes. 75 Anos da Coimbra Editora*, Coimbra., Portugal, 1999, Coimbra Editora, pp. 1005-1060; “Do ‘*Mare Clausum*’ ao ‘*Mare Commune*’? Em busca do Fio de Ariadne através de cinco

rapidly shattered by the coming about of the Cold War¹⁸.

2. Globalization¹⁹: does it make a difference?

With the ongoing *current era of globalization*^{20 21}, and the ensuing *results of*

- end of the division of the world; as well as
- the launching of a powerful process of denationalization^{22 23}

séculos de regulação jurídica”, Paper presented at the Conference “Portugal-Brasil: ano 2000”, held in Coimbra, Portugal, 2000 (*forthcoming*); “A intervenção armada e o Caso do Kosovo – Novos Elementos para a Construção de uma Nova Ordem Internacional?”, *Nação e Defesa*, 2001, n. 97, pp. 75-134; “Intervenção Humanitária e Assistência Humanitária no Pós-Guerra Fria: lembrança do passado e esperança num futuro mais humano?”, *BFDUM*, 2003, vol. 15, pp.165-187. However, we do understand that the Cold War weakened or rendered less clear or consistent the innovative features of that newer normative message. It is in this sense that the developments which we shall subsequently scrutinize may be seen as introducing important new elements to the outstanding reconstruction of the international legal system.

¹⁷ This major mutation is also detectable at the level of the international society, henceforth more usually referred as *international community*, a conceptual transition which benefits from the works of the German theorists of the nineteenth century and above all Ferdinand Tönnies (*Gemeinschaft und Gesellschaft. Grundbegriffe der reinen Soziologie*, Darmstadt, 2005, Wissenschaftliche Buchgesellschaft) and the structures (*Gesellschaft-Gemeinschaft*) therein established.

¹⁸ Relating to questions of security, permit us to refer to Paulo Canelas de Castro, *Mutações e Constâncias da Neutralidade*, Coimbra, 1994, *Mimeo*.

¹⁹ It appears superfluous here to attempt, as many previously did, a definition of globalization. Suffice it to note that these definitions are usually manifold which seems to reflect the complexity and multi-dimensional character of this phenomenon as well as the apparent consensus that it refers to a set of processes. Some of these processes – for instance, mass migration, global terrorism, climate change, destruction of the ozone layer – may be seen to be objective. Others have a more pronounced subjective nature. We would count here a growing perception that a formerly *state-centered* political process is evolving towards a more *multilayered* one where other actors interplay in the pursuit of public goals and fulfillment of public tasks. Similarly, Jost Delbrück, “Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State”, *IJGLS*, 2004, vol. 11, n°1, p. 33, note 7.

²⁰ For all its shortcomings, the term globalization is now the most commonly used term to describe the multifaceted and complex developments that the world has been experiencing in the last decade and a half as well as the changes it has been imparting to the traditional conception of sovereignty.

²¹ For a comprehensive analysis of the nature of the process of globalization, here impossible, see David Held *et al.* (eds.), *Global Transformations: Politics, Economics and Culture*, Cambridge, 1999, Polity Press., chapters 1, 3-5; Ulrich Beck, *What is Globalization?*, Cambridge, 2000, Polity Press; Stefan Oeter, “§1. Welthandelsordnung im Spannungsfeld von Wirtschaft, Recht und Politik”, in Meinhard Hilf and Stefan Oeter, *WTO-Recht. Rechtsordnung des Welthandels*, Baden-Baden, 2005, Nomos, pp. 1-9.

²² Or “*retreat of the State*”, an expression *adroitely* coined by Susan Strange, *The Retreat of the State. The Diffusion of Power in the World Economy*, Cambridge, 1996, Cambridge University Press. In any event, “*diffusion of state power*”. In this milder sense, Anna-Karin Lindblom, *Non-Governmental Organisations in International Law*, Cambridge, 2005, Cambridge University Press, p. 12.

²³ The German term to designate this trend of gradual decline of the capacity and status of the states,



· the coming about of a more intricate and plural society^{24 25 26}; and

· the apparent triumph of a liberal vision of the world²⁷ which further promotes, theoretically, the emancipation of non-state actors;

and with the *characteristics* that the specialised scholarship²⁸ attributes to this phenomenon rendered buzzword of our times, namely those of

· increased interdependence between the nations of the world;

· increased necessity of the States to cooperate within international organizations and through multilateral treaties;

· increased transfer of previously typically governmental functions from the state to other “levels” of governance, both “higher” (international organizations, global or regional) and “lower” (non-state actors, acting within states or in a

namely in the production of public goods necessary to meet the challenges of our times, such as the ones of the protection of human rights, the environment and international security and the conception of the requisite instruments of global governance, ‘*Entstaatlichung*’, appears conceptually more appropriate. Conversely, the expression ‘*dédoublément fonctionnel*’, pointed by Georges Scelle, “Le phénomène juridique de dédoublement fonctionnel”, in Walter Schätzel and Hans-Jürgen Schlochauer (eds.), *Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg*, Frankfurt am Main, 1956, Vittorio Klostermann, pp. 324-342, by referring to the state and relying on its power, definitely seems, in many aspects, far from the current reality.

²⁴ Bas Arts, Math Noortmann and Bob Reinalda (eds.), *Non-State Actors in International Relations*, Aldershot, 2001, Ashgate.

²⁵ NGOs have a growing role in the shaping up of this *universal civil society*. Not rarely they act as a kind of self-appointed advocates or representatives of the public interest of the international community, performing different functions such as the ones of monitoring state practice and its compliance with international obligations, expertise providers, both in the consulting, legislative, implementation and adjudicatory phases of international legal regimes. The historical development and the legal status of NGOs under international law are captured by Stephan Hobe, “Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations”, *IJGLS*, 1997, vol. 5, pp. 191-209; Rainer Hoffmann (ed.), *Non-State Actors as New Subjects of International Law: From the Traditional State Order Towards the Law of the Global Community*, Berlin, 1999, Duncker & Humblot; Karsten Nowrot, “Legal Consequences of Globalization: the Status on Non-Governmental Organizations Under International Law”, *IJGLS*, 1999, vol. 6, pp. 579-645; Michael Hempel, *Die Völkerrechtssubjektivität internationaler nichtsstaatlicher Organisationen*, Berlin, 1999, Duncker & Humblot; Ignaz Seidl-Hohenveldern and Gerhard Loibl, *Das Recht der Internationalen Organisationen*, 7th ed., Köln, 2000, Carl Heymanns Verlag, p. 84; Anna-Karin Lindblom, *Non-Governmental Organisations in International Law*, Cambridge, 2005, Cambridge University Press.

²⁶ Suggestively, Jost Delbrück, “Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State”, *IJGLS*, 2004, vol. 11, n°1, p. 33, note 7, speaks of “*the horizontal multiplicity of actors and their vertical interconnectedness*”.

²⁷ Represented, for instance by Francis Fukuyama, “The End of History”, *The National Interest*, 1989, n°16, pp. 3-18.

²⁸ Summary in Manfred B. Steger, *Globalization*, Oxford, 2003, Oxford University Press.



transboundary setting);

- unprecedented trade liberalization at the multilateral, regional and bilateral level;

- exponential development of new information technologies;
- switch from protectionist to open market economies;
- growth of transnational business activity;
- progressive strengthening of democratic values and institutions;
- linkage between disparate locations on the globe into extensive systems

of communication, migration and inter-connections;

- physical expansion of the geographical domain of the global;
- increased impact of global forces of all kinds on local life;
- systems of interaction between the global and the local;
- wide-ranging impact on human existence;
- changed ways whereby sovereign States, businesses and citizens

interact among themselves and with one another;

- expansion of the range of financial, commercial, cultural and social interactions among foreign countries and nationals;

- increasing political relations between people of different countries;
- growing network of international institutions – economic, social and

political – constituting a nascent new global political entity;

- emergence of new norm-generating actors (and the challenge posed by them and their norms);

- development of transnational regulatory regimes to start coping with the global challenges of our times^{29 30 31};

²⁹ For a concise overview of their theoretical underpinnings as well as their forms, see Anthony McGrew, “Liberal Internationalism: Between Realism and Cosmopolitanism”, in David Held *et al.* (eds.), *Global Transformations: Politics, Economics, and Culture*, Cambridge, 1999, Polity, pp. 267-289 as well as James Rosenau, “Governance in a New Global Order”, in David Held and Anthony McGrew (eds.), *Governing Globalization - Power, Authority and Global Governance*, Cambridge, 2002, Polity, pp. 71-73.

³⁰ Their usual definition points to the existence of clusters of (‘self-contained’) principles, norms and procedures as well as more or less institutionalized forms of their implementation, compliance pursuit and dispute-settlement. See Stephen D. Krasner (ed.), *International Regimes*, Ithaca, 1983, Cornell University Press; Volker Rittberger (ed.), *Regime Theory and International Relations*, Oxford, 1990, Oxford University Press; Andreas Hasenclever, Peter Mayer and Volker Rittberger, *Theories of International Regimes*, Cambridge, 1997, Cambridge University Press.

³¹ For their use as mechanisms of compliance inducement in the context of the distribution and preservation of natural resources and other community goods, see Klaus D. Wolf, *Internationale Regime zur Verteilung globaler Ressourcen*, Baden-Baden, 1991, Nomos.



- blurring of the lines between State and civil society;
- blurring of the lines between public and private;
- increased opportunity for discord and friction among the subjects of this more plural and more interconnected transnational society;

as well as its condition of *instrument* aimed at the *goals* of

- raising the standard of living for the majority of the world's people;
- increasing the size of markets and the efficiency of production;
- allowing countries who are short on capital to borrow from those who have a surplus, and even break down some of the barriers and prejudices that have contributed to military conflicts in the past,

something seems, however, to powerfully be moving, particularly in terms of the location and usage of public authority and capacity to ensure the provision of public goods³², so much that the formerly mentioned contrasts between the national and international realms may not be so obvious anymore³³. Several Authors consider them to be part of a *constellation of post-national forms*³⁴, a new reality which calls for a new *regulation*^{35 36 37}, a new *multi-level* (constitutional)

³² A single example may suffice to represent this fact: under the current conditions, a state is not in a position anymore to control the volatile flow of capital.

³³ In this sense, David Held, "Regulating Globalization", in D. Held and Anthony McGrew (eds.), *The Global Transformations Reader*, 2nd ed., Cambridge, 2000, Polity, pp. 422-423.

³⁴ This is, in particular, Jürgen Habermas' approach. See, foremost, "Die postnationale Konstellation und die Zukunft der Demokratie", *Die postnationale Konstellation. Politische Essays*, 2005, Suhrkamp, pp. 91, ff..

³⁵ Ingolf Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?" *CMLR*, 1999, vol. 36, pp. 703, ff. and, by the same Author, "Multilevel Constitutionalism in the European Union", *ELR*, 2002, vol. 27, pp. 509, ff..

³⁶ Jost Delbrück rather speaks of "*a legal framework of a transnational federalism*". See his, "Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State", *IJGLS*, 2004, vol. 11, n°1, pp. 31-55.

³⁷ One of the good reasons for this call for a constitutionalization of the complex and plural transnational, global society which globalization is giving room to, is that the process is imbalanced and elicits legitimate fundamental criticisms. According to this view, globalization needs to be "tamed" (we seek inspiration in the suggestive title by David Held and Mathias Koenig-Archibugi (eds.), *Taming Globalization. Frontiers of Governance*, Cambridge, 2003, Polity Press). These criticisms have been more systematically identified by the "*globalization discontents*" (see Joseph E. Stiglitz, *Globalisation and Its Discontents*, New York, 2002, Norton, as well as David Held and Anthony McGrew, *Globalization/Anti-Globalization*, Cambridge, 2002, Polity). Amongst these misgivings caused by globalization the following seem to constitute the predominant concerns: the apparent isolated exercise of public authority on different levels, the incapacity to limit (if not to curb) an unfettered (wild) neo-liberal global capitalism, the legitimacy deficit of major actors in the process, both for the lack of democratic entitlements or for their lack of transparency, accountability, liability.

law^{38 39 40 41} involving “*constitutional substitutes*”⁴², a reconstruction of international law which precisely is not premised anymore in the equation public authority-state and on the derivative traditional and rigid internal boundaries between the domestic realm of the state and the international one, the realm⁴³ of the relations between states, but still uses constitutional language, constitutional tools and functions so as to better “frame” the new reality with a view to goals and values of the highest importance⁴⁴.

38 The need to structure and develop constitutionally international law seems to be one of the main features of the outstanding rethinking of international law elicited by globalization. We shall return to this issue in the concluding remarks.

39 One of the main reasons for a constitutional rethinking and establishment of values, goals and principles governing this changed “neo-medieval” international system and the corresponding different and pulverised exercise of public authority by both international and non-state actors (Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, pp. 254-255 firstly presented the idea of neomedievalism precisely as a new political context expressed in a complex layering of international, national and subnational organizations with the world society in which individual notions of rights and a growing sense of “world common good” (undermine national sovereignty) has to do with the serious questions of legitimacy, accountability and responsibility that this move raises (apparently in agreement, see Mattias Kumm, “The Legitimacy of International Law: A Constitutionalist Framework of Analysis”, *EJIL*, 2004, vol. 15, n° 5, pp. 907-931).

40 This notion of *multi-level constitution* should be approached ‘*cum grano salis*’. Indeed, if it (positively) suggests that there are different levels or horizontal normative layers which are equally relevant, it may however neglect the vertical and transversal dimensions of interconnectedness of these structures or ‘*corpus iuris*’, which, not seldom, clearly “penetrate” each other (the European Union model being an obvious example).

41 In the political philosophical realm, this is represented by Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, 1999 and “Globalität statt Globalismus – Über eine subsidiäre und föderale Weltrepublik”, in James Bohmann and Matthias Lutz-Bohmann (eds.), *Weltstaat oder Staatenwelt: Für und Wider die Idee einer Weltrepublik*, Frankfurt am Main, 2002, Suhrkamp, pp. 8-31.

42 D. Chalmers, “Post-nationalism and the Quest for Constitutional Substitutes”, *Journal of Law and Society*, 2000, n°178, pp. 192-206.

43 Another reason for this call for a global constitutionalism and one which equally explains why this new constitutionalism has to be multilayered and have an important global, international dimension as well as overcome the traditional boundaries between the national and international realms, is that this need arises in the context of an *erosion of national constitutions* due to globalization. Indeed, confronted with globalization and some of its features (global problems, action by non-state actors from within states’ confines), which demand a transfer of typically state/governmental functions (at least partially) to other instances of exercise of governance or public power, constitutions loose relatively their reach. As a consequence, a need originates for a kind of compensatory move on other levels, namely on the international plane. This simultaneous *voiding* of constitutional functions and their substitutive assumption in other levels is the line of argument put forward by Authors like John H. Jackson, “Changing Fundamentals of International Law and International Economic Law”, *AVR*, 2003, vol. 4, p. 447 and Thomas Cottier and Maya Hertig, “The Prospect of 21st Century Constitutionalism”, *Max-Planck UNYB*, 2003, vol. 7, pp. 261-328.

44 We return to this issue, in a somewhat more extensive but still compressed way, in the Final Remarks.



In view of so many *signs of change* it seems appropriate to *rethink* old solutions, to engage into a typical *reflexive* endeavor.

Hence the *question* which these apparently *changed circumstances* seem to warrant⁴⁵:

Would it be possible that the principle of the rule of law would not be confined anymore to the domestic setting and would instead already be characteristic of and influencing the international society?

If it were so, if indeed we would be witnessing the dawn of an era marked by the emergence of a rule of law at the international level, this would undoubtedly constitute a major progress for Humanity. Most probably, this would also not fail to repercute both on the State and the International Law traditionally based on it.

Before we actually move into scrutinizing the merits of such a hypothesis (Parts I and II) and subsequently its possible meaning (Part III and Final Remark), a first clarification on the *substance* of the understanding of the *notion of Rule of Law* seems warranted, as well as a subsequent one on the *research method*.

3. Rule of Law – Some essential traits

Indeed, one may note first that although it is in practice a very important feature associated with the modern State and its historical development, the rule of law is a notion far from established or unanimous. It may even have become somewhat harder to define⁴⁶. It does not surprise thus that we may enroll many options proposed and with so diverse contents⁴⁷. One of the main contentious points is whether the notion implies a reference to certain values and goals and what these ones may be. The debate involves a more formal conception and one which preaches a more substantive concept, or, as Paul Craig, put it, an argument between a “*thin*” and a “*thick*” concept of rule of law⁴⁸. Whereas the first line of thought stresses formal requirements such as the one of legality, clarity, but avoids going into the quality of the concept’s contents, the latter one claims that there is no rule of law without

⁴⁵ For other pertinent questions relating to wider impacts on International Law, see Ellen Hey, “Globalization and International Law”, *International Law Forum du Droit International*, 2002, vol. 4, n°1, p. 12.

⁴⁶ It may be the more so in current times. Accordingly, Richard H. Fallon, Jr., “The “Rule of Law” as a Concept in Constitutional Discourse”, *Columbia Law Review*, 1997, vol. 97, p. 1.

⁴⁷ See A. Watts, “The International Rule of Law”, *German Yearbook of International Law*, 1993, vol. 36, pp. 15-45; Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, Leiden, 1998, Nijhoff; and, more recently, A. Watts, “The Importance of International Law”, in M. Byers (ed.), *The Role of Law in International Politics. Essays in International Relations and International Law*, Oxford, 2000, Oxford University Press.

⁴⁸ Paul Craig, “Formal and substantive conceptions of the rule of law: an analytical framework”, *Public Law*, 1997, pp. 467-487.

positive values and demands of substantive fairness⁴⁹, in particular private human rights, enforceable by courts or other institutions charged with the control of legality⁵⁰. For instance there seems to be a fundamental divergence between the English tradition (conveyed by the concept of ‘*rule of law*’) and the German one (which is expressed in the ‘*Rechtsstaat*’ notion)⁵¹.

A major *consensual point*, however, is that, with such a concept, one at least necessarily means that politics yields to law and diplomacy yields to jurisprudence.

Indeed, the rule of law is above all, in a “negative” approach, *not* politics⁵². Professor Oscar Schachter has warned clearly that it is not possible to reduce law to politics “*without eliminating it as law*”⁵³.

Whereas politics is variable, arbitrary, law and its rules are not. Law and its rules are certain, stable. Other implications are that with the “rule of law”, contrary to politics, the law is written beforehand as well as its rules are designed and known in advance. Such as that, with the “rule of law”, the law is meant to apply to all equally, and all are equal before the law. No one is beneath the concern of the law and no one is above the law.

That is why it is also a common idea that, whereas power is arbitrary and subjugates, people, legal subjects, can only have credible rights and be free under the law, under the rule of law.

A second major set of implications of the principle is one not anymore of a *substantive*, albeit diffuse *normative nature*, but rather of an *institutional nature*^{54 55}: with the reference to the rule of law one points to the fact that there are institutions,

⁴⁹ This line of thought is represented by J. Raz, “The rule of law and its virtue”, *Law Quarterly Review*, 1977, vol. 93, pp.195, ff. and R. Summers, “The ideal socio-legal order. Its ‘rule of law’ dimension”, *Ratio Juris*, 1988, pp. 154-161.

⁵⁰ In this sense, R. Dworkin, *A Matter of Principle*, Cambridge, Massachusetts, 1985, Harvard University Press, pp. 11-12.

⁵¹ M.-L. Fernandez Esteban, *The Rule of Law in the European Constitution*, The Hague, 1999, Kluwer, pp. 66, ff. See equally B. Kriegel, “Démocratie et état de droit”, in B. Kriegel, *Propos sur la démocratie. Essais sur un idéal politique*, Paris, 1994, Descartes, pp. 31-44, who also refers to the French tradition and holds that while the French and English outlook underline the formalistic elements, the German conception is axed on a substantive view.

⁵² Even better, so as to prevent any misunderstanding, “*the taming of the political realm by law*”, as Gomes Canotilho suggestively formulated it. See his *Direito Constitucional e Teoria da Constituição*, 5th ed., Coimbra, 2002, Almedina, p. 93.

⁵³ Oscar Schachter, *International Law in Theory and Practice*, Norwell, Massachusetts, 1991, Martinus Nijhoff, p. 4.

⁵⁴ *Vide* Richard H. Fallon, Jr., “‘The Rule’ of Law” as a Concept in Constitutional Discourse”, *Columbia Law Review*, 1997, vol. 97, p. 38.

⁵⁵ This is underlined by Morton J. Horwitz, “The Rule of Law: An Unqualified Human Good”, *Yale Law Journal*, 1977, vol. 86, p. 566, even if this also a perspective which the Author critically combats.



independent in character, and open to the relevant legal subjects which ensure, preferably in a compulsory way, like the courts typically do, that this law is implemented and that conflicts are thus settled in accordance with the established principles and rules.

4. On the method: the framework of the analysis – options and questions

The hypothesis, as we saw, was whether there is any room to believe that we may be witnessing the dawn of an era of international rule of law.

To trace this possible truly *seismic transformation*, the one that an international rule of law is much larger today than it certainly was (not) even two decades ago, I will firstly try to quickly sketch some major developments of International Law which intervened in recent times and which seem to be due, directly, to these new trends of globalization. I shall do so particularly by looking at two specific *issue-areas*: trade law and the law on the protection of the environment.

I decided to scrutinize these two major areas of international law because I believe that they stand out for having seen rather dramatic developments come true⁵⁶; but especially because they can be equated with two structural major areas of domestic law, which stands as our instinctive model of law, particularly when the issue of the rule of law is at stake.

The first area is, structurally, what we may, for the purposes, term an International law of *private nature*. Indeed, this is an area of law that is in its essence similar to *domestic private law* because it is mainly designed to protect *private goods*, be they those of the States, the usual International Law subjects, or those of non-State actors.

In such an area, the primary relations to be established typically involve non-State actors or non-State actors and States. At the dispute level, or secondary relations to which the formerly mentioned ones give rise to, they usually materialize into a State or non-State actor's violation of international legal obligations *vis-à-vis* the author of the claim. Wherever the said States intervene, they do so in 'horizontal' relations, typically not ones where they make use of their '*ius imperii*'. A good example, we think, for such an area is International Trade law.

The second area goes about what we may call an International law of *public nature*. This is an area in which International Law is functionally directed at protecting *public goods*, the collective interests or fundamental values of a community of actors, an area where rules are not disposable by anyone in particular but rather are of relevance to everyone in general, where obligations may be '*erga omnes*'. This law is thus structurally to be equated or compared with *domestic public law*.

⁵⁶ Another possible good choice would be the Law of Human Rights.

At the level of primary rules or primary relations, this area usually makes public entities intervene on at least one side. And at the level of secondary relations or that of disputes over the implementation of those primary rules, we usually see non-State actors or even a State file a complaint, about State actors' violations of some rule of the applicable international legal regime, of possible interest to other stakeholders.

Most of the international environmental regimes belong to this area.

For these two issue-areas, and in line with the lessons withdrawn from the quick observation made of the notion of rule of law, I propose to ask, basically, two questions:

Firstly, I shall try to apprehend whether International Law in such areas became more robust as a block of legality in the first place, and how this happened. In other words: if there has been a *legalization* of issue-areas previously immune to International Law.

This move is, we hope, understandable, logical: after all, before we even address the question of the rule of Law, there must be a viable, robust, comprehensive Law there. And the fact is that this has not been the case, in many fields, for many centuries. Indeed, a first indispensable condition for a true rule of law to exist, for Law's Empire, as Ronald Dworkin would have called it⁵⁷, is of course that a particular area of life or issue-area is properly regulated, that there does indeed exist law for that category of situations, that law or right, and not might, is the '*criterium*' governing the applicable human conducts. This means that that field is *rule-oriented* and not *power or diplomatic-oriented*⁵⁸. This move is the more relevant as it contrasts to the prevailing situation in former times. That also supposes that law is properly established in formal procedural and substantive terms, that it is "solid", so to say⁵⁹. Only then shall it stand a chance to exert the influence it aims at over reality. Under this viewpoint, the quantity and the quality of the rules on these matters as well the coherence of the legal building, seem to be a requisite of fundamental relevance⁶⁰.

⁵⁷ R. Dworkin, *Law's Empire*, Cambridge, Massachussets, 1998, Belknap Press.

⁵⁸ See David A. Gantz, "Dispute Settlement Under the NAFTA and the WTO: Choice Forum Opportunities for the NAFTA Parties", *American University International Law Review*, 1999, vol. 14, p. 1031 and John H. Jackson, *The World Trading System*, 2nd ed., Cambridge, 1997, MIT Press.

⁵⁹ Depending on this solidity, we may point to diverse degrees of legalization, measured in terms of degrees of obligation and precision that the norms in question exhibit.

⁶⁰ For similar *criteria* of this legalization of international relations, see K. Raustiala and A.-M. Slaughter, "International Law, International Relations and Compliance", in W. Carlsnaes, T. Risse and B. Simmons (eds.), *Handbook of International Relations*, London, 2002, Sage, pp. 545-559.



Secondly, we shall focus on the *judicialization*⁶¹ of such areas, or, as a default, some move towards more jurisdictional-like institutions and procedures in the control or review of legality.

Behind this query there is a growing concern within the doctrine and the present world in general over an International Law which is really effective, one which does not hesitate to “bite” on its addressees. This is equally the reason which explains, in particular, the many institutional developments that the international scene and its Law have witnessed in a recent past. Or, as another eminent Author put it⁶², this is the implementation hour of International Law, the hour where International Law growingly cares about compliance, is concerned that it is effectively implemented⁶³.

We shall assess whether we may say that there is an *institutional backbone* which ‘*de facto*’ ensures that this possibly growing law gains clout over reality and is indeed influencing reality. Naturally, this shall only be relevant to the problem at hand if, simultaneously, it may be demonstrated that there is a rising number of procedures and entities designed to determine whether international actors comply

⁶¹ Our concept of “judicialization” comprehends two dimensions. On the one hand, judicialization is the process whereby a given dispute settlement procedure becomes increasingly judicialised, participated by courts or comparable institutions making living proof of independence, impartiality, jurisdiction. On the other hand, the term is used to describe the state of an institution which proves to have reached a certain level of characteristics or properties which are usually associated with judiciary instances.

⁶² Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford, 1997, Clarendon Press.

⁶³ Noticeably, this pull towards implementation and compliance goes together with an intense doctrinal attention to cooperative, and non-confrontational means of implementation, means which should complement the more traditional modes of law enforcement, while not completely replacing the latter. Along these lines, Abram Chayes and Antonia H. Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements*, Cambridge, Massachusetts, 1995, Harvard University Press; Christian Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century”, *RCADI*, t. 281, 2001, pp. 358-389 and Jost Delbrück, “Prospects for a “World (Internal) Law?”: Legal Developments in a Changing International System”, *IJGLS*, 2002, vol. 9, pp. 425-427. This trend in the international legal system may be said to run in parallel to a similar one in the domestic one. Indeed, this move is easily detectable in domestic administrative law (in the Portuguese context, see the pioneering study by Sérvulo Correia, *Legalidade e Autonomia Contratual nos Contratos Administrativos*, Coimbra, 1987, Almedina and later, in particular, works by Maria João Estorninho and Pedro Gonçalves). But it may equally be noted that also constitutional norms are not always provided with sanctions and that even a Constitutional Court withdraws its influence and capacity to mold the political reality from, to quote Konrad Hesse, “*its reputation and the strength of its arguments*” (“*Die Macht des Gerichts beruht nur auf seinem Ansehen und auf der Überzeugungskraft seiner Argument*”). See Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed., Heidelberg, 1995, C. F. Müller, para. 567.

with their international commitments⁶⁴ and that these institutions reveal all the characteristics normally attached to judicial entities, namely the independence and some meaningful type of powers or jurisdiction.

Moreover, I venture that in our globalized world, which is also, for that reason, a much more complex and plural one, increasingly involving transnational relations, this also seems to depend, in the first place, on the *scope* of the *actors* who have their voice or mere expectations “heard” in the processes of adjudication. We shall hence also consider questions of standing and access to justice in the field under scrutiny. This appears the more relevant as it may readily be considered that judicialization as a process is a result not only of the presence of court-like institutions but also of a living experience of actual utilization by the relevant social actors of the services offered by these institutions. We shall therefore wonder if there is recognition of ‘*ius standi*’, of procedural rights of participation in decision-making processes and access to administrative and judicial organs to those “*agents of globalization*” in the relevant area: individuals, undertakings, NGOs, multinationals, epistemic communities even⁶⁵.

I

Legalization

Legalization is indeed a characteristic of our times.

We can hardly think of any aspect of international interaction, ‘*rectius*’ any area of human life, really, where International Law has not developed rules and parameters. Even the ones which in a recent past seemed extraneous to the universal legal order – issues such as the ones of pollution, environment, human rights,

⁶⁴ This is the assessment made by qualified observers such as C.P.R. Romano, “The Proliferation of International Judicial Bodies. The Pieces of a Puzzle”, *New York University Journal of International Law and Politics*, 1999, vol. 3, pp. 709, ff; R. O. Keohane, A. Moravcsik and A.-M. Slaughter, “Legalized Dispute Resolution: Interstate and Transnational”, *IO*, 2000, vol. 54, p. 457; Bernhard Zangl and Michael Zürn, “Internationale Verrechtlichung – Ursachen und Konsequenzen”, in B. Zangl and M. Zürn (eds.), *Verrechtlichung-Baustein für Global Governance?*, Bonn, 2004, Dietz-Verlag.

⁶⁵ In this listing we clearly pay intellectual tribute to the theses of the *deliberative supranationalism* and *deliberative democracy* theories, especially their recognition of the relevance of technical and scientific expertise in decision-making, along ethical and social concerns, as well as of the merit of the inputs or deliberations in the public space of individuals, groups, as well epistemic communities. On these theoretical propositions see, for instance, C. Joerges and J. Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology”, *European Law Journal*, 1997, vol. 3, pp. 273, ff. and Harold Hongju Koh and Ronald C. Slye (eds.), *Deliberative Democracy and Human Rights*, New Haven, 1999, Yale University Press.



humanitarian affairs, refugees, terrorism, disarmament, organized crime, commodities, the oceans and their seabed, communications, outer space, transport, cyberspace- are, these days, profoundly regulated or tend to become so.

It ensues, that it does not make sense anymore, today, to doubt, as was recurrent still in the second half of last century, the very existence of International Law, or ask, as many used to do, what has been described as “*the standard sherry party question*” in the field: “*is international law really law?*”. On the contrary, the departing assumption may instead be that International Law has a normative message of its own on any area of life.

It thus may not surprise that, whereas in the past it was of good tone to doubt International Law, to adopt a skeptical attitude towards this legal order, one may today instead speak, with a leading Author like Thomas Franck, of the maturity and complexity or the *post-ontological* hour of International Law⁶⁶. This certainly reveals a different capacity on the part of International Law *vis-à-vis* the States, another capacity to limit or constrain them.

Indeed, International Law has developed even past the traditional realm of the interactions between the States. Beyond involving obligations without and against the state⁶⁷ and comprehending international community^{68 69 70} interests and values^{71 72} as

⁶⁶ Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford, 1997, Clarendon Press.

⁶⁷ See Christian Tomuschat, “Obligations Arising for States without or against their Will”, *RCADI*, 1993, vol. IV, t. 241, pp. 195-374.

⁶⁸ On the concept and its significance in international law, see Hermann Mosler, “The International Society as a Legal Community”, *RCADI*, 1974, I, vol. 140, pp.1, ff.; Hermann Mosler, *The International Society as Legal Community*, Alphen, 1980, Sijthoff; Christian Tomuschat, “Die internationale Gemeinschaft”, *AVR*, 1995, vol.33, pp. 1, ff; Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht : eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, München, 2001, C.H. Beck. It certainly involves the idea that it is a community determined by law and transcending the states which are its main members. Beyond that there is usually an important definitional uncertainty, only partially attributable to the novelty of the phenomenon. The concept seems, however, more precise, in its legal significance, than the one of Humanity.

⁶⁹ In legal instruments, either case law or of conventional nature, see, for instance, ICJ, “Case Concerning the Barcelona Traction, Light and Power Company, Limited (second phase)”, *ICJ Reports*, 1970, 3, para.33; and Preamble of the ICC-Statute, para.4; article 42,b) of the ILC Articles on State Responsibility (2001), Doc.A/CN.4/L.602,Rev.1.

⁷⁰ An important idea associated with the concept is that the international community is a legal community, a community under the empire of law. This concept thus understood has had a major impact on the then incentive European integration, particularly because it was adopted by the European Court of Justice which in it sought dynamic inspiration for its “constitutionalizing” case-law (a point rightly stressed by Joseph Weiler, “The Transformation of Europe”, in J. H. H. Weiler, *The Constitution of Europe, ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration*, Cambridge, 1999, Cambridge University Press, chapter 2.

⁷¹ Indeed contemporary international law, is not anymore a simple law of bilateral relations, a law of



well as addressing more and more the common concerns of Humanity^{73 74}, it now governs not only transnational interactions in that ever increasing array of areas, but also seems willing to expand to certain aspects of the relationship between a nation and its own citizens^{75 76 77}. This trend⁷⁸ only underlines the importance of the challenges ahead.

“neighbours”, which expresses a reciprocal set of rights and obligations (*‘do ut des’*, *‘tit for tat’*), but increasingly comprehends *“poligonal relations”* (for this latter concept, see J. J. Gomes Canotilho, “A responsabilidade por danos ambientais – Aproximação juspublicística”, in INA, *Direito do Ambiente*, 1994, pp. 397-409 and by the same Author, “Relações jurídicas poligonais, ponderação ecológica de bens e controle judicial preventivo”, *RJUA*, 1994, n°1, pp. 55-66) and multilevel normative programs.

⁷² See Bruno Simma, “From Bilateralism to Community Interests”, *RCADI*, 1994, vol. VI, t. 250, pp. 217-384.

⁷³ A vision already anticipated by C. Wilfred Jenks, *The Common Law of Mankind*, New York, 1958, Praeger.

⁷⁴ See Christian Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century”, *RCADI*, 2001, t. 281.

⁷⁵ An example amongst other possible is the trend to conceive standards of human rights or on environmental issues to be applicable to the (not anymore reserved) domestic domain, where laws are enacted accordingly. Article 2(7) of the Charter of the United Nations seems, therefore, increasingly devoid of any practical function.

⁷⁶ Thus may also be viewed the trend towards enabling the individuals to acquire *dual citizenships*, i.e., for the individual persons to become both citizens of their home nations and world citizens (or citizens of regional supranational entities). In the process, international law correspondingly becomes a kind of *private world law* (the *Weltbürgerrecht* visionarily anticipated by Kant in his *Kant Immanuel, Zum ewigen Frieden. Ein philosophischer Entwurf*, (1795), in Karl Vorländer (ed.), *Immanuel Kant. Sämtliche Werke*, 1964, *Meiner*). In this, sense Otfried Höffe, “Globalität statt Globalismus – Über eine subsidiäre und föderale Weltrepublik”, in James Bohmann and Matthias Lutz-Bohmann (eds.), *Weltstaat oder Staatenwelt: Für und Wider die Idee einer Weltrepublik*, Frankfurt am Main, 2002, Suhrkamp, pp. 31.

⁷⁷ Of course, the “opposite” also applies, since there is equally a trend to “elevate” to the international realm problems which were in the past conceived as purely within the confines of national systems. This is conspicuously the case of democracy, increasingly presented both as entitlement for “extraneous” actors (be they other states, international organizations or NGOs) to scrutinize “internal situations” of some particular state and (directly relevant to the point in view) as a principle (if only aspirational, inceptive, exhortatory) of international law (“soft law”). See Gregory Fox and Brad Roth (eds.), *Democratic Governance and International Law*, 2000; Steven Wheatley, “Democracy in International Law: A European Perspective”, *ICLQ*, 2002, vol. 51, pp. 225-247; L. Ali Khan, *A Theory of Universal Democracy: Beyond the End of History*, The Hague, 2003, Kluwer; UN Commission on Human Rights, Resolution 1999/57, of 27 April 1999, “Promoting of the right to democracy”. We shall return to this issue in the Final Remarks.

⁷⁸ This very broad trend may even lead to the mutation of the multi-century designation of the legal field, as has been recently suggested by A. A. Cançado Trindade, “International Law for Humankind: Towards a New *Ius Gentium*”, *RCADI*, 2005, ts. 316 and 317.



A. Legalization – International Trade⁷⁹

The predecessor of the WTO and its enormous body of rules was the GATT, General Agreement on Trade and Tariffs, a Treaty adopted in 1949, after the failed attempt to create an International Trade Organisation through the Havana Charter not ratified by the United States Congress⁸⁰.

International trade used then to be, in essence, the realm of a minimal law, the domain of constant negotiation, if only diplomatic. Those were the “gold old days” when politics and diplomacy prevailed over law, a good reason for some to deride that modest set of rules, the one of the GATT, as the “*General Agreement to Talk and Talk*”.

And indeed, if one would take care to assess the contents of the Treaty, one could not but feel astonished by the number of rules which amounted to nothing more than a mandate to negotiate or to find solutions ‘à la carte’ to the needs (but also to the variable (in)capacities) of the “customers” involved, apart from some very general and not too constraining introductory principles⁸¹.

Indeed, even the more “solid” rules were full of loopholes, waivers or exceptions that rendered their normative message very scarce, a legal illusion at the most. Of the few rules in question, two in particular stand out to highlight this character:

- Art. XIX, on the one hand. It is a provision which allows for the adoption of safeguard measures every time the domestic producers have been hit or run the risk of suffering serious harm. This provision, which is aimed at pre-empting losses in the national economy, entitles a Contracting Party to unilaterally suspend a tariffs obligation or to modify or even withdraw a formerly made concession, from which

⁷⁹ We integrate in this section some results obtained in the course of research performed for the conference “A Globalização e a Organização Mundial do Comércio”, with which we contributed to the Summer Course of 1997 by the Curso de Estudos Europeus of the University of Coimbra, and which we subsequently developed in a legal advice co-authored with Gomes Canotilho for an undertaking fighting for the recognition of its international entitlements of intellectual property. Part of these latter writings have already been published, as may be seen in Gomes Canotilho and Paulo Canelas de Castro “Do efeito directo do artigo 33º do Acordo TRIPS”, in Faculdade de Direito da Universidade de Lisboa (ed.), *Homenagem ao Professor Doutor André Gonçalves Pereira*, Coimbra, 2006, Coimbra Editora, pp. 747-801.

⁸⁰ The episode is evoked by Said El-Naggar, “Developing Countries and the International Trading System”, in Steve Charnovitz, Debra P. Steger and Peter van den Bossche (eds.), *Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano*, Cambridge, 2005, Cambridge University Press, at p. 58.

⁸¹ Such as those on the freedom of trade, and non-discrimination, most favoured nation treatment, national treatment.



serious harm may ensue to local producers. In spite of the fact that such mechanism is originally conceived as an exception to the rule of tariff obligations and the general prohibition of quotas, it is formulated in such wide, vague terms that it involves the risk in practice of becoming the true “rule”. This is the more likely as the other Contracting Parties affected by such measures, in turn, then have the right to suspend equivalent concessions, as a compensation for the losses incurred into. Safeguard measures give rise to other unilateral measures in a retaliatory ascending-spiral.

- Article XXII on consultations, on the other hand. It firstly calls for a favorable consideration in case of consultations and, generally, accords importance to negotiation and dispute settlement through consultations, in accordance with a two-tiered procedure whereby conflicting parties firstly consult each other and only subsequently, in a second phase, defer the matter to the whole ensemble of Contracting Parties.

In view of such an “open-textured” system, it could not surprise that it would most commonly be described as a flexible, political regime, these features being only underlined by the provisional character of the governing treaty.

This traditional picture changed dramatically in the 90s, however.

1. Brief description of the new system⁸²

Whereas the 1949 GATT agreement was nothing more than a group of some short two dozens of vague norms, the ensemble of the agreements adopted in Marrakesh in 1994 is constituted by hundreds of sometimes quite detailed provisions, in a set of specific and other more general Agreements, covering both general and sectoral questions, with normative accuracy and detail, with both substantive as well as procedural and institutional provisions. This already very dense web of norms which by itself insensitively immediately contributing to a rule-specific analysis is, furthermore, strengthened by the conjunction of institutions devoted to its implementation, according to a legal procedure and exerting legal mind decisions, as well as its legal development⁸³. Moreover, this is a living body which has continuously known new progress to keep pace with life’s own evolution, as may, for instance, be evidenced by some recent developments impacting on the TRIPS Agreement, such as the Doha Declaration related to the issue of access to cheap medicines⁸⁴.

We can see this in even greater detail:

Firstly, the Agreement establishing WTO puts an end to the provisional

⁸² For a much more elaborated one, see, in general, Meinhard Hilf/Stefan Oeter, *WTO-Recht. Rechtsordnung des Welthandels*, Baden-Baden, 2005, Nomos, pp. 1-9.

⁸³ Albeit in this latter dimension with weak success, John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge, 2006, Cambridge University Press, pp. 100, ff..

⁸⁴ Doha Declaration on the TRIPS Agreement and Public Health, adopted in 2001.



character of the GATT Treaty when it creates an International Organisation which, furthermore, is expressly endowed with legal personality.

Secondly, and relating to the institutional question, the system has naturally “hardened” by the mere fact of the establishment of a true International Organisation to deal with the trade and trade-related international issues, instead of the nominal meeting place which GATT was.

Thirdly, on the substantive question, whereas one can certainly first recognise that the applicable law still maintains elements of similarity under WTO and GATT - this is at least the case with the provisions of GATT 1947 which were retained as GATT 1994- the overall picture is quite a different one. On the one hand, because additional agreements were concluded in several other areas, thereby truly broadening the scope of international trade law. This may be illustrated by the General Agreement on Trade and Services, covering trade in services. What is more, on the other hand, there are other areas in which agreements were adopted with a view to specify, with much detail, the former general GATT rules. This is for instance the case with food safety standards in the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), and with technical standards in the revised Technical Barriers to Trade Agreement (TBT Agreement). Finally, even questions which, strictly, are different from trade, were henceforth included. Such is the case of the trade-related intellectual property rights, in the TRIPS agreement.

Fourthly, the predictability and the security of the new regime are enhanced⁸⁵, if not else by this mere fact of having more and more detailed rules. This is a development which is of benefit to both States (every State) as well as non-State actors, such as private undertakings⁸⁶.

Fifthly, looking now at the fundamental contents of the regime, it is crucial to see that the relation between rules and exceptions is dramatically reversed. The traditional derogation system underwent an important shift, in that, henceforth, as underlined by some doctrine⁸⁷ and even case-law of the European Court of Justice⁸⁸,

⁸⁵ So much that some are starting to view it as excessive. See John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge, 2006, Cambridge University Press, pp. 100, ff..

⁸⁶ A point underlined by “Enhancing Security and Predictability for Private Business Operators”, *JWT*, 2001, vol. 35, 1, pp. 4-16.

⁸⁷ Norio Komuro, “Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?”, *JWT*, 1998, vol. 32, n° 2, p. 157.

⁸⁸ Thus was the case of the Opinion by the Advocate-General Tesauro in the Case C-53/96, *Hermès International v. FHT Marketing Choice BV*, Judgment of the Court of 16 June 1998, *ECR* (1998) I-3602.

in the WTO context, derogations are admitted only under very strict conditions. Indeed, the very counted derogations which are still exceptionally allowed today face a totally different context, since they now stand not as discretionary, unilateral mechanisms, but as a result and instrument of the application of predefined rules⁸⁹.

This can be verified, looking, with more detail, at those two very solutions previously considered to be the representation '*par excellence*' of the former flexible GATT model: the solutions on compensation and other unilateral measures and consultations:

- Safeguard measures - it is true that compensations and suspension of concessions are still permitted. However, they are now prescribed to be of a provisional nature and appear as instruments for the enforcement of decision. In any event, they are of a residual nature and adopted in accordance with a strict procedure (article 22, paragraph 2). The mechanism thus became an enhancement instrument of the applicable Law and not a derogation thereto.

- Consultations – albeit the principle of consultations and conciliation is maintained, by articles 4 and 5 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes, corresponding to Annex II to the WTO Agreement, the system is henceforth rather characterised by the security and predictability goals mentioned in article 3, paragraph 2. Besides, if it is still true that the litigious cases are first handled by panels, it is no less true that this solution now appears under a totally different light, since the independence of the Members is henceforth clearly ensured by article 8, paragraph 2. Moreover, the new system demands from the panelists an objective assessment of facts as a condition for a decision which thus amounts to a legal decision, one on the conformity of the debated conduct and WTO Law (article 11). It then falls upon the Dispute Settlement Body to adopt the report of the panel, unless an appeal is made to the Appellate Body (article 16, paragraph 4).

2. Significance

All in all, the change from GATT to WTO has amounted to a strengthening of the formerly existing GATT principles and, here and there, even to a change to those principles themselves. This move was justified by the aspiration to more stringently define the obligations impinging upon States, improve the compliance of WTO Members with WTO law and reduce the past traditional ample resort to unilateral

⁸⁹ For their systematic description and analysis, see Castillo de la Torre, "The Status of GATT in EEC Law – Some New Developments", *JWT*, 1992, vol. 26, n° 5, p. 66 as well as Kuyper, Peter-Jan, "The New WTO Dispute Settlement System: The Impact on the Community", in Bourgeois, Berrod and Fourier (eds.), *The Uruguay Round Results – A European Lawyer's Perspective*, Brussels, 1995, European InterUniversity Press, p. 104.



trade measures⁹⁰.

As it now stands, the system ensures in the first place equality in the access to benefits to every (kind of) States.

This is certainly the case with developed countries, first. As Members of the WTO, with rights and obligations systematically established, the developed countries obtain the security and the predictability they seek as a needed framework for world trade and as a firm foundation for the desired continued growth of the world economy⁹¹. Without such a framework, without such a foundation that only the rule of law ensures, there could not be for them the ambitioned assurance of continued growth. The historic trade expansion of developed countries would be impaired. Without the legal developments imported by the adoption of the WTO regime and the rule of law, the world would not be able to count with the true world economy for which most of these countries had struggled for. With the existing world economy the achievability of the ultimate goal pursued may still be distant in time. But it may also be a mere question of time.

That is equally the case with developing countries, as well. Indeed, without the developments brought about by the adoption of all the WTO Agreements and the establishment of an Organisation where every Member State has equal rights and obligations, the developing countries would have remained system-alooof. Likewise, without the rule of (WTO) law, the developing countries that are now (equal) Members of the WTO, would have not become the equals of the developed countries within the WTO, particularly, and this is one of the greatest achievements of the WTO, equals in the WTO dispute settlement system⁹². Without the rule of law and the new WTO dispute settlement system, most probably, the developing countries would be destined forever to remain developing countries, as had happened in the GATT

⁹⁰ See K. Abbott *et al.*, “The Concept of Legalisation”, *IO*, 2000, vol. 54, p. 406.

⁹¹ It should, however, be noted that the degree of precision, certainty and predictability of the conducts prescribed, proscribed, authorized (“*legalization*”, as a degree) varies from agreement to agreement. Some of the WTO agreements are more legalized than others. The degree of precision of most of the rules of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is higher than a key obligation as the national treatment one. Agreeing, K. Abbott *et al.*, “The Concept of Legalisation”, *IO*, 2000, vol. 54, p. 406. It is precisely this higher “*legalization*” of the TRIPS agreement’s rules, in general, and that of its article 33, in particular, which enabled us to claim it to be a “good case” to test the applicability of the concept of direct effect in the WTO context. See Gomes Canotilho and Paulo Canelas de Castro “Do efeito directo do artigo 33º do Acordo TRIPS”, in Faculdade de Direito da Universidade de Lisboa (ed.), *Homenagem ao Professor Doutor André Gonçalves Pereira*, Coimbra, 2006, Coimbra Editora, pp. 747-801.

⁹² For data relating to their record in the experience of the system so far, see Kara Leitner and Simon Lester, “WTO Dispute Settlement, 1995-2003. A Statistical Analysis”, *JIEL*, 2004, vol. 7, pp. 165-179.



times⁹³. That has been the undisputable historical lesson of much of the twentieth century: they would remain at the mercy of *might*, the very might they lack. The emerging economic vigour of countries like China or India is compelling proof that the status of a developing country within an open system is not an immutable destiny.

B. Legalization – Environmental Protection

The issue-area of natural resources used to be, certainly until the seventies and the pioneering international debate which took place in the United Nations Conference on the Human Environment, in Stockholm, in 1972, an almost no man's land in terms of International Law. This was the overall picture, only derogated by a scarce number of rules of vague contents on entitlement, the question of compensation for expropriation and on use (the principle of equitable use, in the particular area of international watercourses, for instance⁹⁴).

It was hence a rather static law, looking mainly at the definition of the legal positions of the States, the rest being basically referred to the overriding “anti-rule” of sovereignty: a (non) domain where those States, once holding an entitlement of some kind, would basically have ‘*carte blanche*’ to do as it would please them.

1. Signs of change

The situation also changed dramatically ever since Humanity has started developing an environmental awareness in the seventies⁹⁵. International Law has

⁹³ For an analysis of their past and current status in the legal system on international trade, see Said El-Naggar, “Developing Countries and the International Trading System”, in Steve Charnovitz, Debra P. Steger and Peter van den Bossche (eds.), *Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano*, Cambridge, 2005, Cambridge University Press, pp. 58-75.

⁹⁴ On the limitations of the principle of equitable use and reasonable utilisation which induced the developments that this “*regime*” has witnessed in the last decade and a half permit us to refer to Paulo Canelas de Castro, “O Regime Jurídico das Utilizações dos Cursos de Água Internacionais no Projecto da Comissão de Direito Internacional”, *RJUA*, 1996, n°s 5/6, pp. 141-162; “The Judgment in the *Case Concerning the Gabčíkovo-Nagymaros Project*: Positive Signs for the Evolution of International Water Law”, *YBIEL*, 1997, vol. 8, pp. 21-31; “The Future of International Water Law”, in FLAD, *Shared Water Systems and Transboundary Issues. With Special Emphasis on the Iberian Peninsula*, Lisboa, 2000, FLAD, pp. 149-216, now equally in *Recent Developments in Water Law. Principles and Comparative Cases*, Lisbon, 2005, FLAD; “Prospects for the Future of International Water Law: The View Projected by the Epistemic Community”, in The International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of International Water Disputes*, The Hague, 2003, Kluwer, pp. 371-416; “Evolução do regime jurídico da relação rio-mar: rumo a um Direito (integrado) das águas?”, *Revista Jurídica do Urbanismo e do Ambiente*, N°s. 21/22, Junho-Dezembro 2004, pp. 159-232.

⁹⁵ For the ethically charged discourse or doomsday predictions, which awoke the consciousness of the



since then clearly “greened”⁹⁶.

This move meant, in the first place, an impressive process of law-making, of rules production. The evolution has been such that the number of treaties alone in the area is, these days, practically incommensurable. Besides, there does not seem to exist anymore an area where there is not a sizeable international regulation. In a short span of time, States, not seldom in conjunction with many other new non-State actors, particularly International Organisations⁹⁷, have managed to craft solutions (principles, rules, mechanisms, institutions) which strike a balance, albeit difficult and always prone to revision, between economic and environmental considerations.

What is more, States, sometimes assisted by the dense network of international organizations in which they increasingly appear embedded⁹⁸ have shown considerable imagination in the innovative legal engineering in which they engaged; indeed, the scope of instruments they resorted to⁹⁹ was such, that it does not seem excessive to say that they have managed to re-invent the whole palette of sources of international law. It is therefore possible to refer to:

- some, albeit few, general legal principles;
- one or two customary rules;
- a string of non-binding resolutions and declarations;
- very numerous treaties concluded for quite specific matters¹⁰⁰.

Many of these latter ones are, however, “framework agreements”¹⁰¹, i.e., they

international society, see John Alder and David Wilkinson, *Environmental Law and Ethics*, London, 1999, Macmillan, pp. 14-16 and Loraine Elliott, *The Global Politics of the Environment*, 2nd ed., New York, N.Y., 2004, New York University Press, pp. 8-10.

⁹⁶ See Philippe Sands (ed.), *Greening International Law*, London, 1993, Earthscan, as well as, in the International Relations context, K.T.Liftin (ed.), *The Greening of Sovereignty in World Politics*, Cambridge, Massachusset, 1998, MIT Press.

⁹⁷ See Loraine Elliott, *The Global Politics of the Environment*, 2nd ed., New York, N.Y., 2004, New York University Press, pp. 93-112.

⁹⁸ See Union of International Associations (ed.), *Yearbook of International Organizations*, 1992, KG Saar Verlag. Which offers an overview of the existing more than 300 ones.

⁹⁹ See José Juste Ruiz, *Derecho Internacional del Medio Ambiente*, Madrid, 1999, McGraw-Hill, pp. 39-86.

¹⁰⁰ In spite of some influential calls to the effect, no effort of codification of a general law of the environment has ever been truly pursued. See A. Ch. Kiss, “L’état du droit de l’environnement en 1981: problèmes et solutions”, *JDI*, 1981, p. 518.

¹⁰¹ For a good definition of these conventions, very frequent in international environmental law, which enshrine only broad principles of state conduct, leaving the establishment of concrete obligations of the parties to the later adoption of other agreements or protocols and even, in the case of highly technical regulations, to technical or expert bodies (such as, for instance, the International Organisation for Standardisation – ISO – or the Comité Européen de Normalisation – CEN), see Anthony Aust, *Modern Treaty Law and Practice*, Cambridge, 2000, Cambridge University Press, p. 97.

stand as general frameworks for further negotiation of yet other agreements^{102 103}.

2. Significance

In the whole, all this very dense network of sometimes very disparate norms is very much a “soft law”.

The fact should however not be frowned upon, since it quite often has a catalyzing effect towards a “harder” law¹⁰⁴. In any event, this rather corresponds to the needs of the members of the International Society. It is the *character*, markedly *functional* and *progressive* of International environmental law, which contributes towards lending its rules a flexible texture, the one typical of “soft law”¹⁰⁵. On the other hand, and in view of the uncertainties that this field involves, States might otherwise not commit themselves, if the normative demand were different, “higher”.

As much as a “*relative normativity*”¹⁰⁶, this “informal normativity” does not correspond by any means to lack of Law; only to a different kind of Law. Actually, today one can even presume that there is some kind of solution in this vast ‘*corpus iuris*’ for every single problem which may arise: indeed, in this albeit infant domain of law, the problem does not seem anymore to be one of the rules to be applied, but rather that they truly are applied, and complied with.

¹⁰² See Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment*, 1992, p.27 and Christian Tietje, *Internationalisiertes Verwaltungshandeln*, 2001, pp. 247-250.

¹⁰³ For this and other innovative normative techniques, such as the definition of *standards* and *asymmetry* of rights and obligations, see A. Ch. Kiss, “Nouvelles tendances en droit international de l’environnement”, *German YBIL*, 1989, vol.32, pp. 260 ; P. H. Sand, *Lessons to be learned in Global Environmental Governance*, New York, 1991, World Resources Institute, pp. 6-14 and D. Caron, “La protection de la couche d’ozone stratosphérique et la structure de l’activité normative internationale en matière d’environnement”, *AFDI*, 1990, pp. 722-724.

¹⁰⁴ It seems indeed inappropriate these days to regard such soft law-making as irrelevant. Firstly, because states are under a good faith obligation to seriously consider whether to comply with such acts (namely when these are adopted in the framework of the family of United Nations organizations – where article 2 (2) of the Charter certainly compels Member that way), particularly when they consented to them. Furthermore, quite often such acts are an expression of an almost universal ‘*opinio iuris*’ and thus can and actually tend to evolve and promote the emergence of a new international customary law, i.e. become *hard law*. Finally, not seldom they have a major impact on law-making at the domestic level as well, inducing states to shape their domestic law accordingly. In this sense, Jost Delbrück and Rüdiger Wolfrum (eds.), *Völkerrecht*, 2nd ed., Berlin, 1989, De Gruyter, vol. 1, part. 1, pp. 26-27 and Paul C. Szasz, “General Law-Making Process”, in Oscar Schachter and Christopher C. Joyner (eds.), *United Nations Legal Order*, Cambridge, 1995, Grotius, pp. 63-64, 96-97.

¹⁰⁵ P. M. Dupuy, “Soft Law and the International Law of the Environment”, *Michigan Journal of International Law*, 1991, vol. 12, 2, pp. 420-435.

¹⁰⁶ Prosper Weil, “Towards Relative Normativity in International Law”, *AJIL*, 1983, vol. 77, pp. 413 *et seq.*. For a more positive assessment, Ulrich Fastenrath, “Relative Normativity in International Law”, *EJIL*, 1993, vol. 14, n°3, pp. 305-340.



II Judicialization

In domestic contexts, the judiciary, the judicial institutions are usually the backbone of a legal order truly directed by the principle of the rule of law. They stand as one of the most important, if not the most important ‘*custodes*’ or guardian(s) of the system.

It is thus a first natural step to wonder how the International Community has been faring in terms of *setting up Courts* and other independent dispute settlement institutions.

1. Establishment of judicial organs or institutions

The clear broad answer is that, there are definitely, more and more judicial institutions available, as well as judicial procedures designed to adjudicate in disputes over breaches of International Law or disputes as to the interpretation and application of International Law¹⁰⁷.

Indeed, it seems one may even draw a contrast between the situation up until the early 1980s, where there were only a few independent international adjudication procedures and bodies for deciding whether or not legal rules have been violated, and the present situation. Until the 80s, in most issue areas of international relations, adjudication systems, if they existed at all, were dominated by panels, bodies, committees or commissions, like the United Nations Human Rights Committee, made up of politically dependent State representatives. Today, however, there are more than 40, mostly independent, international courts or court-like bodies, most of which were established during the 1990s:

The most conspicuous case may be the permanent International Criminal Court which was finally¹⁰⁸ created by the Rome Statute¹⁰⁹ to judge and sentence

¹⁰⁷ This progress contrasts, however, it should not be forgotten, with the lack of a major change of the situation as to the ‘*vexata quaestio*’ of compulsory jurisdiction, an outstanding issue ever since the days of the two Hague Peace Conferences of 1899 and 1907. This is opportunely reminded by A. A. Cançado Trindade, “International Law for Humankind: Towards a New *Ius Gentium*”, *RCADI*, 2005, t. 317, p. 173.

¹⁰⁸ For outstanding appeals to do so, see M. Cherif Bassiouni, “The Time Has Come for an International Criminal Court”, *Indiana International and Comparative Law Review*, 1991, vol. 1, pp. 1-43. the international efforts to establish this permanent international criminal court reach back to the early years of post World War II. These efforts finally succeeded in 1998 when the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court, on July 17, 1998. See UN Doc. A/CONF.183/9.

¹⁰⁹ *ILM*, 1994, vol. 33, pp. 1598, ss.. It entered into force in 2002.



war criminals¹¹⁰. It builds upon the experience made with the International Criminal Tribunal for the Former Yugoslavia (ICTFY)¹¹¹ and the International Criminal Tribunal for Rwanda (ICTR)^{112 113 114}. That somewhat controversial¹¹⁵ experience proved the need for such institutions to make International Law even more credible, particularly the sensitive International Humanitarian Law and the International Law of Human Rights¹¹⁶. It was also instrumental in showing that the status of international criminal justice would be enhanced if the condition of independence

¹¹⁰ A. Cassese, “The Statute of the International Criminal Court: Some Preliminary Reflections”, *EJIL*, 1999, vol. 10, pp. 144, ff.; Frédéric Mégret, “Epilogue to an Endless Debate: The International Criminal Debate: The International Criminal Court’s Third Party Jurisdiction and the Looming Resolution in International Law”, *EJIL*, 2001, vol. 12, pp. 247, ff..

¹¹¹ See Daphna Shraga and Ralph Zacklin, “The International Criminal Tribunal for the Former Yugoslavia”, *EJIL*, 1994, vol.5, pp. 360-380. See S/Res/827.

¹¹² Roy S. Lee, “The Rwanda Tribunal”, *Leiden Journal of International Law*, 1996, vol. 9, pp 37-61. See S/Res/955 (1994).

¹¹³ The establishment of other ‘*ad hoc*’ tribunals is considered from time to time and indeed intervened most of the times, in hybrid forms (so-called, “*internationalized courts*”), like the Sierra Leone Tribunal, created on the basis of Resolution 1315 of the Security Council, in the year 2000. For this and other tribunals of a similar hybrid character, namely the one entrusted with the prosecution of war crimes, genocide and crimes against humanity in East Timor as regulated by the United Nations Transitional Administration in East Timor (UNAET; Regulation 11 of 2000), see Theodor Meron, *The Humanization of International Law*, Leiden, 2006, Nijhoff, pp. 147-148, 177, 181-183.

¹¹⁴ In view in particular of article 5 of the International Criminal Court’s statute, this new judicial organ is likely to build on the work of the two *ad hoc* tribunals, by further concretizing and enforcing their core notional crimes of genocide, war and crimes against humanity.

¹¹⁵ The doctrinal controversy surrounding these tribunals relates, for instance, to the nature and legality of their establishment. See, in particular, Jost Delbrück, “Article 24 and Article 25”, in B. Simma (ed.), *The Charter of the United Nations-A Commentary*, 2nd ed., 2002, Oxford University Press, pp. 442-464, *notius* para. 56 and Andreas L. Paulus, “Article 29”, *idem*, 13, 61-75, 76-81. Today it is generally admitted that such establishment has been effected under chapter VII together with article 29 of the Charter. The International Criminal Court for the Former Yugoslavia was established by Security Council resolution 827, of May 25, 1993 and the International Criminal Court for Rwanda was established by Security Council Resolution 955, of November 8, 1994. On this matter see also Lori F. Damrosch *et al.*, *International Law; Cases and materials*, 4th ed., St. Paul, Minn., 2001, West Group, pp. 411-414, 1332-1366. The question of the legality of establishing criminal courts by resolution of the Security Council was authoritatively addressed by The International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, in the *Prosecutor v. Tadic* Case, N° IT-94- AR72, in 1995. See *ILM*, 1996, vol. 35, pp. 32, ss..

¹¹⁶ The fact that the above mentioned tribunals were specifically created for the prosecution of “*serious violations of international humanitarian law*” does not diminish their relevance for human rights law, because violations of humanitarian law simultaneously constitute grave human rights violations. See Human Rights Committee, General Comment N°31, “Nature of the General Legal Obligation Imposed on State Parties to the Covenant”, *CCPR/C/21/Rev. 1/Add. 13*, of 26 May 2004, para. 18.



and impartiality could be reinforced¹¹⁷ and the Tribunal become permanent¹¹⁸.

On the other hand, the International Court of Justice remains the primary judicial organ of the UN and its specialized agencies and is busier than ever before in its already long history, with cases of great importance from every corner of the world. In spite of the occurring judicial decentralization and even though the World Court does not hesitate to rule against the positions taken by such a powerful State in the current international scene, as the United States¹¹⁹, its docket gets larger and larger. It is in this body that the great legal-political issues of the day between States keep on being litigated¹²⁰.

And the Security Council, which, as one should not forget, also enjoys adjudicatory powers¹²¹, in spite of the traditional reluctance to using them, certainly for the fear of the veto which has too often been resorted to in the Cold War times, now regularly criticizes those States which threaten the maintenance of the international peace and order, which is the more significant as this concept evolved to relate to a wider array of situations, to cover violations of different settings of common values. The Security Council, henceforth, even goes so far as promoting, authorizing or mandating sanctions against such “trouble makers”.

Still on the *global plane*, reference should equally be made to the International Tribunal for the Law of the Sea, with seat in Hamburg, which has been contributing, ever since its establishment in 1994¹²², to the accreditation of the enormous ‘*corpus*’

¹¹⁷ See Philippe Sands, “The Independence of the International Judiciary: Some Introductory Thoughts”, in Steve Charnovitz, Debra P. Steger and Peter van den Bossche (eds.), *Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano*, Cambridge, 2005, Cambridge University Press, pp. 313-322.

¹¹⁸ But it also evidenced the importance of developments “upstream” (thus again evidencing that legalization and judicialization are complementary moves), such as an uniform substantive international criminal law. See Leila Nadya Sadat, “Redefining Universal Jurisdiction”, *New England Law Review*, 2000, vol. 35, p. 249.

¹¹⁹ See *LaGrand (Germany v. United States)* Case in <http://www.icj-cij.org>. On this and other recent cases (*Breard, Avena*), of direct relevance to the United States of America, see John F. Murphy, *The United States and the Rule of Law in International Affairs*, Cambridge, 2004, Cambridge University Press, pp. 270-277.

¹²⁰ See Rosalyn Higgins, “Respecting Sovereign States and Running a Tight Courtroom”, *ICLQ*, 2001, vol. 50, pp. 121-132.

¹²¹ See Chapter VI and articles 24, 25, 34, 35 of the Chapter, as well as Julius Stone, *Legal Controls of International Conflict*, New York, 1954, Reinhart & Co., pp. 193-194 and Rosalyn Higgins, “The Place of International Law in the Settlement of Disputes by the Security Council”, *AJIL*, 1970, vol. 64, pp. 1-18.

¹²² ITLOS was established on the basis of Annex VI of the UN Convention on the Law of the Sea. For an analysis thereof and initial assessment, see Shabtai Rosenne, “International Tribunal for the Law of the Sea: 1996-97 Survey”, *IJMCL*, 1988, vol. 13, pp. 487-514; and Tullio Treves, “The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16”, *ZaöRV*, 1994, vol. 55, p. 4331.



of law enshrined in the United Nations Convention on the Law of the Sea^{123 124}, not least through its noteworthy granting of a right of access to non-state entities¹²⁵.

One may equally point to the well-established UN Administrative Tribunal¹²⁶ think of the United Nations Claims Commission^{127 128} and the Inspection Panels

¹²³ The Tribunal is nothing but an element of the complex scheme of dispute settlement of the Law of the Sea regime as derives from the relevant provisions of the 1982 UN Convention (such as Part XV, Arts. 279-299). That scheme comprises, besides the Tribunal (Annex VI, Statute), The Seabed Disputes Chamber (Arts. 186-191), distinct or special Chambers (provided by its Statute), a Commission of Conciliation (Annex V), arbitration (Annex VII, including the constitution of an Arbitral Tribunal) and special arbitration (Annex VIII, including the constitution of a Special Arbitral Tribunal, with fact-finding powers). Art. 297 of the Convention lists three options (the International Tribunal for the Law of the Sea, the ICJ, or arbitration), for binding procedures (at the mere request of a contending party), thus constraining the traditional free choice of dispute settlement means of International Law.

¹²⁴ On the *experience* of this dispute settlement system, see, e.g., A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, Dordrecht, 1987, Nijhoff, pp. 3-283; Thomas A. Mensah, "The International Tribunal for the Law of the Sea", *Leiden Journal of International Law*, 1998, vol. 11, pp. 527-546 and Hugo Caminos, "The Creation of Specialised Courts: The Case of the International Tribunal for the Law of the Sea", in N. Ando, E. McWhinney and R. Wolfrum (eds.), *Liber Amicorum Judge S. Oda*, vol. I, The Hague, 2002, Kluwer.

¹²⁵ For a critical view of the achievements of the International Tribunal for the Law of the Sea, underlining the limited number and scope of the cases actually adjudicated, basically relating to its compulsory jurisdiction in "prompt release" cases and in claims for provisional measures where the arbitral tribunal before which the claim will ultimately be brought has not yet been constituted, and arguing that this scant record is due to the disputants' availability for other options for adjudication, see Jillaine Seymour, "The International Tribunal for the Law of the Sea: A Great Mistake?", *IJGLS*, 2006, vol. 13, n° 1, pp. 1-35.

¹²⁶ In spite of the considerable resistance of prominent states like the Soviet Union and The United States, the U.N. Administrative Tribunal was established by the United Nations General Assembly based on a Statute specifically conceived for that Tribunal. See General Assembly's Resolution 351(IV), *UNGAOR*, 4th Session, 1949. Generally, Hans-Joachim Priess, *Internationale Verwaltungsgerichte und Beschwerdeausschüsse*, Berlin, 1989, Duncker & Humblot, which also provides valuable insights into the experience of other international administrative courts.

¹²⁷ David D. Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", *AJIL*, 1990, vol. 84, pp. 104-156. See as well the United Nations Compensation Commission created by the Security Council in the aftermath of Iraq's invasion of Kuwait and designed to provide compensation for war damages on the basis of claims which individuals, corporations, governments and international organizations were entitled to bring, although only governments had access to the Commission – a political body in spite of its tasks (consideration and verification of claims, determination of losses) and composition ensuring significant judicial elements (see Richard B. Lillich (ed.), *The United Nations Compensation Commission*, Irvington, NY, 1995, Transnational Publishers).

¹²⁸ The United Nations Compensation Commission has been set up by the Security Council (Resolutions 687 and 692, of 1991), in the aftermath of Iraq's invasion of Kuwait, with the goal to award



established by the World Bank and other multilateral development banks¹²⁹.

Furthermore, arbitration¹³⁰ has equally witnessed a tremendous development¹³¹. UNCITRAL and ICC rules are used in international commercial arbitrations¹³². Investment disputes are regularly referred to the ICSID¹³³.

The Permanent Court of Arbitration¹³⁴ seems to have acquired a new life¹³⁵, after having adapted its governing Rules^{136 137 138 139}. The progress made in the

compensation for war damages. In spite of its powers and membership, the Commission remains a political organ as its procedure is predominantly an administrative one. See John R. Crook, "The United Nations Compensation Commission – A New Structure to Enforce State Responsibility", *AJIL*, 1993, vol. 87, pp. 149-151 and Richard B. Lillich (ed.), *The United Nations Compensation Commission*, Irvington, NY, 1995, Transnational Publishers.

¹²⁹ Laurence Boisson de Chazournes, "Le Panel d' inspection de la Banque mondiale: a propos de la complexification de l' espace public international", *RGDIP*, 2001, n°1, pp. 145-1652; Ellen Hey, "The World Bank Inspection Panel: Towards the Recognition of a New Legally relevant Relationship in International Law", *Hofstra Law and Policy Symposium*, 1997, p. 61; David Freestone, "The Environmental and Social Safeguard Policies of the World Bank and the Evolving Role of the Inspection Panel", in A. Kiss et al. (eds.), *Economic Globalization and Compliance with International Environmental Agreements*, The Hague, 2003, Kluwer, pp. 145-154.

¹³⁰ I actually prefer to view its function as complementary of the judicial one, thereby constituting a "symbiotic relationship" as Charney once correctly put it. See J. I. Charney, "Is International Law threatened by Multiple International Tribunals?", *RCADI*, 1998, vol. 271, at p. 315.

¹³¹ C. Gray and B. Kingsbury, "Inter-State Arbitration since 1945: Overview and Evaluation", in M. W. Janis (ed.), *International Courts for the Twenty-First Century*, Dordrecht, 1992, Nijhoff, pp. 55-83.

¹³² See John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law. Institutions and Procedures*, Oxford, 2000, Oxford University Press, pp. 45-58.

¹³³ *Idem*, pp. 59-73.

¹³⁴ For an authoritative account of its history and present achievements, see Hans Jonkman, "The Role of the Permanent Court of Arbitration in International Dispute Resolution", *RCADI*, 1999, t. 279, pp. 16-47. See as well Shabtai Rosenne (ed.), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration. Reports and Documents*, The Hague, 2001, particularly valuable for its historical recounting.

¹³⁵ *Vis-à-vis ad hoc* arbitration, in particular, the PCA, as a form of institutional arbitration and conciliation, which is furthermore condoned by more than 97 states and has been in existence for more than a century, seems to offer an advantageous, more legitimate alternative. In any event, the actual success of arbitration in general, and of the PCA in particular, will depend very much on the possibility of overcoming the usual reluctance of States to engage in adjudicative solutions, especially in their relationships with individuals and NGOs. It is indeed important not to lose sight of the fact that even if non-State actors thus gain standing to bring claims before an adjudicative dispute settlement body, in the absence of any form of improbable compulsory jurisdiction, state consent remains to be obtained. This lends yet further relevance to the reflection on the factors that States ponder while deciding to resort to arbitration. For this matter, see Philippe Sands, "Concluding Remarks", in The International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of International Water Disputes*, The Hague, 2003, Kluwer, pp. 417-425.

¹³⁶ Indeed, apart from arbitration, later sets of optional rules address alternative methods of dispute resolution. See, e.g., PCA, *Optional Conciliation Rules* (1996) and PCA, *Optional Rules for Fact-*

environmental protection field is particularly noteworthy^{140 141}.

And the same image can be transmitted on the *regional level*.

Especially with the European Court of Justice at the top of the progressively more sophisticated and complex European Union judicial system^{142 143}. It stands as

Finding Commissions of Inquiry (1997), in Secretary-General and the International Bureau of the Permanent Court of Arbitration, *Permanent Court of Arbitration. Basic Documents*, The Hague, 1998, at pp. 153, ff. and 171, ff. respectively; also available at <http://www.pca-cpa.org/BD>.

¹³⁷ See PCA, *Optional Rules for Arbitrating Disputes Between Two States* (1992), in Secretary-General and the International Bureau of the Permanent Court of Arbitration, *Permanent Court of Arbitration. Basic Documents*, The Hague, 1998, at pp. 41, ff.; also available at <http://www.pca-cpa.org/BD>.

¹³⁸ These Rules cover both disputes between states and international organizations (see PCA, *Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* (1993), in Secretary-General and the International Bureau of the Permanent Court of Arbitration, *Permanent Court of Arbitration. Basic Documents*, The Hague, 1998, at p. 69), disputes between parties in which only one is a state (see PCA, *Optional Rules for Arbitration Involving Organizations and States* (1996), in Secretary-General and the International Bureau of the Permanent Court of Arbitration, *Permanent Court of Arbitration. Basic Documents*, The Hague, 1998, at p. 97), and disputes between international organizations and private persons (see PCA, *Optional Rules for Arbitration between international Organizations and Private Parties* (1996), in Secretary-General and the International Bureau of the Permanent Court of Arbitration, *Permanent Court of Arbitration. Basic Documents*, The Hague, 1998, at p.125; also available at <http://www.pca-cpa.org/BD>).

¹³⁹ These new “optional rules” are modeled after the popular UNCITRAL Arbitration Rules, reprinted in Secretary-General and the International Bureau of the Permanent Court of Arbitration, *Permanent Court of Arbitration. Basic Documents*, The Hague, 1998, p. 237.

¹⁴⁰ See PCA, *Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment* (2001) and PCA, *Optional Rules for Conciliation of Disputes relating to Natural Resources and /or the Environment* (2002), available at <http://www.pca-cpa.org/EDR>.

¹⁴¹ The International Court of Environmental Arbitration and Conciliation (information about it, its Statutes, members and texts of resolved cases may be found in <http://iceac.sarenet.es> as well as Eckard Reh binder and Demetrio Loperena, “Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation”, *EPL*, 2001, vol. 31, n° 6, pp. 282-292) shall hardly be a true alternative, at least in the foreseeable future. Even if this latter Court evidences still more *flexibility* than the PCA (especially because of the possibility offered for performing a declaratory non-binding adjudication of international environmental disputes upon the basis of an unilateral initiative of the alleged victim of environmental harm) and involves a mechanism for *legal assistance* to claimants without resources and capacity to afford ordinary proceedings, it does not enjoy the same *standing* as other alternatives. One may even wonder whether its very flexibility is not one of the reasons for scepticism and reluctance to adhere on the part of likely defendants, the states. Indeed, the experience acquired (see Eckard Reh binder and Demetrio Loperena, “Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation”, *EPL*, 2001, vol. 31, n° 6, pp. 282-292) may be read as proof of the likelihood of these problems.

¹⁴² Technically, it stands as the judicial organ of all European Communities (currently, two, after the ECSC superseded), the European Union formally still lacking international legal personality.

¹⁴³ Recently, a third “layer” of justice was established, with the setting up of a specialised European



the institutional image of the world's most elaborate¹⁴⁴ and comprehensive international mechanism of judicial review¹⁴⁵ and, more generally, ensures that Law prevails in its specific legal order^{146 147}, one which is made of rules enjoy supremacy and may also have direct effect in the domestic legal orders^{148 149}. It is undeniable that its rulings and have particularly contributed to make European law the venerable lighthouse of the conduct of every actor within the Union, certainly because it has done so in a way which is of palpable benefit to the citizens^{150 151 152 153}.

Union Civil Service Tribunal. It is thanks to the Treaty of Nice that this and other developments of the judicial architecture of the Union intervened or may intervene in the future (article 2(32) regarding new article 225 a). The creation of a European Union Patent Tribunal is currently being examined.

¹⁴⁴ The European Court of Justice proclaimed in its ruling of 1971 on the case *Commission vs. Council* that the Treaty had established a complete system of review mechanisms destined to control the legality of the acts of the institutions.

¹⁴⁵ E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organizations", in D. W. Bowett *et al.* (eds.), *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, London, 1965, Stevens & Sons, p. 95, rightly proclaimed that in this elaborate scheme it seems difficult to think of an unlawful act which would remain outside the catalogue of situations of the applicable article 230.

¹⁴⁶ Art. 220 of the Treaty establishing the European Community.

¹⁴⁷ See A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe*, Oxford University Press and K. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, Oxford, 2001, Oxford University Press.

¹⁴⁸ This is the case with regulations which, according to article 249 possess general applicability, are binding in their entirety and are directly applicable in all Member States. Regulations confer rights and duties directly upon EC citizens, whether natural persons or corporate entities, and are ultimately enforceable by the ECJ.

¹⁴⁹ For other legal instruments, namely directives, see the ECJ's *Van Gend & Los* case law and the rulings in the case 9/73, *Schlüter*, ECR, 1973, pp. 423-454, (32), case 57/65, *Lütticke*, ECR, 1966, pp. 361-375; case 36/74, *Walrave*, ECR, 1974, pp. 595-610; case 41/74, *Van Duyn*, ECR, 1974, pp. 567-585; case 9/70, *Franz Grad*, ECR, 1970, pp. 509-535.

¹⁵⁰ Daniel Sarmiento, *Poder judicial e Integración europea, La construcción de um modelo jurisdiccional para la Unión*, Madrid, 2004, Civitas.

¹⁵¹ On their internationally privileged status, due to the generous European legal construction, see the observations by Moura Ramos, Rui Manuel, *Direito Comunitário. Programa, conteúdos e métodos de ensino*, Coimbra, 2003, Coimbra Editora, pp. 24-25.

¹⁵² This is also a reason why it remains difficult to accept, also for reasons of consistency, the procedural deficit corresponding to the rule of article 230 (4) of the Treaty on the 'ius standi' of private individuals. We have reverted to the problem recently in Paulo Canelas de Castro, "Locus Standi of private applicants to the European Court of Justice – Sisyphus's Works?", *BFDUM*, 2004, vol. 17, pp. 15-43.

¹⁵³ For the status of NGOs in the European Court of Justice, see Anna-Karin Lindblom, *Non-Governmental Organisations in International Law*, Cambridge, 2005, Cambridge University Press, pp. 264-270.

With different character, methods and impact, the trend seems recently to have been followed by the system set up by Mercosur¹⁵⁴ and, albeit with (even) less practical successes, in spite of its institutions' sophistication, the Andean Community¹⁵⁵, in Latin America. There are also some instances which were set up in North America, in the context of the North American Agreement on Environmental Cooperation¹⁵⁶. As there also similar indications, however at a less developed stage, originating from the SADC¹⁵⁷ and other African regional endeavours^{158 159}.

Moreover, this is a trend which holds not only for the more obvious economic game but equally for the protection of human rights¹⁶⁰, where the European Court of

¹⁵⁴ See Paulo Borba Casella, and Vera L. V. Liquidato (eds.), *Direito da integração*, São Paulo, 2006, Quartier Latin (forthcoming); P. B. Casella, "Quadrilateral perspective on integration in the Americas – a view for the Mercosur and Brazil", in L. Perret (ed.), *The Evolution of Free Trade in the Americas / L'évolution du libre-échange dans les Amériques*, Montréal, 1999, Wilson and Lafleur, pp. 125-155; P. B. Casella, L. O. Baptista and Araminta de A. Mercadante (eds.), *MERCOSUL: das negociações à implantação*, São Paulo, 1st ed., 1994, 2nd. rev. ed., 1998, LTr. Ed; P. B. Casella, *Mercosul: exigências e perspectivas – integração e consolidação de espaço econômico*, São Paulo, 1996, LTr; P. B. Casella, *Mercosul: exigências e perspectivas de integração e consolidação de espaço econômico integrado*, São Paulo, 1995, FDUSP.

¹⁵⁵ See José Luís da Cruz Vilaça and José Manuel Sobrino Heredia, "Do Pacto Andino à Comunidade Andina. O Protocolo de Trujillo: Simples Reforma Institucional ou Aprofundamento da Integração Subregional?"; *Temas de Integração*, 1997, n^o3, vol. 2; Galo Pico Mantilla, *Derecho Andino*, 2nd ed., Quito, 1992, Tribunal de Justicia del Acuerdo de Cartagena.

¹⁵⁶ This one of two side agreements to the North American Free Trade Agreement (NAFTA), developed to support the environmental provisions of NAFTA. Under this agreement a so-called "citizen submission procedure" has been created which permits private parties to launch complaints regarding the object of the agreement. It should be mentioned that the other NAFTA side agreement, the North American Agreement on Labor Cooperation, includes another submission process, which is, however, of a weaker nature. On both, see, Jack I. Garvey, "Trade Law and Quality of Life-Dispute Settlement under the NAFTA Side Accords on Labour and the Environment", *AJIL*, 1995, vol. 89, pp. 439-453; Raymond MacCallum, "Evaluating the Citizen Submission Procedure under the North American Agreement on Environmental Cooperation", *Colorado JIELP*, 1997, vol. 8, pp. 395-396 and A. L. C. de Mestral, "The Significance of the NAFTA Side Agreements on Environmental and Labour Cooperation", *Arizona JICL*, 1998, pp. 169-185.

¹⁵⁷ The SADC Tribunal established by article 9 of the 1992 Treaty of the SADC and which seats in Windhoek, Namibia, was inaugurated in November 2005 and obeys to the Protocol on the Tribunal and the Rules of Procedure of the SADC Tribunal.

¹⁵⁸ For the one of OAHADA (the African Association for a Unified System of Business Law), see Boris Martor, Nanette Pilkington, David S. Sellers and Sébastien Thouvenot, *Business Law in Africa, OHADA and the Harmonization Process*, London, 2002, Kogan Pace, *notius* pp. 11-16.

¹⁵⁹ For these and other examples of other organisations' usually less elaborate dispute settlement mechanisms, see Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 3rd ed., Dordrecht, 1995, Nijhoff.

¹⁶⁰ More usually, in the Human Rights context, there is the setting up of a supervisory body which strictly speaking does not qualify as judicial organ, since there is typically no power to make binding



Human Rights stands above any other experience¹⁶¹ ¹⁶², even it is also brilliantly emulated by other similar institutions especially in the American continent¹⁶³ namely with the Inter-American system for human rights relying on both the Inter-American Commission and the Inter-American Court¹⁶⁴ ¹⁶⁵.

Naturally, the mere fact of the *establishment* of instances and procedures of adjudication does not lead necessarily to the better compliance with International Law, a goal which is equally sought by the principle of the rule of law¹⁶⁶ ¹⁶⁷ ¹⁶⁸. The

decisions in cases before them. Their usefulness should not be underrated, however, since the statements emanating from these bodies tend to be regarded as authoritative interpretations of the underlying conventions. Amongst these bodies, the Human Rights Committee, in particular, was instrumental in creating an impressive body of case-law and clarifying the contents of the International Covenant on Civil and Political Rights by developing General Comments and by questioning states on the basis of the national reports presented. See Dominick McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford, 1994.

¹⁶¹ In the context of the Council of Europe and based on the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁶² It involves the most advanced mechanism of judicial settlement of interstate and private complaints. Both the Court as well as the Commission (which in the mean time has lapsed with the entrance into force of Protocol n°11 to the Convention) have developed a very rich case law which stands as a model in the protection of Human rights and amounts to an “*European perspective*” (see Charles Leben, “Is there a European Approach to Human Rights?”, in Philip Alston (ed.), *The EU and Human Rights*, Oxford, 1999, Oxford University Press, pp. 69, ff., *notius* p.93), according to which human rights appear as a pole of a triangle equally comprehending reference to democracy and rule of law and with an impact surmounting the scope of Europe. Along these lines, Theodor Meron, *The Humanization of International Law*, Leiden, 2006, Nijhoff, pp. 440-442.

¹⁶³ *Vide*, for instance, Lucius Caflisch and António Cançado Trindade, “Les Conventions américaine et européenne des droits de l’homme et le droit international général”, *RGDIP*, 2004, n°5.

¹⁶⁴ See Thomas Buergenthal, “The Inter-American Court of Human Rights”, *AJIL*, 1982, vol. 76, pp.231-245; David J. Padilla, “The Inter-American Commission on Human Rights of the Organization of American States. A Case Study”, *American University Journal of International Law and Policy*, 1993, vol. 9, pp. 95-115; Scott Davidson, *The International-American Human Rights System*, Aldershot, 1997, Dartmouth.

¹⁶⁵ With a growingly interesting experience, the African Commission and Court for Human and People’s Rights. See generally, Evelyn A. Ankumah, *The African Commission on Human and People’s Rights: Practices and Procedures*, The Hague, 1996, Nijhoff; U. Oji Umzurike, *The African Charter on Human and People’s Rights*, The Hague, 1997, Nijhoff; and Rachel Murray, *The African Commission on Human and Peoples’ Rights and International Law*, Oxford, 2000, Hart. For standing of NGOs before the African Commission, see Anna-Karin Lindblom, *Non-Governmental Organisations in International Law*, Cambridge, 2005, Cambridge University Press, pp. 279-285.

¹⁶⁶ Also because by itself it equally raises a specter of jurisprudential fragmentation, a concern proficiently addressed by John H. Jackson, “Fragmentation or Unification Among International Institutions: The World Trade Organization”, *NYUJILP*, 1999, vol.31, pp. 823, ff.; Cesare P. R. Romano, “The

mere establishment of courts does not amount, in this sense, to a sufficient judicialization.

The establishment of adjudication procedures should, on the contrary, be regarded as just a first, albeit indispensable, condition for judicialization and an emergent international rule of law.

Foremost, because there may be compelling reasons, specific to the domain, to shy away from judicialization pure and simple. This is often said to be the case with the field of the protection of the environment. And even where this is not the case, mere judicialization may not be enough and other conditions have to be met as to the contents and impacts of this judicialization, enabling one to assert that a rule of law truly exists.

Amongst such required elements, we believe that the following ones are of particularly high relevance:

2. Equality

It seems indeed imperative, first, that all legal subjects or social actors are *equal before the law*, that no one is above the Law and that all similar matters receive a similar or equal treatment. This is something which could not be said of the major actors and situations of former International Law. In traditional international law, the more powerful States were more likely to get away in case of violations of the legal obligations, while less powerful States would more likely have to face consequences if they committed similar offences. With the establishment of judicial adjudication organs and procedures in most of the issue-areas of today's international life and International Law, the chance of reaching this equal treatment is more serious¹⁶⁹.

Proliferation of International Judicial Bodies: The Pieces of the Puzzle”, *NYUJILP*, 1999, vol. 31, pp. 709, ff.; Jonathan I. Charney, “The Impact on the International Legal System of the Growth of International Courts and Tribunals”; Pierre-Marie Dupuy, “The Danger of Fragmentation or Unification of the Legal System and the International Court of Justice”; Georges Abi-Saab, “Fragmentation or Unification: Some Concluding Remarks”, all in *NYUJILP*, 1999, vol. 31, at, respectively, pp. 697, ff.; 791, ff.; and 919, ff.. Robert Y. Jennings, “The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers”, *ASIL Bulletin*, 1995, vol. 9, pp. 2-7.

¹⁶⁷ Some Authors argue, however, that this diversity of judiciary institutions may actually involve several advantages: see Alan Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction”, *ICLQ*, 1997, vol. 46, pp. 37-54; Jonathan I. Charney, “Is International Law Threatened by Multiple International Tribunals?”, *RCADI*, 1998, t. 281, pp. 101-373.

¹⁶⁸ In any event, it is possible to devise alternatives aimed at diminishing the danger. In this sense, Georges Abi-Saab, “Fragmentation or Unification: Some Concluding Remarks”, *NYUJILP*, 1999, vol. 31, pp. 919-933.

¹⁶⁹ See ‘*infra*’ examples relating to “adjudication” in the realm of international trade.



3. Independence

The political independence and impartiality of adjudication procedures is another crucial precondition for the equal treatment of similar violations of international legal rules.

Naturally, diplomatic adjudication procedures, like those of the United Nations Human Rights Committee^{170 171 172 173 174} have not really become the exception. As well as the truly judicial adjudication ones, like those of the European Court on Human Rights have not become the undisputable rule either. However, it is equally a fact that, particularly over the last decade and a half, many of the formerly existing procedures to settle the disputes in international relations have gradually become more judicialized. This means that they now tend to become more akin to the judicial ones, those we know in the domestic realms. For this, they have had to become increasingly more politically independent, rely increasingly on compulsory jurisdiction and render the access to them increasingly easy.

4. Jurisdiction

Another equally important precondition for an international rule of law is that adjudication procedures can exercise compulsory jurisdiction.

Only when those allegedly in breach of their legal obligations have no means of preventing the procedure from being implemented, does a comparable treatment of comparable offences seem viable.

Traditionally, in most international issue-areas, adjudication procedures could not exercise compulsory jurisdiction.

This is the case for the International Court of Justice, whose jurisdiction largely depends on its recognition by the States involved in a legal dispute¹⁷⁵. We may just recall the hurdles faced by Portugal in the East Timor Case, its impossibility

¹⁷⁰ The Committee on Human Rights has been set up in the normative context of the International Covenant on Civil and Political Rights.

¹⁷¹ The main legal instruments governing its action are Resolutions 1235 (XLII) and 1503 (XLVIII) of the United Nations Economic and Social Committee.

¹⁷² It has been set up by the General Assembly of the United Nations.

¹⁷³ Generally on this mechanism, see Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, New York, 1992, Oxford University Press and Stephen Marks, "The United Nations and Human Rights: The Promise of Multilateral Diplomacy and Action", in Burns Weston and Stephen Marks (eds.), *The Future of International Human Rights*, 1999, Boulder, p. 291.

¹⁷⁴ Cfr. Anne F. Bayefsky, "Making the Human Rights Treaties Work", in Louis Henkin and John Lawrence Hargrove, *Human Rights: An Agenda for the Next Century*, Washington, 1994, American Society of International Law, p. 229.

¹⁷⁵ The forms to consent to the Court's jurisdiction are foreseen in article 36 of the Statute.



of bringing Indonesia to justice¹⁷⁶, to illustrate the problem.

Since the 1980s, however, adjudication procedures in a growing number of issue-areas have been given the authority to give a ruling without the consent of the defending State. This is certainly the situation in criminal matters.

5. Access

A further precondition for the comparable treatment of comparable violations of international legal rules is that adjudication procedures cannot only be invoked by States.

For reasons of diplomacy, States tend to refrain from complaining about other States violating international legal rules. As a result, only some violations, usually those of less powerful States, give rise to legal proceedings, while others, especially those of powerful States, do not. To rectify this shortcoming, some advocate that non-State actors should be given access to international adjudication procedures.

Traditionally, however, international adjudication procedures can only be initiated by States. The International Court of Justice is a typical example.

Adjudication procedures in which non-State actors had standing used to be rare, an early exception¹⁷⁷ being the European Court on Human Rights.

¹⁷⁶ Miguel Galvão Teles, “As Nações Unidas e a questão de Timor-Leste”, *Política Internacional*, 1999, vol. 20, n.º3, pp.177-191; Miguel Galvão Teles, “Timor-Leste”, *Dicionário Jurídico da Administração Pública*, 2. suplemento, Lisboa, 2000, pp. 617, ff.; Paulo Canelas de Castro, “Das demokratische Portugal und das Selbstbestimmungsrecht der Völker - Der Fall Ost-Timor”, in E. Jayme (Hrsg.) *Deutsch-Lusitanische Rechtstage*, Baden-Baden, 1994, Nomos Verlag, pp. 152-175; Miguel Galvão Teles and Paulo Canelas de Castro, “Portugal and the Right of Peoples to Self-Determination”, *Archiv des Völkerrechts*, n.º 34, 1, 1996, pp. 2-46.

¹⁷⁷ Even in this context the access of individuals and NGOs is the culmination of an evolutionary process. Indeed, in the original structure of the Organisation, individuals and NGOs had access to the Commission only and on the condition of the acceptance by the State of the individual claim presented to the Commission. However, this mode as well as the balance European Commission–European Court, have been modified so as to enable access to the Court by the judicial representatives of the victims (firstly, it was possible for them to be present along with the Commission, later on they were enabled to present written pleadings and eventually a right to directly address the Court has been recognized) and later in 1998 they have been integrated in the process as full parties before the European Court of Human Rights. See the description of the historical evolution by Philippe Sands, ““Turtles and Torturers”: The Transformation of International Law”, *NYUJLP*, 2001, vol. 33, p. 546; António Augusto Cançado Trindade, “The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century”, *Columbia Human Rights Law Review*, 1998, vol. 1, p. 17; Anna-Karin Lindblom, *Non-Governmental Organisations in International Law*, Cambridge, 2005, Cambridge University Press, pp. 328-345. This progression of the European system consisting of timid subsequent steps has suffered an initial modification of import with the adoption of Protocol 9 which allowed direct access of individuals to the Court. This instrument has later been superseded by Protocol 11 which entered in force in 1998 and revised the system completely, henceforth allowing individuals, NGOs and groups of individuals to directly submit claims to the Court.



However, today's international adjudication systems increasingly provide access for non-State actors such as individuals¹⁷⁸, private groups¹⁷⁹, and international agencies.

Further lines of inquiry¹⁸⁰ – not incurred into, due to the limited approach, scope and goal of this paper¹⁸¹ – are the relative importance of such instances and procedures within the whole range of possible dispute settlement mechanisms in the particular area¹⁸², as well as the effective recourse by possible “consumers” to these mechanisms¹⁸³.

¹⁷⁸ This is so in particular with the Inter-American system, where the integration on the judicial representatives of the victims in the delegation of the Inter-American Commission to the Court has been originally accepted (they were named “*assistants*” to the delegation). In 1996, the judges of the Inter-American Court started to make questions to the representatives of the victims and their briefs presented to the Court. By the end of 1996, there was a revision of the Rules of Procedure enabling for the representatives of the victims to directly make their arguments and evidence to the Court, at the stage of compensation's discussion. Later in the Rules of Procedure of the Inter-American Court of 2002 there is provision (article 35, paragraph 4) enshrining the individuals' “*locus standi*” to the processes before the Court.

¹⁷⁹ For NGOs, both as full parties in proceedings and as “*amicus curiae*”, see Anna-Karin Lindblom, *Non-Governmental Organisations in International Law*, Cambridge, 2005, Cambridge University Press, chapters 5 and 6, pp. 218-299, 300-364.

¹⁸⁰ Similar criteria, in R. O. Keohane, A. Moravcsik and A. M. Slaughter, “Legalised Dispute Resolution: Interstate and Transnational”, *IO*, 2000, vol. 54, p. 457.

¹⁸¹ In particular, it may be noted that albeit recognizing the merits of the approach preached by the “dual agenda” project, a line of thought which aspires to overcome the “cultural” divide between International Relations (disproportionately influenced by its “realist” historical learning) and International Law and rather committed to combining the traditionally autonomous viewpoints of International Relations and International Law (on this, see Robert Beck, “International Law and International Relations: The Prospects for Interdisciplinary Collaboration”, in Robert Beck *et al.* (eds.), *International Rules: Approaches from International Law and International Relations*, Oxford, 1996, Oxford University Press, pp. 3-30; José Manuel Pureza, “O lugar do Direito num horizonte pós-positivista”, *Política Internacional*, 1998, 18, n°2, pp. 79-91; “Ordem jurídica, desordem mundial. Um contributo para o estudo do Direito Internacional”, *Revista Crítica de Ciências Sociais*, 2002, vol. 64, pp. 12-16), we recognize our limitations regarding the methods required by the queries subsequently mentioned in the text, more typical of the International Relations' approach.

¹⁸² A consideration which may be particularly relevant for the environmental protection field.

¹⁸³ In the trade area, one may note that the number of disputes has exploded since the creation of the WTO, possibly reflecting greater confidence in the new system among WTO Members. See, in particular, M. L. Busch and E. Reinhardt, “Testing International Trade Law. Empirical Studies of GATT/WTO Dispute Settlement”, in D. L. M. Kennedy and J. D. Southwick (eds.), *The Political Economy of International Trade Law. Essays in Honour of Robert E. Hudec*, Cambridge, 2002, Cambridge University Press, p. 464, and Kara Leitner and Simon Lester, “WTO Dispute Settlement, 1995-2003. A Statistical Analysis”, *JIEL*, 2004, vol. 7, pp. 165-179.



A. Judicialization – International Trade

1. A true judicial system

Long before there was a WTO, as we saw, there was the GATT¹⁸⁴. This was no organization to start with¹⁸⁵, only a legal illusory reference to “*a mix of law and diplomacy*”, in the accurate assessment of a long-time observer, Robert E. Hudec¹⁸⁶.

The “dispute settlement system” accorded to the premises of the venture. It began as informal “working parties” of diplomats which only over the decades, slowly, evolved somewhat to less contingent reasoning, through the system of, nonetheless, ‘*ad hoc*’ panels. These were bodies still constituted by diplomats and applying diplomatic or politically minded deliberations, which would still have to be condoned by assemblies where a single veto (foremost that of the “losing party”) would suffice to devoid the whole exercise of any consequence whatsoever¹⁸⁷.

The present situation is a radically different one. The system became judicialized and, as one Author suggestively put it, henceforth bites on the States¹⁸⁸.

The most dramatic mutation of the new WTO-law system is precisely the establishment of a truly judicial system of settlement of disputes¹⁸⁹; a two-tiered one. Indeed, apart from the first tier, already mentioned, where panels still exist but appear under different vests (the panelists, whose independence is statutorily guaranteed, have to look at the case objectively), there is now a second tier, where the Appellate Body intervenes. Following the panel’s decision or the one by the Dispute Settlement Body¹⁹⁰ that a certain measure is incompatible with WTO rules¹⁹¹,

¹⁸⁴ The seminal work on the substance of its law is John H. Jackson, *World Trade and the Law of GATT*, Indianapolis, 1969, Bobbs-Merrill.

¹⁸⁵ Although GATT was originally conceived as part of the Havana Charter which had been meant to establish an International Trade Organisation.

¹⁸⁶ Robert E. Hudec, *Enforcing International Trade Law. The Evolution of the Modern GATT Legal System* Salem, New Hampshire, 1993, Butterworth.

¹⁸⁷ Ernst-Ulrich Petersmann, “Strengthening GATT Procedures for Settling Trade Disputes”, *World Economy*, 1988, vol. 11, pp. 55-89.

¹⁸⁸ Miquel Montana i Móra, “A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes”, *Columbia Journal of Transnational Law*, 1993, vol. 31, pp. 103, ff..

¹⁸⁹ The governing legal instrument is the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, more commonly known as the Dispute Settlement Understanding. It corresponds to Annex II to the WTO Agreement. See *ILM*, 1994, vol. 33, pp. 1226, ff.. A good summary may be found in Alan C. Swan and John F. Murphy, *Cases and Materials on the Regulation of International Business and Economic Relations*, 2nd ed., New York, 1999, Lexis, pp.591-596.

¹⁹⁰ In practice, the General Council of the WTO.

¹⁹¹ The Dispute Settlement Body is only seized of matters when a WTO member government lodges a complaint that benefits “*accruing to it*” are being impaired by the actions of another member government (art. 3.3 of the Dispute Settlement Understanding). The Dispute Settlement



that organ recommends to the Member state the way to proceed (article 19, paragraph 1) and the Dispute Settlement Body is empowered to control the compliance with the report and the recommendations (article 21). But the defendant can launch a recourse to the Appellate Body on questions of law. This Appellate Body is a permanent organ and its seven members, who are lawyers, are nominated for a renewable term of office of 4 years (article 17, paragraphs 1 and 2). It is thus conceived as a judicial international organ and it performs functions similar to any other judicial organ, namely to decide on the questions of law previously assessed in the panel report upon International Law (article 17, paragraph 6)^{192 193}.

2. Equality

The WTO has clearly moved in the direction of legal rather political treatment of trade situations and resolution of disputes, as compared to previous practices in the pre-WTO trading system¹⁹⁴. This change was precisely thought to be of “benefit” to the less powerful countries so as to render them equal to the initially more powerful countries. The record of their resort to the dispute settlement system as well as the results thereof seem to accredit this view.

3. Independence

We have seen that after a first short period when the disputing Parties endeavoured to diplomatically solve the problems themselves, decisions on disputes

Understanding refers to this as a “*case*” which arises out of a “*dispute*” (art. 3.7). A mere allegation of non-compliance without more is not technically within the purview of the WTO dispute system, nor is a disagreement as to the interpretation of the WTO Treaty.

¹⁹² Rambod Behboodi, “Legal Reasoning and the International Law of Trade: The First Steps of the Appellate Body of the WTO”, *JWT*, 1998, n°32, vol. 4, pp. 55-99 and Deborah Z. Cass, “The “Constitutionalization” of Trade Law: Judicial Norm-generation as the Engine of Constitutional Development in International Trade”, *EJIL*, 2001, vol. 12, pp. 39-75.

¹⁹³ There is some hesitation in the doctrine, however, as to the designation of the Body. While M. Nettesheim, “Von der Verhandlungsdiplomatie zur internationalen Verfassungsordnung – zur Entwicklung der Ordnungsformen des internationalen Wirtschaftsrechts”, in C.-D. Classen *et al.* (eds.), *In einem Vereinten Europa dem Frieden der Welt zu dienen... - Liber Amicorum Thomas Oppermann*, Berlin, 2001, Duncker & Humblot, p. 396 and Armin von Bogdandy, “Verfassungsrechtliche Dimensionen der Welthandelsorganisation”, *Kritische Justiz*, 2002, vol. 34, p. 267 do not hesitate to qualify it as a “*judicial entity*”, others, like J. Bacchus, “Groping toward Grotius: the WTO and the International Rule of Law:”, *Harvard ILJ*, 2003, vol. 44, p. 541, are more parsimonious and prefer to refer to it as a “*quasi-judicial*” instance. The recognition of the function performed as “*judicial*” is, however, widespread.

¹⁹⁴ See J. H. H. Weiler, “The Rules of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement”, in R. B. Porter *et al.* (eds.), *Efficiency, Equity, and Legitimacy. The Multilateral Trading System at the Millennium*, Washington D. C., 2001, Brookings.



over alleged violations of GATT obligations were, in the 1950s, undertaken by the so-called panels, composed of three legal experts acting in their individual capacities. Their independence was compromised, however, by the fact that it was for the very States involved in a dispute to select the panelists, on a case-by-case basis. Frequently, representatives from neutral States rather than truly independent legal experts were selected as panelists.

However, in the late 1980s and early 1990s, especially after the WTO had replaced the old GATT, the adjudication procedure became more politically independent. While the composition of the panels as such did not change, their status became legally different, as we have already seen, since article 8, paragraph 2 ensures their independence. And their functions also appear under a new light, since they are now expected to assess objectively the facts and be determined by law, a stronger and clear law. Furthermore, a remarkably independent Appellate Body was established to revise panel reports in appeal cases.

In contrast to the panels, the Appellate Body is composed of legal experts who are as independent as judges of ordinary courts. Rather than being selected by the States involved on a case-by-case basis, the seven members of the Appellate Body are now elected to deal with all disputes that might arise during their four-year term. This gives them a significant degree of political independence.

4. Jurisdiction

The GATT/WTO is equally an example of an institution in which jurisdiction of adjudication procedures has become compulsory.

Throughout the 1970s and 1980s, jurisdiction of GATT panels was not obligatory. The establishment of a panel, as well as the adoption of its report, required the decision of the GATT Council. These decisions, however, were dependent on the (“*positive*”) consensus of all States, including the defending State. This meant that even the defending State could always block the procedure.

However, this method also changed in the mid-1990s, with the creation of the WTO in 1995. The dispute settlement mechanism in the field of international trade law was greatly strengthened, it now involves compulsory jurisdiction. Among the various changes to the dispute settlement system¹⁹⁵, there is the fact that nowadays

¹⁹⁵ The complex process which dynamically translates the WTO dispute system can be succinctly described as follows: the complaining Member State’s government has a procedural right to secure an independent panel to review its claims and the defendant government’s response. The panel will review pleadings and reply briefs, hold an oral hearing and submit follow-up questions and reach a decision within six to nine months. When not appealed, this decision is adopted by the DSB (consisting of all WTO member governments) unless the governments, take a consensus not to adopt (“*negative consensus*”). When a case is appealed on issues of law, the Appellate Body will



the establishment of a dispute settlement panel and the adoption of a panel report can no longer be blocked by one of the parties to a dispute, as was formerly the case under the GATT. On the contrary, the newly established Dispute Settlement Body can reject panel reports only by consensus (in the jargon of the Organisation, there was an evolution from a “*positive consensus*” to a “*negative*” one). Which means, as Norio Komuro said, that the rule now is a “*quasi-automatic consensus*”¹⁹⁶. Also parties to a dispute can now appeal a panel ruling to the Appellate Body on points of law, since there is now a two-tiered dispute settlement system. The only possibility remaining for defending States now is to invoke the Appellate Body. Again, however, its reports can only be rejected by a unanimous decision of the Dispute Settlement Body¹⁹⁷. Therefore, the defendant can no longer block the adoption of reports. Moreover, whereas in the past the panelists were diplomats, the members of the Appellate Body are these days fully-trained Lawyers applying a purely legal mind.

5. Access

Today’s international adjudication systems increasingly provide access for non-State actors such as individuals, private groups, and international agencies. A case in point is that of the Law of the Sea dispute-settlement system¹⁹⁸.

consider briefs and responses, hold an oral hearing and issue a decision, usually within 60 to 90 days. This appellate decision is adopted by the DSB unless there is a consensus not to do so. Following adoption, defending governments that lose are given a “*reasonable*” period of time to comply. If the original complaining party believes that compliance has not ensued, it may lodge a complaint following DSU art. 21.5. This brings back the original panel to review the quality of compliance. That decision is to be given in 90 days and there may be appeal of it. Once the appeal is exhausted and if compliance has not ensued, the complaining party may seek authority to “*suspend concessions or other obligations*”, a formula which is the WTO jargon for retaliation, countermeasure or sanction. Under current practice, the consideration of retaliation does not occur until after an Art. 21.5 panel has found continued non-compliance. The complaining government may then seek authority to retaliate. An arbitration according to Article 22.6 determines the proper level of retaliation. During this process, the litigating governments can settle. Once the arbitration is complete, which has to happen within 60 days, the complaining government gains the right to impose trade retaliation on the losing defendant government at the monetary level set by arbitration. The purpose of such retaliation is not to punish, but to induce compliance. The DSB exercises continuing oversight over a dispute until it is definitively settled (art. 21.6).

¹⁹⁶ Norio Komuro, “Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?”, *JWT*, 1998, vol. 32, n° 2, p. 157.

¹⁹⁷ To date, all panel and Appellate Body decisions brought to the DSB have been adopted.

¹⁹⁸ Other conspicuous bodies wherein individuals have standing to lodge complaints are the International Labor Organization, the North American Free Trade Agreement in Chapter 11 (Investment), and dispute settlement bodies of regional human rights treaties. See generally D. Shelton, “The Participation of Nongovernmental Organisations in International Judicial Proceedings”, *AJIL*, 1994, vol. 88, p. 625.

Nevertheless, the adjudication procedure within the trade regime of the WTO still only provides access for States, and, as in the GATT, only States may call for a panel. However, in this setting there are some innovations which may work as a “bridge” to future initiatives and legal developments. Indeed, beyond the access already given to them under the GATT, private actors may ‘participate’ in the WTO dispute settlement proceedings as ‘*amicus curiae*’¹⁹⁹, by means of so-called ‘*amicus briefs*’ in which they provide information that should be taken into consideration by the Appellate Body^{200 201 202 203}. And it is not rare these days to see individuals or undertakings in the national delegation of a disputing Party²⁰⁴. Moreover, some doctrine equally “fights” for more “generous” rules on standing^{205 206 207 208}.

¹⁹⁹ Hervé Ascensio, “L’*amicus curiae* devant les juridictions internationales”, *RGDIP*, 2001, vol. 4, tome 105 pp. 907-908, suggests that this may be fulfilled without a habilitating provision, in a rather informal mode.

²⁰⁰ See generally S. Krislov, “The *Amicus Curiae* Brief: From Friendship to Advocacy”, *Yale Law Journal*, 1963, vol. 72; E. Angell, “The *Amicus Curiae*: American Development of English Institutions”, *ICLQ*, 1967, vol. 16, p. 1017; Loretta Re, “The *Amicus Curiae* Brief: Access to the Courts for Public Interest Associations”, *Melbourne University Law Review*, 1984, vol. 14, pp. 552, ff..

²⁰¹ Specifically, see J. Waincymer, *WTO Litigation. Procedural Aspects of Formal Dispute Settlement*, London, 2002, Cameron May, pp. 328-331, S. Ohloff, “Beteiligung von Verbänden und Unternehmen im WTO Streitbeilegungsverfahren. Das Shrimps-Turtle Verfahren als Wendepunkt?“, *Europäische Zeitschrift für Wirtschaftsrecht*, 1999, vol. 139.

²⁰² In the ‘case law’, see Panel Report, United States – *Import Prohibitions of Certain Shrimps and Shrimp Products* case (India, Pakistan and Thailand v. U.S.), May 15, 1998, WTO Doc. WT/DS58/R. See Appellate Body Report, United States – *Import Prohibitions of Certain Shrimps and Shrimp Products*, Oct. 12, 1998, WTO Doc. WT/DS58/AB/R. See however, the strong criticisms it elicited, namely by Asif H. Qureshi, “Extraterritorial Shrimps, NGOs and the WTO Appellate Body”, *ICLQ*, 1999, vol. 48, pp. 205-206. The apparent reversal of orientation of the Appellate Body in *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos – Containing Products*, March 12, 2001, WTO Doc. WT/AB/R, does not seem to bode well, however, for the more generous stance in this context.

²⁰³ Other important examples of recognition of ‘*ius standi*’ to individuals are the ones of ILO, chapter 11 of the NAFTA agreement, on investment and the judicial organs set up by the regional treaties on human rights. See, generally, D. Shelton, “The Participation of Nongovernmental Organisations in International Judicial Proceedings”, *AJIL*, 1994, vol. 88, p. 625.

²⁰⁴ As Steve Charnovitz, “WTO Dispute Settlement as a Model for International Governance”, in Alexandre Kiss, Dinah Shelton and Kanami Ishibashi, (eds.), *Economic Globalization and Compliance with International Environmental Agreements*, The Hague, 2003, Kluwer, p. 246, notes “It is true that some governments like the United States routinely espouse complaints in the WTO at the behest of a private industry, but the WTO takes no cognizance of the origin of complaints”.

²⁰⁵ See, exemplarily, Norio Komuro, “Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?“, *JWT*, 1998, vol. 32, n° 2.

²⁰⁶ A particular reference should be made to recent resolutions by the International Law Association relating to International Trade Law, namely Resolution n°2/2000, Annex 3 (“*Declaration on the*



B. Judicialization – Environmental Protection

1. Different instances of compliance control

In this domain the picture is different than in the former one in quite a number of aspects.

In spite of some doctrinal calls for the setting up of a World Environment Court^{209 210}, countered by other authoritative doctrine^{211 212}, no specific ‘*ad hoc*’

Rule of Law in International Trade”), adopted at ILA’s 69th Conference on 29 July 2000, which recommends ‘*inter alia*’ that “WTO member should strengthen the rule of law in international trade by enhancing and acceptance of WTO rules by in particular; (b) “*Opening the WTO dispute settlement system for observes representing legitimate interests in the respective procedures, and promoting full transparency of WTO dispute settlement procedures; (c) Allowing individual parties, both natural and corporate, an advisory ‘locus standi’ in those dispute settlement procedures where their own rights and interests are affected*”. Of International Law Association, *Report of the 69th Conference*, London, 2000, pp. 24-25.

²⁰⁷ See, however, Raymond Ranjeva, “Les organisations non gouvernementales et la mise en oeuvre du droit international”, *RCADI*, 1997, t. 270, pp. 50, ff., expressing reservations concerning this role of ‘*amicus curiae*’ in jurisdictions obeying the principle of state consent.

²⁰⁸ Other ideas ventilated over recent years to equally reduce the ‘democratic deficit’ of the WTO are the establishment of a WTO parliamentary body (a proposal made by the European Union) and of an advisory WTO Economic and Social Committee (a proposal made by the International Law Association); the adoption of a Declaration pledging respect for the universal human rights obligations shared by the WTO Member States; more systematic WTO consultation with NGOs and based on the belief that these latter ones’ expertise and monitoring capacities may help reduce the detected information asymmetries between citizens and parliaments, on the one hand and WTO negotiators, on the other hand (the WTO already holds annual WTO seminars with NGOs on trade-related environmental and development problems). See E.-U. Petersmann “Human Rights and International Economic Law in the 21st Century” *JIEL*, 2001, vol. 3, pp.54-56 and R. Howse, “How to Begin to Think About the Democratic Deficit’ at the WTO”, in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns*, Vienna, 2003, Springer, p. 82.

²⁰⁹ Namely, by the Italian Judge Amedeo Postiglione (*The Global Villlage Without Regulations*, Firenze, 1992, Giunitti; *Tribunale Internazionale Dell’Ambiente* Roma, 1992; “An International Court for the Environment?”, *Environmental Policy and Law*, 1993, vol. 23, pp. 73-78; *Giustizia e Ambiente Globale: Necessità Di Una Corte Internazionale*, Milano, 2001), the German Professor Alfred Rest (“Enhanced Implementation of the Biological Diversity Convention by Judicial Control”, *Environmental Policy and Law*, 1999, vol. 29, pp. 32-42; “The Indispensability of an International Environmental Court”, *RECIEL*, 1998, vol. 7, pp. 63-67; “Need for an International Court for the Environment?; *Environmental Policy and Law*, 1994, vol. 24, pp. 178-187) as well as Jan Pronk, “Keynote Address”, in International Bureau of the Permanent Court of Arbitration (ed.), *International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms*, The Hague, 2001, Kluwer.

²¹⁰ These calls revolve around the ideas that unresolved or even unaddressed environmental problems are important, numerous, of magnitude and specificity, that there is the need for expertise and specific knowledge in dealing with them, that there is a specific need for the provision of a wider

judicial procedure has been established to deal with cases of non-compliance with existing rules. Instead, supervisory and preventive mechanisms have been set up. A number of international institutions have been established with the general task of endeavoring to stave off further degradation of the environment.

States have felt that there was little point in trying to ensure general *compliance* with international rules on protection of the environment by resorting to traditional judicial mechanisms²¹³ and, in cases of persistent non-compliance, to rules on State responsibility. Another alternative advocated is to rather focus on the technical management of a regime. In such mode, binary options would be avoided, small violations would not be counted as violations, as long as the integrity of the regime would not be threatened²¹⁴.

These general trends, sometimes equated with the emergence in international legal thinking of post-modernism²¹⁵ are not absolute ones, however. They do not amount to a total lack of resort to judicial mechanisms. This is evidenced by various cases of environmental nature brought to the International Court of Justice in the late 90s²¹⁶. And the World Court has equally showed readiness to meet the challenge

access to international justice in environmental matters to individuals and NGOs, a wider one than the one usually provided in other judicial instances, and that the procedures in question should be adequate and open to the expression of common, collective or public interests.

²¹¹ Judge Sir Robert Jennings (“The Need for an Environmental Court?”, *Environmental Policy and Law*, 1992, vol. 20, pp. 312-314), Ellen Hey (*Reflections on an International Environmental Court*, The Hague, 2002, Kluwer).

²¹² The reasons more often adduced are based on the values of uniformity of law and jurisprudence which might be at stake if international courts were to proliferate, thus enhancing the risks of clashing substantive rulings, forum shopping and overlapping jurisdictions among intentional judicial ‘*fora*’.

²¹³ On this both theoretical and practical problem, see Martti Koskenniemi, “Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol”, *YBIEL*, 1992, vol. 3, pp. 123, ff.. For a parallel regime in the context of Kyoto Protocol and its experiences, as well as the problems posed, see J. Brunnée, “The Kyoto Protocol: Testing Ground for Compliance Theories?”, *ZaöRV*, 2003, vol. 63, pp. 263-270.

²¹⁴ This theory is most representatively interpreted by Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge, Massachusetts, 1995, Harvard University Press.

²¹⁵ See Veijo Heiskanen, “The Rationality of the Use of Force and the Evolution of International Organization”, in J.M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations*, Tokyo, 2001, United Nations University Press, pp. 155-185. See also D. Harvey, *The Condition of Post modernity*, Oxford, 1989, Blackwell.

²¹⁶ A conspicuous example is that of the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (ICJ Reports, 1996, pp. 241, ff.) of 8 July 1996, another one (*The Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Reports or *ILM*, 1998, vol. 37, pp. 162, ff). On this latter one, see Paulo Canelas de Castro, “The Judgment of the *Case Concerning the Gabcikovo-Nagymaros Project*: Positive Signs for the Evolution of International Water Law”, *YBIEL*, 1997, vol. 8, pp. 21-31.



by setting up a specialized chamber specifically for these matters²¹⁷ and looking at other working methods^{218 219}. The same conclusion is warranted by the experience of the International Tribunal for the Law of the Sea and other arbitral courts²²⁰.

This notwithstanding, the still prevalent feeling is that questions of the environment cannot be settled by black-and-white binary decisions, that is by simply deciding whether a State has or has not complied with an international rule. A raising “soft law” in the field gives also rise to a mounting “soft responsibility”²²¹ as well as softer enforcement mechanisms.

Some good reasons seem to justify this “deviance”:

First, most of the times international rules governing these matters are not so clear-cut and specific as one might expect.

Second, once the breach of a rule has occurred it may be too late for judicial bodies to step in, for the damage to the environment may be of such magnitude that the payment of compensation proves inadequate to the loss or destruction of the natural assets.

²¹⁷ The Court set up its first specialised standing chamber, devoted to environmental matters in July 1993. the Chamber is composed by the Court’s President and Vice-President and 5 judges elected every three years.

²¹⁸ It is however striking that this chamber has never been required to act. This may be explained by the ‘transversal’ nature of environmental issues, which albeit corresponding to a growing international concern are hardly a “self-contained” matter, as both the *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* Case (*ICJ Reports*, 1997, p.7) and the *Fisheries Jurisdiction (Spain v. Canada)* Case (*ICJ Reports*, 1998), seem to have proved.

²¹⁹ See Rosalyn Higgins, “Respecting Sovereign States and Running a Tight Courtroom”, *ICLQ*, 2001, vol. 50, pp. 121-132.

²²⁰ It seems appropriate to recall that Agenda 21 (39.10) calls upon States to further study mechanisms for effective implementation of international agreements, such as modalities for dispute avoidance and settlement, specifically mentioning non-compliance procedures, arbitration and conciliation. Eckard Rehbinder and Demetrio Loperena, “Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation”, *EPL*, 2001, vol. 31, n° 6, p. 286 rightly point out that one of the limitations of these procedures is the fact that, in spite of their likely interests, especially when environmental issues are involved, individuals and NGOs do not partake in this oversight over the behaviour of states parties in the implementation of a convention. This may explain that, even when these procedures are instituted, recourse to more formal adjudicatory procedures, such as arbitral courts, is not usually dispensed. Along these lines, see Laurence Boisson de Chazournes, “La mise en oeuvre du droit international dans le domaine de la protection de l’environnement: enjeux et défis”, *RGDIP*, 1995, tome IC, pp. 56, *et seq.* and UNECE MP.WAT/2000/5, of December 17, 1999: Geneva Strategy and Framework for Monitoring Compliance with Agreements on Transboundary Waters, Annex I, UN/ECOMP.WAT/2000/5(Dec. 17, 1999).

²²¹ Already calling attention to this trend: R.B. Bilder, “The Settlement of Disputes in the Field of the International Law of the Environment”, *RCADI*, 1975, vol. I, t. 144, pp.139-239.



Third, the law-breaking State may be unable to pay compensation, because of its poor financial conditions, its underdevelopment, or other reasons.

Fourth, the damage may have been caused by private persons, without any State responsibility (for instance, due to lack of due diligence) being involved.

Fifth, it may happen that the damage has been caused not to one or more specific States but to the whole international community, and for diplomatic, political, or other reasons no State is prepared to institute judicial or other proceedings against the delinquent State.

Sixth, one may doubt that Lawyers are always the most ideal persons to assess these kinds of problems, at least by themselves.

In short, it has been rightly considered that this is an area where what is first and foremost needed is *prevention*, carried out by *collective bodies* acting on behalf of the international community or at least a group of States²²². It has been felt that the primary task of these bodies should be to *monitor* the conduct of States and, in case of non-compliance, *assist* the deviant State in remedying the damage. Sanctions should be envisaged as a last resort and intervene only in case of repeated non-compliance.

These remarks are not intended to imply that legal disputes may not arise between two or more States and that they may not be settled by recourse to arbitral or judicial proceedings. Indeed, most treaties on the environment, even those that provide for monitoring mechanisms, do not rule out such recourse; they even explicitly provide for it. This, for instance, holds true for the 1992 Convention on Climate Change (Article 14). And, as we also pointed, indeed some recourse has been made and even seems to be on the rise.

The fact however remains that in reality States tend to shun judicial proceedings and rely primarily on supervisory procedures and monitoring mechanisms.

In any event, these have been innovatively set up and should not be overlooked or underestimated.

Such monitoring bodies see to it that States conform to the applicable international standards on protection of the environment. They therefore act on behalf either of the collectivity of States behind a particular treaty, or of the whole humanity (in the case of bodies established within universal organizations such as the UN). Monitoring mechanisms have the task of both verifying whether States are complying with international standards and promoting respect for such standards. Clearly, the role these mechanisms play is well attuned to the realities of the present international community.

²²² Jutta Brunnée, "COPing with Consent: Law-Making under Multilateral Environmental Agreements", *Leiden Journal of International Law*, 2002, vol. 15, pp. 1, ff.

The wealth of these mechanisms is remarkable: a survey of the numerous treaties on the environment permits to detect four main classes: (a) States' self-reporting procedures; (b) inspection; (c) so-called non-compliance procedures; (d) preventive global monitoring.

a) Many treaties on the environment provide for the obligation of States to prepare *periodic reports* on their implementation.

These reports are normally transmitted to the Secretariat established by the treaty, or to the Secretariat of the organization in charge of the particular treaty (this is, for instance, provided for in Article VIII of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)). In other cases the reports are submitted, through the Secretariat, to the Conference of the States parties (exemplarily, Article 12 of the 1992 Framework Convention on Climate Change). In most cases, State reports are examined by the Secretariat, which then submits to the Conference of States parties draft recommendations, to be discussed and, if possible, adopted by the Conference.

b) Monitoring through *on-site inspection* is far more incisive. Inspections are made either by a joint organization or body or by individual contracting States²²³.

This supervisory method is envisaged, for instance, in the 1959 Antarctic Treaty, under which each State party may carry out inspections and report to the "Consultative Parties", which then discuss the reports in their meetings. The 1973 International Convention for the Prevention of Pollution by Ships (MARPOL) entrusts both the flag State and the State where boats dock with monitoring tasks. The 1992 Niue Treaty on Co-operation in Fisheries Surveillance and Law Enforcement in the South Pacific Region provides for inspection on the sea (carried out on the strength of the Pacific Patrol Boat Programme, by boats of the contracting States) and by the air (carried out by aircraft of Australia and New Zealand). Other treaties confer the power of inspection on collective bodies. For example, the Schedule adopted in 1971 to the 1946 Convention for the Regulation of Whaling established a scheme of international observers, appointed by the International Whaling Commission, but nominated and paid by governments. The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) provides that the Secretariat, after receiving States' reports, may authorize an inquiry, the result of which is submitted to the Conference of States parties, which in turn may make recommendations to the relevant State (Article 13). A more effective supervisory system is that provided for in the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, under which an

²²³ On the mechanism, in general, see Stefan Oeter, "Inspection in International Law: Monitoring Compliance and the Problem of Implementation Law", *NYBIL*, 1997, vol. XXVIII, pp. 101-169.

intergovernmental Committee ensures ‘systematic’ monitoring of the state of conservation of world heritage sites, as well as ‘reactive’ monitoring when these sites are threatened by natural disasters or human activities.

c) A third and more advanced supervisory system is the so-called *non-compliance procedure*.

It was first established in 1990 with regard to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. It has subsequently been taken up in other treaties (notably in the 1992 Framework Convention on Climate Change, the 1994 Protocol on the Reduction of Sulphur, additional to the 1979 Convention on Long-Range Transboundary Air Pollution, the 1994 UN Convention to Combat Desertification and the Kyoto Protocol^{224 225}). This monitoring system is much stronger than the other ones and shares some features with the judicial settlements of disputes. In particular, on the one hand, the proceedings may have a contentious character (the State complained of may appear before the monitoring body to put forward its arguments and submissions) and, on the other one, the outcome of the procedure may be the adoption of a binding decision (imposing what in practice amounts to a sanction).

Normally, this procedure unfolds as follows (the one established in 1990 and subsequently improved upon will be taken as a model): if the Secretariat after examining States’ periodic reports, considers that a State is not complying with the treaty, it may make a report to the Meeting of States Parties as well as the Implementation Committee (a permanent body consisting of representatives of ten contracting States, and normally meeting twice a year). Similarly, the Secretariat may forward to the Committee the objections and misgivings (called reservations) expressed by a State party and supported by “*corroborating information*”, concerning another contracting State’s implementation of its obligations. In addition, a State party may report to the Committee, through the Secretariat, that, despite having made its best, ‘*bona fide*’ efforts, it is unable to comply fully with its obligations. The Committee discusses the Secretariat’s report, or the complaining State’s “*reservations*”, or the submissions of the States about its own inability to fulfill the Protocol’s obligations. It may invite to its discussion the State complained of or self-reporting. It then makes a report to the meeting of States parties. This gathering shall decide upon and call for steps to bring about full compliance with the Protocol. The measures that the meeting may adopt, listed in Annex V, include: (a) appropriate assistance, including assistance for the collection and reporting of data, technical

²²⁴ See *ILM*, 1998, vol. 37, pp. 22, ff..

²²⁵ A good presentation of the contents of the Protocol is the one made by Claude Breidenich *et al.*, “Current Development: The Kyoto Protocol to the United Nations Framework Convention on Climate Change”, *AJIL*, 1998, vol. 92, pp. 315, ff.



assistance, technology transfer and financial assistance, information transfer and training; (b) the issuing of cautions; (c) suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.

d) A fourth system is different from those so far discussed in that it is not primarily designed to verify whether States infringe international rules for the protection of the environment. Rather, it aims at *collecting data and information* on the environment so as to better prevent possible damage to the environment. The most important system belonging to this category is the Global Environment Monitoring System (GEMS) established within the framework of the Earth-Watch Programme designed by UNEP. It is directed “*to assemble and assess information on the human and natural environment in order to anticipate environmental degradation and alert the international community to ways in which human activities may be interfering with the functioning of the biosphere and with human well-being*”²²⁶.

2. Independence

In numerous International environmental regimes, it has been possible to enhance the independence of adjudication procedures.

²²⁶ For the theoretical discussion on the properties and benefits of such solutions of compliance promotion, in general, see Günther Handl, “Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio”, *Colorado Journal of International Environmental Law and Policy*, 1994, vol. 5, pp. 305, ff.; Harold K. Jacobsen and Edith Brown Weiss, “Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project”, *Global Governance*, 1995, vol. 1, pp. 19, ff.; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty. Compliance With International Regulatory Agreements*, Cambridge, Massachusetts, 1995; Patrick Szell, “The Development of Multilateral Mechanisms for Monitoring Compliance”, in W. Lang (ed.), *Sustainable Development and International Law*, Boston, MA, 1995, Graham & Trotman, pp. 97, ff.; Laurence Boisson de Chazournes, “La mise en oeuvre du droit international dans le domaine de la protection de l’environnement: enjeux et défis”, *RGDIP*, 1995, tome IC, pp. 56, *et seq.*; James Cameron *et al.* (eds.), *Improving Compliance with International Environmental Law*, 1996; Rüdiger Wolfrum, “Means of Ensuring Compliance With and Enforcement of International Environmental Law”, *RCADI*, 1998, pp. 272, ff.; David G. Victor *et al.* (eds.), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice*, 1998; O. Yashida, “Soft Enforcement of Treaties: The Montreal Protocol’s Noncompliance Procedure and the Functions of International Environmental Institutions”, *Colorado Journal of International Environmental Law and Policy*, 1999, vol. 10, pp. 95, ff..

Generally speaking, until the early 1980s, hardly any International environmental regime contained provisions for independent authorities to adjudicate on violations of legal obligations. In the International Whaling Commission, States had to settle disputes over the violation of their legal obligations amongst themselves.

By contrast, most International environmental regimes established since the 1980s do have adjudication procedures, albeit with a limited degree of political independence.

The international regime for the protection of the ozone layer was probably the first International Environmental Regime in which a committee of experts was given the task of adjudicating disputes over alleged breaches of international obligations. Since then, however, expert committees have to some extent become standard for most treaties on the protection of the international environment. Most of these committees enjoy remarkable political independence, as the experts who act in their individual capacities, once elected, cannot be removed for their entire term.

3. Jurisdiction

By contrast, jurisdiction of adjudication procedures has become quasi-compulsory in many International environmental regimes.

In most International environmental regimes, committees of experts are given the authority to decide independently whether information they receive on violations of environmental rules merits further investigation. Although, in most of these treaties, the reports of expert committees have to be approved by the relevant conference of States, in practice they are always adopted without further revision.

4. Access

In contrast to the access in GATT/WTO, access to the adjudication procedures of international environmental regimes, has increasingly been opened up to include complaints from non-State actors.

In most of today's international environmental regimes, such as the regime for the protection of the ozone layer and the regime to combat climate change, adjudication procedures can be initiated '*ex officio*'.

Expert committees entrusted with adjudication can act upon information on potential violations they either acquired themselves or received from the secretariat. This indirectly gives environmental groups such as Greenpeace access to the adjudication procedures. Although formally, such NGOs complaints do not have to be heard, international environmental regimes' committees of experts have so far not refused to act upon credible information about potential violations of legal obligations by States.



III Assessing the progress

1. Bright signs

The evidence which seems possible to collect on the issue-areas considered – international trade law, international environmental law – and relating to both questions of legalization and judicialization, as well as such factors as independence of the relevant dispute settlement mechanism, jurisdictional powers and access to the dispute settlement services, does indeed accredit a major role for law and the idea of resorting to judicial and other mechanisms of legal control as important methods for settling disputes in the current International Law. Overall, in terms of their changing accessibility as well as their growing political independence and increasing compulsory jurisdiction, International Law, both in its primary rules as well as adjudication procedures, has become more legalised and judicialized than it used to be.

This certainly holds true for international trade law, as well as, albeit to a lesser extent, for most international environmental regimes.

A greater degree of legalization and judicialization, however, does not lead to uniform law development and adjudication procedures. Instead, depending on the issue area in question, it does give rise to rules and procedures with a specific profile.

In particular, we found the adjudication procedures of the WTO to be more judicialized in terms of their political independence and jurisdictional powers. But this was not the case anymore with respect to their accessibility standard.

By contrast, most international environmental regimes are more “open” in terms of access to the relevant adjudication procedures. But their political independence as well jurisdiction is still insufficient. In the whole, judicialization here is less advanced, a fact which may be explained by the specific characteristics of International Environmental Law, which even led some to question the appropriateness of resorting to adjudicatory mechanisms in this context¹.

In any event, what seems to deserve to be retained is that the driving force behind this process of legalization and judicialization seems to be, at least to some degree, the accelerated process of globalization. This relationship would also explain why judicialization is far more advanced within the GATT/WTO than within the environmental protection sector.

¹ We discussed this issue in Paulo Canelas de Castro, “Water Law: the View Projected by the Epistemic Community”, in The International Bureau of the Permanent Court of Arbitration, *Resolution of International Water Disputes*, The Hague, 2003, Kluwer, pp. 371-416.

Indeed, globalization has become the driving force behind legalization and judicialization. States have had to respond to its challenges with *new international rules*. Moreover, due to the fact that national borders are increasingly penetrated in the context of globalization, States have increasingly agreed on “*trans*”national rules, rules not premised on the border (“beyond-the-border”) or in relation to which borders are not the decisive factor. In contrast to traditional international rules or rules of neighborliness, these newer ones not only regulate how States have to act towards other States, but also how they should regulate their own societies². This is clearly the case of the rules of TRIPS in the WTO context, for example³. In response to the complexities of globalization, the rules themselves have become increasingly elaborate, and their application particularly difficult, requiring the *weighing* of conflicting *legal principles*. For example, the application of many WTO rules rests on balancing free trade against consumer safety or protection of intellectual property or protection of intellectual property and access to cheap medicines. In turn, these “new” rules or new wave of legalization, which in a significant part occurred in an international (stronger) institutional setting, encouraged States to gradually accept more international *institutionalisation*, in particular through *judicialised adjudication*. This intervened as it became apparent that judicial adjudication is better suited to the reliable implementation and application of such rules than diplomatic adjudication. The goal of primacy of International Law over international politics seems to have thereby been promoted.

2. Uncertainties: ominous clouds looming in the horizon?

However, some words of caution seem equally warranted: The first one to venture that the expansion of an international rule of law is not a triumphant one-way street to progress. On the contrary, one should expect problems to intervene along the way⁴. Among these⁵, the temptation of major powers towards hegemonic

² Trade may be done between states but does relate to the economic activities of the corresponding societies. Environmental matters are, even more markedly, matters mainly of human societies, the environmental problems are typically caused by private action.

³ We develop this topic further in J. J. Gomes Canotilho and Paulo Canelas de Castro, “Do efeito directo do artigo 33º do Acordo TRIPS”, in Faculdade de Direito da Universidade de Lisboa (ed.), *Homenagem ao Professor Doutor André Gonçalves Pereira*, Coimbra, *forthcoming*, Coimbra Editora.

⁴ Some more recent situations where these anxieties built up and which may be taken as illustrative test cases (but certainly not an exhaustive listing thereof), are the adoption of major legal instruments relating to the law of the sea, the attitude *vis-à-vis* the international criminal jurisdiction, the adoption of the Kyoto Protocol, the intervention in Iraq, the treatment of prisoners of war in Guantánamo, Al-Ghraib or elsewhere, the position in relation to the Geneva Conventions, the regulation of terrorism and the balance of this “*war on terrorism*” with established human rights.

⁵ Other possible issues which come to mind but deserving a discussion here impossible are the one of

positions might be at present one of the deepest sources of concern. Although in many issue-areas the emergence of an international rule of law took place in tandem with a growing hegemony of the United States^{6 7}, we also have witnessed in recent years compelling indications that the hegemony by that⁸ or any other powerful country⁹¹⁰, might endanger the international rule of law¹¹.

Notably, recently, the legalization as well as judicialization of procedures have come under severe pressure in areas where United States' dominance is particularly strong or feels its national interests to be at stake. This is particularly obvious in the case of the Kyoto Protocol¹² or the International

fragmentation of international law and the trend towards some informalisation of law. Interestingly, the International Law Commission seems to share part of this concern, having recently inscribed the former topic in its agenda. See Gerhard Hafner, "Risk Ensuing from the Fragmentation of International Law", in International Law Commission, *Report of the Working Group on Long-Term Programme of Work*, UNDoc. ILC (LII)/WG/LT/L./Add. 1. (2000) and, by the same Author, "Pros and Cons Ensuing from Fragmentation of International Law", *Michigan Journal of International Law*, 2004, vol. 25, pp. 849-863.

⁶ For instance, in the early post-war period when the USA led the initiatives for creating the United Nations, the Bretton-Woods institutions and the GATT. See also John Murphy, *The United States and the Rule of Law in International Affairs*, Cambridge, 2004, Cambridge University Press, pp. 2-4.

⁷ For international environmental law, see Jutta Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories?", *ZaöRV*, 2003, vol. 63, pp. 619-636, in point 2, captioned "*The Trajectory of US Engagement in International Environmental Law*".

⁸ Similar apprehensions have been voiced by leading international law scholars *vis-à-vis* the trajectory of the United States in relation to international law in general or particular areas of international law, such as Jutta Brunnée, "The United States and International Environmental Law: Living with an Elephant", *EJIL*, 2004, vol. 15, n° 4, pp. 617-649 and Ivan Shearer, "In Fear of International Law", *IJGLS*, 2005, vol. 15, n°1, pp. 345-378. Philippe Sands is particularly corrosive in his *Lawless World. America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War*, New York, N.Y., 2005, Viking.

⁹ The concern may indeed relate to a wider array of major powers than the United States, as I. Shearer rightly points, albeit there is also the perception that their misgivings or public attitudes *vis-à-vis* the current development of international law are less well known or less clear. For this, see Ivan Shearer, "In Fear of International Law", *IJGLS*, 2005, vol. 15, n° 1, pp. 345-378.

¹⁰ For similar 'Ängste' in Australia, see, besides the article already quoted by Shearer, Hilary Charlesworth *et al.*, "Deep Anxieties: Australia and the International Legal Order", *Sidney Law Review*, 2003, vol. 25, pp. 423, ff.

¹¹ On a similar vein, within the very United States' scholarship of international law or international relations, denouncing a '*disengaging*' trend or one of '*unilateral action*', see Jonathan D. Greenberg, "Does Power Trump Law?" *Stanford Law Review*, 2003, vol. 55, p. 1815; D. M. Malone and Y. Foong Khong, "Unilateralism and U.S. Foreign Policy: International Perspectives", in D. M. Malone and Y. Foong Khong (eds.), *Unilateralism and U. S. Foreign Policy: International Perspectives*, 2003, p. 5; D. Caron, "Between Empire and Community - The United States and Multilateralism 2001-2003: A Mid-Term Assessment", *Berkeley JIL*, 2003, vol. 21, p. 398.

¹² After the Clinton administration signed the Protocol on December 11, 1998 the Bush administration



Criminal Court¹³. This has equally happened before with Part XI of the United Nations Convention on the Law of the Sea¹⁴ ¹⁵ ¹⁶ and, more recently, with the formulation of the Bush doctrine of pre-emptive strike¹⁷ and the United States and British attack on Iraq in 2003¹⁸. By contrast, in issue-areas in which the United States' dominance is not as pronounced, the legalization and judicialization of adjudication procedures continue uninterrupted. This holds true in the WTO, for instance, where the US generally powerfully contributed to the development of the applicable law and respects the relevant adjudication procedures. It may be deemed telling that the WTO dispute settlement system is actually the only system recently set up to which the United States consented.

A second word of caution which may equally appear opportune concerns the contents of this rule of law: even in these issue-areas where it seems possible to demonstrate an expansive international rule of law, this one is still far from the usual understanding of the domestic rule of law of modern States, both in terms of the primary law as well as the adjudication procedures. Suffice to mention international environmental law. It does not seem likely that within the foreseeable future the

made clear that it would not ratify it, a process which is well reminded by John Murphy, *The United States and the Rule of Law in International Affairs*, Cambridge, 2004, Cambridge University Press, pp. 339-341. See also Bruce Yandle and Stuart Buck, "Bootleggers, Baptists, and the Global Warming Battle", *Harvard Environmental Law Review*, 2002, vol. 26, pp. 177, ff..

¹³ Since the jurisdictional rules governing the International Criminal Court (article 13 of the Statute) may lead to situations where United States nationals may be involved, in spite of the United States not being a party to the Rome Statute, the United States has pursued a three-poles policy which in part voids that rule of its effects: on the one hand, internationally, by passing the so-called "article 98 agreements" with several countries or bilateral immunity agreements, whereby the non-surrender of the nationals to the International Criminal Court is ensured; on the other hand, still internationally, by ensuring a compromise from the Security Council that it shall not act contrary to the American interests, through Resolutions 1422 (2002) and 1487 (2003) of the Security Council; finally, internally, by enacting legislation prohibiting any cooperation with the International Criminal Court (see *HRLJ*, 2002, vol. 27, pp. 275, ff.).

¹⁴ We analysed this issue in Paulo Canelas de Castro, *Do 'Mare Clausum' ao 'Mare Commune'?* Em busca do fio de Ariadne através de cinco séculos de regulação jurídica do Mar", (*forthcoming*).

¹⁵ Other examples could be given of such an attitude of demands for special unequal treatment: the comprehensive Test Ban Treaty, the Landmines Convention, the Convention on Biological Diversity.

¹⁶ This intervened prior to the aftermath of the Cold War and the new wave of globalization we have been looking at. It is not however without notorious precedents, as the Connally reservation and the withdrawal of its consent to the compulsory jurisdiction of the International Court of Justice in the *Nicaragua* Case well attest.

¹⁷ Countering the letter of article 51 of the Charter of the United Nations and even its more liberal corresponding practice.

¹⁸ It does not seem credible the effort at reconducting it to article 51 of the Charter and no Resolution by the Security Council authorized such action.



international rule of law will attain the same degree of normative development or be as binding on States as the domestic rule of law.

Moreover, in contrast to the domestic rule of law, the emergent international rule of law is not holistic, uniformly integrated across the whole spectrum of International Law principles and rules. There is not one rule of law which extends across all issue-areas and there are no indications that such an integrated rule of law might come about. Instead, we are rather witnessing the emergence of a variety of rules of law differing from one issue-area to the next. Some developments, some regimes are even presented as ‘self-contained’¹⁹ ²⁰. The international rule of law remains issue-area-specific. General principles, be they already established or emerging, as well as some emulation among areas and cross-fertilization, once again usually through principles²¹, may be contributing towards the dilution of the problem, but not to its disappearance.

¹⁹ Apart from the aforementioned literature on regime theory, see Math Noortmann, *Enforcing International Law. From Self-help to Self-contained Regimes*, Aldershot, 2005, Ashgate, pp. 129-160.

²⁰ This is, however, a trend which is far from eliciting approval or consensus. On the contrary we may even point towards a rise in the doctrine of studies aimed at ensuring the cross-pollination, intellectual and normative bridges, linkages between different legal solutions or areas of law, even between legal systems and legal orders. The trend appears to even become more and more the air of our times. On the problem, focusing on the WTO regime, see José E. Alvarez (ed.), “Symposium: the Boundaries of the WTO”, *AJIL*, 2002, vol. 96, n°1, with all the contributions therein, pp. 1-157.

²¹ We have been arguing this in different instances and done our own tests and attempts along these lines, particularly in the fields of the International Law of the Sea and the International Law of Watercourses. See Paulo Canelas de Castro, “Mutações e Constâncias do Direito Internacional do Ambiente”, *RJUA*, 1994, n° 2, pp. 145-183; “O Regime Jurídico das Utilizações dos Cursos de Água Internacionais no Projecto da Comissão de Direito Internacional”, *RJUA*, 1996, n°s 5/6, pp. 141-162; “Intervenção de Paulo Canelas de Castro: “Para que os rios unam: um projecto de Convenção sobre a cooperação para a protecção e a utilização equilibrada e duradoura dos cursos de água luso-espanhóis”, in Universidade Autónoma de Lisboa, *Conferência Portugal – Espanha*, Lisboa, 1997, pp. 53-90; “Novos Rumos do Direito da Água: a caminho de uma revolução (tranquila)?”, *Revista do Centro de Estudos de Direito do Ordenamento do Urbanismo e do Ambiente*, 1998, n°1, pp.11-36; “Do *Mare Liberum* ao *Mare Commune*? - as viçosas mutações do Direito Internacional do Mar”, *Revista Jurídica da Associação Académica da Faculdade de Direito de Lisboa*, 2001, n° 24, pp. 11-24; “New Era in Luso-Spanish Relations in the Management of Shared Basins? The Challenge of Sustainability”, in Malgosia Fitzmaurice and M. Szuniewicz (eds.), *Exploitation of Natural Resources in the 21st Century*, London, 2003, Kluwer, pp. 191-234; “The issue of Transboundary Rivers in Southern Africa”, in Luso-American Foundation, *Implementing Transboundary River Conventions, with emphasis on the Portuguese-Spanish Case: Challenges and Opportunities*, Lisbon, Portugal, 2003, pp. 209-248; Do ‘*Mare Clausum*’ ao ‘*Mare Commune*’? Em busca do fio de Ariadne através de cinco séculos de regulação jurídica do Mar”, *forthcoming*; as well as “Freshwaters-Sea Interface: Emerging International Legal Field?”, *BFDUM*, vol. 16, 2004, pp. 179-220; “Evolução

Still further, this overall picture, which seems to hold for the issue-areas considered, but also for other ones (similar data may be collected in other areas, such as that of the Law of the Sea²² and the Law of Human Rights), may be bleaker with more sensitive, highly politically ones. Indeed, it appears less likely to ascertain a comparative development of an international rule of law in what regards issues of security and defense^{23 24}. All the indications are, on the contrary, that this trend

do regime jurídico da relação rio-mar: rumo a um Direito (integrado) das águas?”, *RJUA*, 2004, n° 21/22, pp. pp. 159-232; *Recent Developments in Water Law. Principles and Comparative Cases*, Lisbon, 2005, Luso-American Foundation; “Cambiamento dei paradigmi nella legislazione internazionale e europea a tutela delle acque”, *Rivista Giuridica dell’Ambiente*, 2006, n°6 (forthcoming); “A nova geração dos tratados internacionais sobre águas no contexto da África Austral: Rumo à sustentabilidade?”, in Carlos Alberto de Bragança (Coord.), *5º Congresso Ibérico, Gestão e Planeamento da Água – Bacias Partilhadas, Bases para a Gestão Sustentável da Água e do Território – Resumos de Comunicações e Lista de posters*, Lisbon, 2006, FCT (forthcoming); “Mudança de Paradigmas no Direito Internacional da Água? As “Regras de Berlim” da Associação de Direito Internacional”, in Carlos Alberto de Bragança (Coord.), *5º Congresso Ibérico, Gestão e Planeamento da Água – Bacias Partilhadas, Bases para a Gestão Sustentável da Água e do Território – Resumos de Comunicações e Lista de posters*, Lisbon, 2006, FCT (forthcoming); “Nova Era nas Relações Luso-Espanholas na Gestão das Bacias Partilhadas? Em busca da Sustentabilidade”, in J.J. Gomes Canotilho (org.), *O regime jurídico internacional dos rios transfronteiriços*, Coimbra Editora, 2006, Coimbra (forthcoming).

22 Again see Paulo Canelas de Castro, “Do *Mare Liberum* ao *Mare Commune*? - as viçosas mutações do Direito Internacional do Mar”, *Revista Jurídica da Associação Académica da Faculdade de Direito de Lisboa*, 2001, n° 24, pp. 11-24; further developed in Do ‘*Mare Clausum*’ ao ‘*Mare Commune*’? Em busca do fio de Ariadne através de cinco séculos de regulação jurídica do Mar”, *forthcoming*; as well as “Freshwaters-Sea Interface: Emerging International Legal Field?”, *Boletim da Faculdade de Direito da Universidade de Macau*, vol. 16, 2004, pp. 179-220; Paulo Canelas de Castro, “Evolução do regime jurídico da relação rio-mar: rumo a um Direito (integrado) das águas?”, *RJUA*, 2004, n° 21/22, pp. pp. 159-232.

23 In the past we have noticed the resilience of this area of international legal regulation, possibly due to its closer connection with fundamental issues of the preservation of the State and its attributes (or the traditional thinking thereof), in Paulo Canelas de Castro, *Mutações e Constâncias da Neutralidade*, Coimbra, 1994, *Mimeo*; “Da não intervenção à intervenção? O movimento do pêndulo jurídico perante as necessidades da comunidade internacional”, *A Ingerência e o Direito internacional. XIV Jornadas IDN/CESEDEN*, 1996, pp. 77 129; and “Da não intervenção à intervenção? O movimento do pêndulo jurídico perante as necessidades da comunidade internacional”, *Boletim da Faculdade de Direito da Universidade de Coimbra*, 1995, vol. LXXI, pp. 287-345 (article which follows the line of argument of the previous one); “De quantas Cartas se faz a paz internacional?”, *Vértice*, 1998, pp. 5 27, as well as in Antunes Varela, Diogo Freitas do Amaral, Jorge Miranda e J. J. Gomes Canotilho (eds.), *Ab Uno Ad Omnes. 75 Anos da Coimbra Editora*, Coimbra, 1999, Coimbra Editora, pp. 1005-1060.

24 Even if we do not wish to go further “backwards” into the past and review cases like the ones of the use of force in Kosovo or Afghanistan (see Paulo Canelas de Castro, “A intervenção armada e o caso do Kosovo - novos elementos para a construção de uma nova ordem internacional”, *Nação e*



towards a progressing international rule of law is in this domain less powerful.

Final Remark

A fundamental transformation of International Law

Be as it may, albeit emergent and incoherent, this imperfect international rule of law certainly indicates a *fundamental transformation in the conception of International Law and the sovereignty of contemporary States*. Indeed, this emergent international rule of law significantly limits States' discretion to arbitrarily act outside of international law. Given that sovereignty was one of the characteristics that have defined modern States for centuries, the emergence of an international rule of law must be considered as one of the most fundamental transformations of modern States within the last times of the twentieth century and a fundamental distinctive birthmark of the new century and millennium. Moreover this emerging international rule of law can also be regarded as indicative of a fundamental transformation of international law itself and of the conception of the "tension" State sovereignty *vis-à-vis* the international legal order within such law^{25 26}. This transformation is of

Defesa, 2001, vol. 97), the recent Iraq question with the doubts raised as to the legality of the military intervention, is a case in point, substantiating this claim (see the good succinct argument by Christian Tomuschat, *Völkerrechtliche Aspekte bewaffneter Konflikte*, Heidelberg, 2004, C. F. Müller, pp. 13-18).

²⁵ As Ellen Hey observed (from a different angle but with converging results): "*The changes ... required ... would involve a paradigmatic shift of emphasis for the discretionary role of states...a shift of emphasis from states being bound by international law only at their own discretion to states having the responsibility to develop and implement international law in order to further interests of humankind...*". See Ellen Hey, "Sustainable Use of Shared Water Resources: The Need for a Paradigmatic Shift in International Watercourses Law", in Gerald Henry Blake *et al.* (eds.), *The Peaceful Management of Transboundary Resources*, London, 1995, Grahamd & Trotman, pp. 127, ff.

²⁶ Apart from this "functionalization" of sovereignty (along the same fundamental lines, referring in particular to international environmental law, see Franz Xaver Perrez, *Cooperative Sovereignty. From Independence to Interdependence in the Structure of International Environmental Law*, The Hague, 2000, Kluwer, particularly chapters 5 and 6, pp. 145-343, where the Author (re)conceptualizes sovereignty "*as responsibility to cooperate*"), another promising important line of thought to the undergoing rethinking of the concept of sovereignty is the one which questions its traditionally assumed unitary character and instead underlines its *divisible nature*. It is particularly relevant in the context of studies on the impacts of globalization upon international law and its structures but has a wider and more fundamental bearing, since it pertains to the very nature of one of the more fundamental and enduring structures of the traditional paradigm of international law. See, for instance, Stefan Oeter, "Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der Europäischen Union", *ZaöRV*, 1995, vol. 55, p. 685; Katharina Heckel, *Der Föderalismus als*

such a magnitude that it does not seem disproportionate to say that a true *paradigm-shift*, if not a *scientific revolution*, as presented by Thomas Kuhn²⁷, is in the making. It certainly starts to stand as a vector to be taken on board when thinking on the *implications* of the principle of the rule of law in any context.

And, in view of recent important jurisprudence by some leading courts of domestic legal orders²⁸, we may equally think that it is starting to change the traditional views on the relationship between International Law and domestic law, from within the very internal legal orders, traditionally self-sufficient, almost “secluded”²⁹.

The progress may actually be of an unsuspected magnitude. Indeed, the expansion of the rule of law may stand not as a mere goal in itself but as an evidence (amongst others) of a more profound (tectonic) change, a mutation of the very conception of International Law.

Prinzip überstaatlicher Gemeinschaftsbildung, Berlin, 1998, Duncker & Humblot, pp. 85-87; Anne Peters, *Elemente einer Theorie der Verfassung Europas*, Berlin, 2001, Duncker & Humblot pp. 144-148. Still looking at it as inherently indivisible but modifying its traditional conception, since simultaneously accepting that the underlying authority may be divided between different entities, Alexander Böhmer, *Die Europäische Union im Lichte der Reichsverfassung von 1871*, Berlin, 1999, Duncker & Humblot, pp. 188-194.

²⁷ Thomas Kuhn, *The Structure of Scientific Revolutions*, Chicago, 1969, University of Chicago Press.

²⁸ Foremost, that of the United States, in recent cases. See, in particular, *Grutter v. Bollinger* and *Atkins v. Virginia*, as well as *Lawrence v. Texas* where the Supreme Court or some of its 9 judges rediscovered an affinity for foreign and international law in dealing with constitutional issues which honors the ‘dictum’ “*International Law is part of our law, and must be ascertained and administered by the courts of justice (...)*” but decries the traditional Court’s constitutional jurisprudence. Similar movements can be detected in the constitutional jurisprudence of other common law countries. See Cheryl Saunders, “The Use and Misuse of Comparative Constitutional Law”, *IJGLS*, 2006, vol. 13, n° 1, pp. 37-76.

²⁹ E.g., Michael Cottier, “Die Anwendbarkeit von völkerrechtlichen Normen im innerstaatlichen Bereich als Ausprägung der Konstitutionalisierung des Völkerrechts”, *SZIER*, 1999, pp. 403, ff..



