

Global  
Administrative  
Law

Towards a  
*Lex Administrativa*

Edited by

Javier Robalino-Orellana

&

Jaime Rodríguez-Arana Muñoz

Foreword by

Benedict Kingsbury

This book presents a series of studies in the emerging field of Global Administrative Law. It departs from the original studies of the Institute of International Law and Justice of New York University School of Law, but moves ahead into new aspects. There is an undeniable process of a global homologation of principles of administrative, comparative and international law under different legal systems. We are moving towards a *lex administrativa*.

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and  
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CAMERON  
 MAY  
INTERNATIONAL LAW & POLICY

*This book is dedicated to academics and practitioners of Administrative Law who understood that this field does not end in plain and local understanding of the principe de légalité. There is indeed an interconnected legal system.*

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# Law and Globalization: Between the United States and Europe<sup>1</sup>

Manuel Ballbé\* and Roser Martínez\*\*

## I. Introduction

In order to understand the process of globalization of law, we must study the American regulatory model<sup>2</sup> and administrative State (belatedly created in the XX century) as well as the functioning and internal harmonization between the fifty States of the American Union and the Federal Government because both the European Union and the globalization process have been inspired by it.

Globalization is largely a United States ("US") product, which has exported its administrative and regulatory model to the entire world.<sup>3</sup> We must recognize that there is also a European globalization in the sense that many of the reforms and processes for regional and global integration have a lot to do with the present experience of the European Union ("EU").<sup>4</sup>

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<sup>1</sup> This article is based on an article in homage of Professor Ramón Parada published in the *Revista de Administración Pública*, 174, Madrid, 2007.

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<sup>2</sup> In this article when we use the words *America* or *American* we mean The United States of America.

<sup>3</sup> See the works of the investigation group "The Emergence of Global Administrative Law" headed by B. Kingsbury and R. Stewart, Professors at New York University. B. Kingsbury, R. Stewart and N. Krisch, "The Emergence of Global Administrative Law", *Law and Contemporary Problems* (2005). R. Stewart, "U.S. Administrative law: a Model for Global Administrative Law", *Law and Contemporary Problems*, 68, 2005. B. Kingsbury, "The Concept of Law in Global Administrative Law", *European Journal of International Law*, 20, 2009. See also A. Aman, *Administrative Law in a Global Era*, (Cornell U.P., 2003). It is worth mentioning that the works of Professor García de Enterría, early in the Spanish tradition, have been those who most have positively influenced a certain Americanization of Spanish laws.

<sup>4</sup> For more in depth analysis on the European model and the functioning and harmonization between the fifty states of the United States see M. Ballbé, C. Padros, *Estado competitivo y armonización europea* (Ariel, 1997) and M. Ballbé, R. Martínez, *Soberanía dual y constitución integradora. La reciente doctrina federal de la Corte Suprema norteamericana* (Ariel, Barcelona, 2003).

Globalization was above all an Americanization. It is true that some only see the negative part, as it happens with progressive movements opposed to deregulated trade without administrative interventionism. But it is also important to remember that US inspired globalization has some very positive aspects.<sup>5</sup>

Upon analyzing the American legal system we find that it has been a pioneer in the quest of new rights gained in the last decades: civil rights, women's rights, environmental, labor and social law, minorities rights, health, food safety, road and traffic safety, and others. It is a fact that the US legal system have not been the result of a neoliberal and neoconservative approach, but rather of a transcendental degree of activism from community movements, unrivaled in Europe or the rest of the world. All this has gelled in a period called "the rights revolution",<sup>6</sup> which has implied a wide *corpus iuris* that acknowledges the right of groups and citizens to have access to and to participate in administrative and judicial procedures, in what has been called a model for administrative law to "ensure representation of interests and groups".<sup>7</sup>

The new US administrative and regulatory system, with ample and new administrative agencies of all kinds, was the base model for the creation of the EU. The European Coal and Steel Community (ECSC), the European Commission or the European Central Bank are mere independent administrative agencies shaped after the American pattern.<sup>8</sup> The same occurs with the European regulations and directives<sup>9</sup> (whether pertaining to competition or to environment). For instance, the US antitrust law (most of it not a mercantile law, but an administrative law of competition) lies deeply entrenched in the political and legal tradition of economic federalism.<sup>10</sup> It has already been established in the constitutional tradition that there is no political democracy without economic democracy. The US movement of independence arose largely because of the English trade monopolies. The majority of the thirteen initial state constitutions had provisions related to the fundamental rights of free competition. For instance, Art. 41 of the Constitution of Maryland says "[t]hat monopolies are odious, contrary to the spirit

<sup>5</sup> C. Harlow and R. Rawlings, *Pressure Through Law* (Routledge, London and NY, 1992).

<sup>6</sup> C. Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective* (The University of Chicago Press, 1998). C.R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990).

<sup>7</sup> See the article of the then Harvard Professor of Administrative Law, R. Stewart, "The reformation of American Administrative Law", *Harvard Law Review*, 88, 1975.

<sup>8</sup> D. Geradin et al. (ed.), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar, 2005).

<sup>9</sup> See R. Alonso García, *Sistema jurídico de la Unión Europea* (Thomson-Civitas, 2007).

<sup>10</sup> M. Ballbé, "La competencia como principio vertebrador del sistema pluralista", *Anuario de la competencia de 1998*, Fundación ICO-Marcial Pons, 1998.



of a free government and the principles of commerce, and ought not to be suffered". The neoliberal idea that free market took place in the US without any intervention of the State is evidently erroneous. This constitutional right had a judicial control, which demonstrates that there was a judicial applicability than rather than a plain administrative control system since the 19<sup>th</sup> century.

Hence the principle of fragmentation and balance of economic power was the expression of the federal constitutional principle of *checks and balances*. This principle was exported by the US to Europe during World War II. After the defeat of Nazism, as Garrigues pointed out, "the American soldiers carried their antimonopoly law in their backpacks – *Sherman Act* of 1890". The US always understood that Nazism and concentration of political power was no more than the result of a previous concentration of economic power through the German cartels.<sup>11</sup> Articles 85 y 86 of the European Treaty, are ultimately the incarnation of the US legal system as far as competition is concerned.<sup>12</sup>

Therefore, if globalization is a US inspired process, we need to go back in time and analyze the internal US system to better understand what we are to expect from it and the ultimate meaning of these administrative regulations.

Firstly, it is noteworthy that the important changes occurred in the US at the beginning of the 20th century – mainly driven by the progressive movement initiated by President W. Wilson who transformed the liberal State without public administrations or with reduced interventionist regulations into a powerful "administrative and regulatory State". Important administrative agencies were created and a strong interventionism in the economic and social spheres came about, later to become the institutional base and legal genesis of the US as a great power in the international arena.

The US legal system underwent two large phases: its creation (as an individualcentric State) and the one from the beginning of the XX Century up until our current time (administrative and regulatory State).

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<sup>11</sup> J. Garrigues, *La defensa de la competencia mercantil* (Madrid, 1964).

<sup>12</sup> Jean Monnet, one of the founders of the European Union was very familiar with conditions in the US where he lived and was involved during the decisive years of the World War II, as can be seen from his trajectory and his memories. He was inspired by the American laws as to the development of the articles on competition in the European Treaties. First with that of the ECSC and later with that of Rome. Among his collaborators for the writing of articles on competition law of the ECSC treaty there is a former Harvard Law teacher specialized in Antitrust who was in Paris in 1950. Monnet, *Memorias, Siglo XXI*, 1985. Djelic, M., "Does Europe Mean Americanization? The Case of Competition", *Competition and change*, Vol.6 (3), 2002, p. 244. M. Djelic, *Exporting the American Model. The Postwar Transformation of European Business* (Oxford University Press, 2001).

## II. The Catholic and Protestant Religious Influence in the State Configuration

The Catholic Church, from the 10th century through the construction of the absolute State, represented the sole perfectly organized and articulated administration in all of Europe and became a model of hierarchical and interconnected organization. At that time, nowhere in Europe was there yet any other administrative and functional framework as the existing church, with all its churches, convents, abbeys, etc.<sup>13</sup> And, Latin, the vehicular language of the church, was also the language of the law and of administrative expertise. As to security, the Catholic Church offers multiple innovating solutions on a regulated plan as well as on an organizational plan. Catholicism will have a protective function for believers (embryon of the future "protector State") establishing a social, moral and material order under its own multiple administrations and regulations, which used their own procedures which, later on, will constitute the origin of the centralist administration and public security system. There were legal and political security organizations created by the Catholic Church and were imposed as common law all over Europe. One of them is the *Tregua Dei*, a military and religious order (a standing army and also a military police). Another security organization was the inquisition. In the words of Braithwaite, "[the Catholic Church was] the most powerful regulator of medieval Europe".

Besides administrative functions, the Catholic Church conferred universal supraterritorial jurisdiction along with the idea of administrative justice "retained" or "delegated" but not independent from the executive power of the Pope. Proof of the influence of these principles in the formation of absolute States is Richelieu's Edict of 1641, evidencing how the prohibition on judges from controlling the Administration had been legally configured in the Old Regime.<sup>14</sup>

The Protestant Revolution also brought about a revolution against the existing legal and organizational systems. On one hand, the Catholic

<sup>13</sup> J. M<sup>a</sup> Font i Rius, , *Estudios sobre los derechos e instituciones locales en la Cataluña medieval*, Ediciones de la Universidad de Barcelona, 1985.

<sup>14</sup> F. Monnier, "La naissance du contentieux administratif moderne", *Revue Administrative*, 286, 1996. "Some Continental nations, such as Italy and France, have relied upon well-staffed and specialized tribunals, comprised of high-ranking civil servants and located within the administrative bureaucracy itself, to control the actions of administrators. Indeed, during the sixteenth and seventeenth centuries in England the Tudor and Stuart monarchs had developed powerful administrative tribunals. These bodies might well have evolved into a bureaucratic version of administrative justice analogous to the present French *Conseil d'Etat* or the Italian *Consiglio di Stato*. But this line of development was cut short in Britain by the Glorious Revolution of 1688, the political triumph of parliamentary government, and the related celebration of the independent judiciary as an important check on executive power". S. Breyer and R. Stewart, *Administrative Law and Regulatory Policy* (Little Brown and Company, 1985) p.24.

system revolved around the administration (ecclesiastic at first and later of the State). On the other hand, the Protestant system around the individual and the community. Therefore, the hierarchical organization model of the administrative State (inspired by the Catholic Church) was rejected by protestant States like the US.

That is why the US was borne as a country without neither a large public administration nor administrative intervention. The US State model was centered on the individual or on the community, and not on the corporation, as opposed to the European States where, from the beginning, Public Administration was the centre of all, (following the organizational model of the Catholic Church and its "administrative State" system.

The US model – fruit of the protestant and puritan religious conception of their founders – was based on the free interpretation of the Bible by the individual. Consequently, the protagonists of the interpretation of the regulation will not be the Public Administration but the individual or the community. The American puritanism opposes a centralized, hierarchized, professional and hyperregulating organization (either of the Catholic Church or of the Anglican Church).<sup>15</sup> This individual-oriented dynamic rejected any church or institutionalized administration having any type of monopoly of power, such as the British administration. Anglicanism also accentuated a model consisting in having the Queen to be the Head of the political power and at the same time the head of the religious power. Therefore, the royal and the religious administration was overlapped just as it had occurred in the roman-christian empire.

In the US, the culmination of the individual regulatory determination would be the recognition of the right of any citizen to carry arms (provided in the second amendment of the US Constitution). Thus, the legitimate use of violence only by the State and its Public Administration (as it occurred in the European tradition) was rejected. The belief that the origin of a modern State is when it acquires the monopoly of legitimate violence is not applicable to the US because of the principle constitutional principle that allows citizens to carry weapons.<sup>16</sup> This is an individual oriented vision,<sup>17</sup> in contrast to the Administration oriented European tradition. Moreover, in the early years of the US, the individuals, communities or local groups (denominated *posse comitatus*<sup>18</sup> or community

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<sup>15</sup> R. McCleary and R. Barro, "Religion and Economy", *Journal of Economic Perspective*, vol. 20, 2, spring 2006, pp. 46-72.

<sup>16</sup> R. Martínez, *Armas: ¿Libertad americana o prevención europea?* (Ariel, 2002).

<sup>17</sup> B.A. Shain, *The Myth of American Individualism* (Princeton, 1994).

<sup>18</sup> B. Baker, J. Elsea and C. Doyle, *The Posse Comitatus Act and Related Matters* (Novinka, 2004).

groups of the county) acted as police directed by a Sheriff elected by the community. Consequently, he was not an official but just any citizen and the distinction between public and private would fade away.

The same occurred with justice: it will be the individuals (citizen-judge), through the jury – a non administrative but communitary institution – who shall have the capacity to decide on the guiltiness or innocence of the trialed individual.<sup>19</sup>

The same reasoning applies to the US Army. It was not a *standing army* (full-time career soldiers like in Europe) but it was formed by volunteers (citizen soldier) trained by State militias (later called National guards of each State). The national guards only obey to the President of the United States in case of war and emergencies. Still today fifty percent of the US Army, in all its units including those sent to Iraq, are national guards coming from the fifty states of the Union. Under this model of a composed State and thus a composed army, it is easier to understand what are today the international military forces of intervention commanded by the United Nations ("UN"): a military force composed and integrated by units of various States.<sup>20</sup> This is another example of US inspired globalization.

Therefore, there are opposed State models: one dominated by individuals and communities and one dominated by the Public Administration and its civil servants. The US model of the citizen-police, citizen-soldier and citizen-judge compared to the model of the civil servants as police, army and judge.

### III. Certain Perversions of the Individual Oriented US Model

The crisis of the US State stands out in each one of the institutions previously mentioned. Citizens as police in the *posse comitatus* extralimited themselves in their functions and defended the interests of the local stakeholders. In many cases, this legal institution practically transformed itself into a party of gunmen who took matters in their own hands. Also, jurors were appointed by the sheriff and consequently the separation between police and justice did not exist; many abuses have taken place, which have been classified by the expression lynching.<sup>21</sup>

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<sup>19</sup> The primacy of the juror over the judge is valid after the US. Supreme Court *Ring vs. Arizona*, 2002, that annulled all death sentences pronounced by a judge and not by the jury.

<sup>20</sup> M. Ballbé and M. Martínez, *Soberanía dual...*. Mainly for this subject matter. See Chapter 9, about National Guard, p. 105.

<sup>21</sup> C. Waldrep, *The Many Faces of Judge Lynch. Extralegal Violence and Punishment in America* (Palgrave, 2002). The watchmen were also called "regulators" thus spreading the duties of the *posse*. R.M., Brown, *Legal and Behavioral Perspectives of American Vigilantism*. L.M.

Another perversion of the system was the militarization of the *posse comitatus* due to the fact that militia and Army volunteers frequently acted in law enforcement functions. In some cases, a militia unit was brought into the community commanded by a sheriff or marshall. After the civil war, the police functions in the community had to be carried out by the military of the North, in order to protect the free black citizens of the South. In a very disputed presidential election, the military –when exercising police functions– were accused of manipulating votes. As a result of all this, the most important legislative act that separated the civil police function from the military function was promulgated. In fact, the federal *posse comitatus* Act of 1878 prohibited the professional military men or the militias to participate in the law enforcement functions of the community.<sup>22</sup>

On the state level where this law is not applied, the militias and the national guards of the States (depending on each Governor on a general basis) were constantly used in local activities:

After 1920 the National Guard had strong ties also to local business leaders. Many high-ranking Guard officers were among their community's leading businessmen. In this period, as in the late nineteenth century, the Guard served the interest of business in conflict with labor. It saw frequent service in strikes. ... (In the media) and even on the floor of Congress, it was attacked as the private army of big business.<sup>23</sup>

The 1878 law, which represents the current tradition of civil versus military power, has been the most discussed since 9/11 and it has been recently modified to give new protagonism to the Army security wise.<sup>24</sup>

Another perversion of the system was the privatization of security activities. Upon rejecting the model of professional police corps which, in the mid 19th century only existed in large urban concentrations such as those in Chicago or New York, private investigators and security companies arose to cover this field. The most famous one was the one created by Alan Pinkerton in 1840: the Pinkerton National Detective Agency.<sup>25</sup> Paradoxically its most important clients were, besides private enterprises, Public Administrations (i.e. post offices, night guard services, etc.). They also carried out federal offence investigations assigned to them by the Department of Justice.

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Friedman, *Law in American History*, 1971, p. 101. See M.C. Fernández, "Lynching in Guatemala. Legacy of War and Impunity", *Weatherhead Center for International Affairs*, Harvard University, June 2004.

<sup>22</sup> S. Skowronek, *Building a New American State. The Expansion of National Administrative Capacities 1777 – 1920* (Cambridge, 1984). G. Rao, "The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-nineteenth-century America", *Law and History Review*, 26, spring 2008.

<sup>23</sup> M. Derthick, *National Guard in Politics* (Harvard, 1965) pp. 51-52.

<sup>24</sup> "Preserve Posse Comitatus", *The Progressive*, Nov. 2005.

During the Civil War the inexistence of any small federal administration acting in the South made the Government require to Pinkerton a work pertaining to the Intelligence Service. Pinkerton had an agents network in the South and the Federal Public Administration did not. In 1861, the President resorted to General McClellan, a director of the Railroad sector who gave Pinkerton the mission of organizing a military secret service.<sup>26</sup> The origin of the CIA and the American Secret Service lies on private security. In fact, Pinkerton's company considers itself the first institutionalized US intelligence services which only began as a public organization with the Secret Service (today a federal police, different from the FBI, that protects the President).<sup>27</sup>

Pinkerton was also required to protect Lincoln. Later though, because of internal fights between politicians and the military and the distrust due to the growing protagonism and influence of Pinkerton, his contract as Presidential escort was cancelled. However, Pinkerton detected in time a plot to assassinate the President in Baltimore, but this was mocked and dismissed as a fabrication and a form of pressure to renew his contract. However, the subsequent assassination of Lincoln made him more famous and prestigious.

The crisis of the private security model came about precisely because of their growing success. The *pinkertons* were called as volunteer members of the *posse comitatus* once having sworn before the sheriff to assume their function of public police. It was during the strike of 1892 when, in order to hold back disturbances, the Pinkertons were, as in other occasions, used as police. The deaths caused by the shooting provoked by this police intervention caused a great impact and was rejected by the population. All this caused the first federal private security law, the *Pinkerton act* of 1893 which, for the first time, prohibited that members of private security companies act as police and law enforcement. This prohibition obligated the Department of Justice in 1905 to create its own Federal Police Corps which would later become the FBI.

Globalization made the old security model to be in the middle of the public debate<sup>28</sup> during the Iraq War.<sup>29</sup> In Iraq, private security companies

<sup>25</sup> J. Horan, *The Pinkertons: The Detective Dynasty that Made History* (Crown, 1967).

<sup>26</sup> R. Jeffreys-Jones, *Cloak and Dollar* (Yale University Press, 2002).

<sup>27</sup> M. Dorman, *The Secret Service Story* (Delacorte, 1967).

<sup>28</sup> A. Leander, "Globalization and the State Monopoly on the Legitimate Use of Force", *Political Science Publication*, Faculty of Social Sciences, n. 7, Copenhagen, 2004. H. Steiner, "The Indispensable Metaphor of War. On Populist Politics and the Contradictions of the State's Monopoly of Force", *Theoretical Criminology*, 7, 2003, p. 265.

<sup>29</sup> See the work of Professor of Administrative Law, P. Verkuil, *Outsourcing Sovereignty. Why Privatization of Government Functions Threatens Democracy* (Cambridge, 2007). N. Parrillo, "The de-privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century", 16 *Yale J.L. and Human*, 2007.

have an ample spectrum of functions: (i) escort US authorities in Iraq (i.e. Paul Bremer), (ii) administration of the occupation and later the Government of Iraq), or (iii) render all kind of services (military and police).<sup>30</sup> Another example is the private enterprise Blackwater, which even in the regulations which initially were established enjoyed immunity as occupation army.<sup>31</sup>

As of 1829, the fourth abuse of the system was the selection of all positions in administration through *the spoil system*. During President Jackson's Administration appointments were made for brief mandates in order for an "official elite" not to appropriate itself of the positions as spoil. Thus the majority of public posts, including 90% of all the judges of the States were elected as was the sheriff.

At the end of 19<sup>th</sup> century, the crisis of the State-community became more acute due to corruption and the takeover of the administrative positions by political parties, above any other merit or professional capacity (political clientelism or patronage). The need to construct a public administration, by then anorexic and lacking professionalism, in order to respond to the requirements and public services demanded by progress became more and more evident. Although today the US still has residues of this anomic State,<sup>32</sup> at the beginning of the 20<sup>th</sup> century, the US was to be transformed into an administrative and regulatory State.

#### IV. The Construction of an Administrative and Regulatory State in the US. The First Wave: Wilson's Era

The cornerstone of this new administrative philosophy was headed by the *progressive movement* of which President W. Wilson was one of its protagonists.<sup>33</sup> In his famous book *Congressional Government*, Wilson condemned the lack of a government led by the Executive and the inexistence of implementary public administrations as well as the shortage of career, professional and impartial officers. He defended the approval of interventive administrative regulations, essential to public

<sup>30</sup> P. Singer, *Corporate Warriors. The Rise of the Privatized Military Industry* (Cornell University Press, 2003). See also C. Rosky, "Force, Inc.: the Privatization of Punishment, Policing, and Military Force in Liberal States", *Connecticut Law Review*, Vol.36, 2004.

<sup>31</sup> Recently the Government of Iraq cancelled its contracts with this enterprise because their private agents acting as police cause the death of 17 innocent Iraqi civilians. See Scahill, "Blackwater. The Rise of the World Most Powerful Mercenary Army", *Nation Book*, 2007, Also Pelton, *Licensed to Kill*, 2006; Rasor et al., *Betraying our Troops. The Destructive Results of Privatization* (Fallgrave, 2007).

<sup>32</sup> P. Waldmann, *El Estado Anómico* (Nueva Sociedad, 2003). W. Morrison, "Anomie" in *The Sage Dictionary of Criminology*, 2001, p. 10.

<sup>33</sup> R. Pestritto, "The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis", *Social Philosophy and Policy*, Vol.24, 2007.

services that require a highly specialized authorities (railroad, gas, water, etc.) as well as for other economic and social fields.<sup>34</sup>

Wilson's progressive movement was the true regenerator of the US Federal System making it an administrative State. Moreover, there were influences of European administrative models (mainly the German and English models).<sup>35</sup> This transformation followed its own logic. Its main point was the instauration of independent administrative agencies and the introduction of specialized administrative personnel putting an end to the old spoil system.

### 1. The Railroad Regulation

The more important federal administrative regulatory reform begins in 1887 with the Interstate Commerce Commission.<sup>36</sup> A very important regulation is initiated in all matters that, according to the constitutional clause, will affect Interstate Commerce.

The antecedent of the State's regulatory agencies, which later inspired this federal administrative reform, is the Massachusetts Railway Commission created in 1869. Mr. Charles Adams was its first President.

At that time the railroad appeared as a natural monopoly: "for Americans, monopoly ultimately implied a foreclosure of those economic opportunities that set the New World democracy apart from the Old World tyranny. Any argument in favor of any form of monopoly bore therefore a crushing burden of negative national prejudice".<sup>37</sup>

At the beginning the legislators limited themselves to promote the construction of new railroads in order to compete with those already existing but, for Adams, this option made no sense. In 1869, he complained that legislators "only saw the existence of monopoly, but they did not realize that it was much easier and much cheaper to regulate it than to destroy it". And for this it was necessary to create an administrative commission composed of specialists, the period of their position not coinciding with the period of the legislature. It was a matter of separating politics and administration. Obviously, the functioning of

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<sup>34</sup> D. Mayer, "The Myth of Laissez-faire Constitutionalism: Liberty of Contract During the Lochner Era", 36 *Hastings Const.L.Q.*, winter 2009.

<sup>35</sup> "Wilson subscribed thoroughly to the doctrine of historical progress that he had learned from reading German state theorist like Hegel and Bluntschli and from his own teachers such as Richard T. Ely, who had received their education at German universities". R. Pestritto, *The progressive origins of the administrative state... op.cit.*

<sup>36</sup> See the first stage in J. Marshaw, "Recovering American Administrative Law: Federalism Foundation, 1787-1801", *Yale Law Journal*, April 2006.

<sup>37</sup> McCraw, *The Prophets of Regulation* (Harvard U.P., 1984) p. 10.



this regulatory commission will influence later Wilson in his seminal essay "The study of Administration".<sup>38</sup> The general political lines having been given the execution and the control as technical matter had to be reserved for an independent administrative organization composed of experts. The corruption that had appeared around the growing power of the railroad enterprises in collusion with politicians and administrators was a decisive factor for the creation of these regulatory commissions located outside the reach of politics.

The creation of this agency allowed for the introductions of new model of independent public administration and a new concept of regulation. The agency was able to summon the directors of railroad companies as well as other implicated protagonists, politicians or private parties and request them to declare before a public audience. It was also capable to issue reports and make recommendations. Their function was to see to the impartiality and transparency in the functioning of certain economic and entrepreneurial sectors.

The purpose was to give more administrative power to these agencies. From that moment – although it might be difficult to understand it in the European tradition – the set of actions structuring a specific sector through multiple instruments was later to be called *regulation*.

The agency or commission, safeguarding its power to demand information from the railroad enterprises, did not have any coercitive power. In the words of Adams "the commissioners have no power except that of recommending and reporting. Their only appeal is to publicity. The board is at once prosecuting officer, judge, and jury, but with no sheriff to enforce its process". This is precisely what Adams wanted and his strategy has remained in the essence on the functions of the regulatory commissions "as one of the most ingenious" – and calculated denials – in the entire history of regulations.<sup>39</sup>

Later, regulatory commissions in sectors such as electricity – not only on a State level but also on a federal level – would reproduce this scheme, creating a new administrative system, different from the one applied in continental Europe.<sup>40</sup>

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<sup>38</sup> "Yet it was his own notion of the distinction between politics and administration, Wilson argued, that cleared the way for importing what was essentially a Prussian model of administration into the United States". R. Pestritto, *The Progressive Origins of the Administrative State... op.cit.* W. Wilson, "The Study of Administration" (1887) in *Classics of Public Administration*, J. Shafritz and A. Hyde (Ed.) (The Dorsey Press, Chicago, 1987).

<sup>39</sup> McCraw, *op.cit.*, p 20. See on the evolution of the Theories of Administrative Law Professor W. Chase, *The American Law School and the Rise of Administrative Government* (Wisconsin, 1982).

<sup>40</sup> The Pure Food and Drug Act and the Meat-Inspection Act (1906), "represented a significant widening of federal regulatory power" in U.S., McGerr, M., *A fierce Discontent. The Rise and Fall of the Progressive Movement in America* (Oxford U.P, 2003) p.163.

## 2. The Antitrust Law (1890)

A key law of the administrative and regulatory State is the 1890 Federal Antitrust law, called the Sherman Act. This law expresses US commitment to free trade and competition. Some neoliberals still claim that the American Capitalism was non-regulated and that there was no administrative and judicial interventionism. This shows a lack of knowledge of the consequences of this law still in force today. The Sherman Act comprises the instauration of a more rational and efficient capitalism under the federal principle of *checks and balances*.

Almost a century the principles of economic democracy were introduced in Europe. These administrations and regulations are opposed to the concentration of economic power.<sup>41</sup> Senator Sherman – the inspirer of the Antitrust Law – said the following about the judicial, constitutional and federal value contained in this economic regulation:

If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade with power to prevent competition and to fix the price of any commodity.<sup>42</sup>

Perhaps the most impacting result of this regulation of trade and competition was the 1911 US Supreme Court decision ordering *Standard Oil* to break up into thirty four independent enterprises.<sup>43</sup>

## 3. Community Pressure Through the Law: Litigating to Regulate. *Muller v. Oregon* (1908) and the Women's Suffrage Movement

Social movements have driven most of the big changes in American constitutional and administrative law<sup>44</sup> and will predetermine the future of global law.

In 1905 Brandeis said:

[t]he great achievement of the English-speaking people is the attainment of liberty through law, it is natural, therefore, that those who have been

<sup>41</sup> S. Piott, *The Anti-Monopoly Persuasion. Popular Resistance to the Rise of Big Business in the Midwest* (Greenwood, 1985).

<sup>42</sup> W. Adams and J. Brock, *The Bigness Complex* (Stanford Economics and Finance, 2004) p.XI (Preface).

<sup>43</sup> The later judge of the Supreme Court, Brandeis counselor of Wilson will be one of the ideologist of the fight against economic concentration. See his book *Other People's Money and the Bankers Use It*.

<sup>44</sup> W. Skridge, "Some Effects of Identity-based Social Movements on Constitutional Law in the Twentieth Century", *Michigan Law Review*, vol.100, p. 2062.

trained in the law should have borne an important part in that struggle for liberty and in the government (...).<sup>45</sup>

Community activism in the US always had a legal strategy founded on a so-called regulation through litigation. One of the first successes of this strategy was achieved by the women's mobilization inside the National Consumers' League (NCL) related to the recognition of the right of maximum working hours.

A New York's State law established a limit to the working hours of NY bakers at ten per day, but it had been declared unconstitutional by the Supreme Court in *Lochner v. New York*, in 1905. On this case, Harlow said:

In the disastrous case of *Lochner v. New York*, the Supreme Court drew on the 'freedom of contract' doctrine to rule that protective legislation was unconstitutional unless justified on the grounds of health and safety.<sup>46</sup>

The Supreme Court, in the *Lochner* era, stick to the maintenance of the conservative principles of laissez-faire and free market without restrictions and tended to strike down economic and social regulations.

The line of argument of the Supreme Court on *Lochner* was the following:

It is a question of which of two powers or rights shall prevail – the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.<sup>47</sup>

The legal advice of famous commentator Louis Brandeis<sup>48</sup> to the women's movement to support the Oregon act that established maximum hours work for them, was a decisive combination to induce a change on jurisprudence with the historic decision *Muller v. Oregon*. On Brandeis, Strum said:

This theory of law was responsive to communal needs and his interest in the problems of labor came together in 1908, when he [Brandeis] worked

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<sup>45</sup> P. Strum (ed.), *Brandeis on Democracy* (U.P. Kansas, 1995) p. 53.

<sup>46</sup> C. Harlow and R. Rawlings, *Pressure Through law* (London and NY, 1992) pp. 76-77.

<sup>47</sup> Peckham, J., Opinion of the Court, *Lochner v. N.Y.* (No.292).

<sup>48</sup> Who will later be advisor the President Wilson and mastermind of several administrative proposals. Later appointed Supreme Court Justice.

with his sister-in-law Josephine Goldmark and the National Consumers' League on what became the famous 'Brandeis brief' in *Muller v. Oregon* (1908). Submitted to the United States Supreme Court on behalf of an Oregon law setting maximum hours of work for women, it devoted only two pages to legal precedent and over a hundred pages to sociological data demonstrating that overly long work days had negative effects on women and their families".<sup>49</sup>

This change will endure a jump from a State based on the laissez-faire to a more interventionist and regulatory State. Thus an innovative administrative law will be initiated. Brandeis and the movement strategy were one of the first forms of regulation through information and evaluation by collecting scientific, medical and sociological data, about women's working conditions in America, even comparing with Europeans studies and regulations. He said "when women worked long hours, it was destructive to their health and morals". Such conditions as poor health from standing for long hours, which reformers documented to justify state intervention, were translated by the justices as indicators of fundamental gender difference,<sup>50</sup> as shown below:

The successes scored by the National Consumers' League (NCL) present a very different picture to the suffragists' record of failure.<sup>51</sup>

The importance of this innovation for the future of interest-group litigation cannot be overestimated:

First, it opened the door to the admission of sociological and other contextual material not normally admissible under legal rules of evidence. This in turn encouraged American courts to take a bolder line on policy-making".<sup>52</sup>

Over the next decades, laws for the woman worker generated the template for standards for all workers, shifting the discourse from the regulation of dangerous work to the protection of needy workers. Conceptions of gender, particularly notions of women's biological and social disadvantages, fueled both discussions about and the development of sociological jurisprudence, the documentation of social conditions to argue for legal changes. This emphasis on the state's responsibility to counter economic oppression derived from women's dual position at home and in the marketplace. The Great Depression would provide a contextual argument for those searching to end exploitation of made workers as well.<sup>53</sup>

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<sup>49</sup> P. Strum (ed.), *Brandeis... op.cit.*, p. 10.

<sup>50</sup> E. Boris, "Labor's Welfare State: Defining Workers, Constructing Citizens", *The Cambridge History of Law in America* (Grossberg and Tomlins Ed., Vol. III, 2008) p. 332.

<sup>51</sup> Harlow, C., Rawlings, R., *Pressure...op.cit.*, p. 76.

<sup>52</sup> *Ibid.*, p. 77.

<sup>53</sup> See note 50, p.334.

With *Muller v. Oregon* a labor law orientation began, no longer based solely on relationships between individuals (private law) and under the liberty of contract principle but based on a firmly affixed principle of State regulation of the labor market. This regulatory law and regulatory control of labor<sup>54</sup> were consolidated on *West Coast Hotel v. Parrish* of 1937:

In asserting that the relationship between employer and employee was public, not private, *West Coast Hotel* blurred the boundaries between State and market. (...) It affirmed the State's right to enact measures to mitigate women's disadvantages in the labor market on the basis "that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances".<sup>55</sup>

Women's activism, even in time of war, will achieve a constitutional change, because finally women's right to vote will be recognized.

The context of World War I infused American rights discourse, both where rights were denied and where they were extended. In the final years of the long campaign for woman suffrage, suffragists used wartime ideology to prove their point. In 1918, picketers from the National Women's Party surrounded the White House, holding banners with messages intended to embarrass the war effort. One banner read: 'To the Russian envoys... we the women of America tell you that America is not a democracy. Twenty million American women are denied the right to vote'. President Wilson, who had resented the suffrage protesters, ultimately came to embrace women suffrage as a war measure, arguing to Congress that it must consider 'the unusual circumstances of a world war in which we stand and are judged not only by our own people and our own consciences but also in the view of all nation's and peoples'... The president believed that the suffrage amendment 'was vitally essential to the successful prosecution of the great war of humanity in which we are engaged'. (...) Once the Nineteenth Amendment was finally ratified in August 1920, some believed that women voters would support the League of Nations, in the interest of peace.<sup>56</sup>

#### **4. President Wilson's Administration**

The Wilson's Administration sought to make important changes towards an administrative and regulatory State. Hence, the seeds of legal and administrative globalization were originated. It cannot be forgotten counselor, Colonel House who, in 1912, published an anonymous

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<sup>54</sup> R. Johnstone and R. Mitchell, "Regulating Work" in Parker, Scout, Lacey and Braitwaite (ed), *Regulating Law* (Oxford, 2004) p. 101.

<sup>55</sup> E. Boris, *Labor's Welfare...*, p. 334.

<sup>56</sup> *New York Times*, "Cox Sees League Aid in Suffrage Victory", August 19, 1920. M. Dudziak, "Making Law, Making War, Making America" in *The Cambridge History of Law in America*, Grossberg and Tomlins Ed., Vol. III, 2008, p. 703.

novel, *Phillip Dru: Administrator*. It exposed a program of administrative reforms where the creation of a Federal Reserve was proposed as well as other measures which would be later enforced. The novel also contained administrative proposals with an international focus, such as the creation of the League of Nations. Eventually it would be Colonel House and the British Foreign Secretary Edgar Gray who would make official the international proposal. The idea was the creation of a World Federation of Nations that would accept arbitration and subordination to International Law based on *the Anglo-Saxon Rule of Law* instead of resorting to the use of force. It also proposed the elimination of trade barriers and internal tariffs following the model (which previously existed between the States of the US) to be found in Art. 4 of the Federal Constitution. This was the first step towards the GATT idea which would eventually lead to the WTO.

It has been said that these worldwide proposals made by Wilson would be an "extrapolation to the International arena of the American domestic constitutional ideas of federalism".<sup>57</sup>

Wilson's entire proposal as indicated by senator Moynihan was a world ruled by law.<sup>58</sup>

All essential points proposed by Wilson in the 1918 Congress "derived from some aspect of the US Constitution.(...) the League of Nations which in its structure replicates the federal and branch structures of the US Constitution".<sup>59</sup> Paradoxically, this power of the States in the Senate – facing Wilson's presidency – was what held the US back from subscribing the Versailles Agreement for the creation of the League of Nations.

The innovative package of Wilson's administrative and regulatory reforms was to be as revolutionary as the proposal of International Administration. "Wilson had promised a 'second struggle for emancipation', an economic program that would break the chains of monopoly and restore competition. Unlike antitrust, regulation accepted the existence of threatening businesses but tried to control their behavior. Corporations would be allowed to continue only under the watchful eye of government".<sup>60</sup>

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<sup>57</sup> P. Bobbitt, *The Shield of Achilles. War, Peace and the course of History* (Anchor Books, NY, 2003).

<sup>58</sup> Moynihan, *On the Law of Nations* (Harvard, 1992).

<sup>59</sup> P. Bobbitt, *op.cit.*, p. 401.

<sup>60</sup> M. McGerr, *A Fierce Discontent....op.cit.*, pp. 153, 159.

The Clayton Act of 1914, upheld to a higher degree the principles of the Right of Competition and the fragmentation of economic power. Brandeis endorsed the creation of "a board or commission to aid in administering the Sherman law".<sup>61</sup> The Federal Trade Commission ("FTC") was created, at the same time, as the Administration to apply the "commerce clause" and the regulation of interstate commerce and enforcement of competition law.

Brandeis (who served from 1912 until 1916 as President Wilson's chief economic advisor and was regarded as one of the architects of the FTC) said, in 1912: "[b]ut besides making the Sherman Law certain, and providing legal machinery, we need administrative machinery. We need industry, as in our cities, in addition to the prosecuting attorney, the inspector and the police. You hear much said of correcting most abuses by publicity. We need publicity; but as a pre-requisite to publicity we need knowledge. We must know, and know contemporaneously, what business – what big business – is doing. When we know that through an authoritative source, we shall have gone very far toward the prevention of the evils which attend the conduct of business".<sup>62</sup>

The respected ICC Commissioner, Prouty, declared that "the regulation of trusts and monopolies is plainly an administrative rather than a judicial function".<sup>63</sup>

Likewise, in 1913<sup>64</sup> the Federal Reserve was created. It regulated the Wall Street market and gave way to the financial and regulatory supremacy of the US, which overcome Great Britain in this role.

In 1913, Amendment 16 to the American Constitution gave power to the Congress to create Federal taxes and establish an Ad-hoc administration entailed the implementation of what later would be the US Internal Revenue Service ("IRS").<sup>65</sup> This was the establishment of the pillar of the modern social and interventionist State.

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<sup>61</sup> T. McCraw, "Brandeis and the Origins of the FTC" in *Prophets of regulation. Adams, Brandeis, Kahn* (Belknap, 1984) p. 111.

<sup>62</sup> Brandeis, "The Regulation of Competition Versus the Regulation of Monopoly by Louis D. Brandeis", *An Address to the Economic Club of New York*, November 1, 1912. "Above all else, Brandeis exemplified the anti-bigness ethic without which these would have been no Sherman Act, no antitrust movement, and no Federal Trade Commission", p. 82.

<sup>63</sup> McCraw, T., Brandeis ..., *op.cit.*, p. 128. All businessmen showed overwhelming support for a new regulatory commission. "This enthusiasm derived not from a desire for more regulation, but rather from a sense that expert administrative regulation would be more stable and predictable than hit-or-miss antitrust litigation", p.116.

<sup>64</sup> W.L. Silber, *When Washington Shut down Wall Street. The Great Financial Crisis of 1914 and the Origins of America's Monetary Supremacy* (Princeton University Press, 2007).

<sup>65</sup> J. Thorndike, "Reforming the Internal Revenue Service: a Competitive History", *Administrative Law Review*, Vol. 50, 2001, p. 719.

On the other hand, the administrative and regulatory State was also enhanced as a consequence of the 1919 Prohibition law (*Volstead Act*). It is worth pointing out that this entails administrative interventionism not only in enterprises, but also in the American way of life itself.<sup>66</sup>

## V. The Roosevelt' Era: the Second Wave of Construction of the US Regulatory State – Regulation Through Revelation

The second wave came about as a consequence of the 1929 crash and the election of Roosevelt as President in 1932 (he had gained a great administrative experience as the Governor of the State of New York during 8 years). His program called the New Deal allowed for more interventionism and regulations after the great depression.

Roosevelt counselors and Harvard's administrative law professors Frankfurter and Landis wrote the legislation regarding the stock market and the company's obligations in this field.<sup>67</sup> Thereafter, in 1934 Landis was appointed<sup>68</sup> President of the new commission, the famous *Securities Exchange Commission* ("SEC").<sup>69</sup>

This reform may be considered transcendental because it changed the administrative law parameters and the traditional forms of administration, intervention and inspection. A regulation was designed to establish *corporate responsibility* which forced companies to be co-responsible, to create a department of financial risk, to have their accounts disclosed and to be submitted to financial and accounting auditing, certification and accreditation. This new regulatory framework encouraged full and true disclosure. It is a key regulatory policy instrument in that it serves as a measure of compliance: "mandatory disclosure as a regulatory mechanism".<sup>70</sup> This design introduced the self-regulation model which is the base of the modern concept of administrative law in the new risk society and the beginning of corporate responsibility in other fields, such as occupational safety and health, or environment, consolidated in the 1970.

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<sup>66</sup> This brought about that the Treasury through the tax authority created another Federal police body where the famous Elliott Ness acted. Later on, this police split in 1972: the Federal Police of the IRS and that of the ATF (Alcohol, Tobacco and Firearms).

<sup>67</sup> R. Pestritto, *The Progressive Origins of the Administrative State... op.cit.*

<sup>68</sup> T. McGraw, *Prophets of Regulation* (Belknap Harvard, 1984) p. 153. The second Glass-Steagall Act, passed on 1933, introduced the separation of bank types according to their business (commercial and investment banking), and it founded the Federal Deposit Insurance Corporation for insuring bank deposits.

<sup>69</sup> J. Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* (Houghton Mifflin Co., 1982).

<sup>70</sup> C. Williams, "The Securities and Exchange Commission and Corporate Social Transparency", *Harvard Law Review*, 112, 1999, p. 1209.



Companies were also obligated to reveal information as to their economic activities (transactions, benefits, losses, etc.). This marked the beginning of new rights of the citizens, like to have access to corporate information. This created, along with compulsory external auditing, a large pool of risk management professionals, *soft-law*, security regulations in which the companies, the active community and the government would co-participate configuring a new model of governance within the regulatory State.

Still today when talking of evaluation and auditing in the public administration,<sup>71</sup> it is said that it is an extrapolation of private company techniques to the public sector. It is precisely the contrary: it was the progressive movement, the regulators and the regulations that obligated the enterprises to introduce these techniques. Consequently, it was the beginning of a new form of public and social regulation which transformed the Government into a regulatory State and one of its patterns will be the evaluative State.<sup>72</sup>

The difference between the two concepts, administrative government and regulatory government is that with the latter, it is not a matter of creating ample public administrations full of officials but of regulatory agencies of higher authority and efficiency without a great deal of administrative machinery. . . When regulating the behavior of companies and citizens, and transferring the responsibility to them, they become active protagonists of the implementation of the values and principles of this regulation. This change from administrative State to regulatory State goes back to the Landis period, with SEC. With this change the Administration was no longer the sole protagonist because enterprises and the citizens<sup>73</sup> will also be protagonists. Landis understood this process. In 1938 he wrote that "*the administrative has replaced the judiciary as the principal form of social control of business*".<sup>74</sup> In the future, social movements and corporate responsibility will complement this new administrative control system.

To construe the SEC's public interest, disclosure power had increased corporate accountability to shareholders. This was a central goal of Congress in 1933 and 1934, as was constraining the exercise of

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<sup>71</sup> See T. Jiménez, *Auditoría y calidad universitaria ULAB* (VDM Verlag, 2009).

<sup>72</sup> S. Courville, C. Parker and H. Watchirs, "Introduction: Auditing in Regulatory Perspective", *Law and Policy*, Vol.25, 3, July 2003. M. Power, *The Audit Society: Rituals of Verification* (Clarendon Press, 1997).

<sup>73</sup> C. Stone, *Where the Law Ends. The Social Control of Corporate Behavior* (Harper Torchbooks, 1975).

<sup>74</sup> E. Glaeser and A. Shleifer, "The Rise of the Regulatory State", *Journal of Economic Literature*, Vol.41, June 2003.

corporate power and inculcating a greater sense of public responsibility into corporate managers.<sup>75</sup>

Landis "was a seminal scholar of regulatory strategy, a critic of legislative enactment uncoupled from a theory of administrative design. His regulatory genius was in seeing the need for an institutional design that gave all gatekeepers – executives, accountants, brokers, bankers, lawyers – a stake in enforcing the law. Part of the disclosure regime in the 1933 Act, for example, was the provision of the names and addresses of lawyers who passed on the legality of a security issue. This was a radical innovation in giving lawyers a reputational stake in enforcing the law. His ideas, subsequently modeled globally not only in securities regulation, were for regulation that was self-enforcing, that engaged industry participants in self-regulation monitored by a federal agency. He envisaged participatory regulation within a 'regulatory community' .... Landis was severely attacked both by business leaders who detested transparency and by liberal New Dealers, including some within the SEC itself, who wanted (...) punitive control rather than cooperative regulation with the business community as partners.

The decisive historical moment in the shift from insider network capitalism to global transparency capitalism was the New Deal".<sup>76</sup>

The global reach that SEC has progressively acquired was evident then. Today the system of "mutual recognition" of legislations is being proposed, although the US is still the world reference in the financial regulation through revelation. The SEC is the agency that all the others want to emulate.<sup>77</sup> The paradox is that due to the deregulatory processes in the US, Europe has improved its regulations which as of now are the model for the rest of the world.<sup>78</sup>

Also for companies wanting to be listed on the New York Stock Exchange or to enter into the American Market, the SEC requires that they use the USGAAP<sup>79</sup> – an entire regulatory protocol of accounting and finance.

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<sup>75</sup> C. Williams, *The Securities... op.cit.*, p. 1199.

<sup>76</sup> J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge U.P., 2000) pp.163-164.

<sup>77</sup> J. Sarra, "Disclosure as a Public Policy Instrument in Global Capital Markets", *Tex.Int'l L.J.*, sum. 2007.

<sup>78</sup> See the article of the director of the department of international affairs of the SEC, E. Tafara, "A Blueprint for Cross-border Access to US Investor: a New International Framework", *Harvard International Law Journal*, Vol. 48, 2007. See also S. Mann, "Too far over the hedge: why the SEC's attempt to further regulate hedge funds had to fail and what, if any, alternative solutions should be considered", 82 *St. John's L.Rev.*, win 2008.

<sup>79</sup> *United States Generally Accepted Accounting Principles*.

The recent scandals of Enron and WorldCom bankruptcies have made it evident that the whole Landis design, after having operated for more than half a century, has been a success. The most interventional regulatory corrections to these irregularities have taken place during President G. W. Bush Administration. It is true that the *Sarbanes-Oxley Act* of 2002 ("SOX") was recognized as an administrative regulation to stop fraudulent practices. This law reinforces *watchdog* organizations and the responsibility of the directors, accountants and lawyers. Precisely this crisis has its beginning in the conservative periods of Nixon, Reagan and Bush in which these control organizations were qualified as *toothless watchdogs*. Now this new legal design "transforms these organizations and auditors into sheriffs who will police their clients as guardians of the public trust".<sup>80</sup> Nevertheless, the SOX was immediately distorted to lax enforcement.<sup>81</sup>

Since the scandal of the Barings Bank bankruptcy, the interaction between the Public Security administrations has intensified and they share information to establish the level of risk of the different companies and financial organizations. For instance, the International Organization of Securities Commission ("IOSCO")<sup>82</sup> is a structure of daily cooperation and interaction between regulators and officials from different countries and is one of the models of administrative and regulatory globalization. It is what Slaughter has called "the new diplomats".<sup>83</sup>

Precisely what made the US so great (since the crisis of the 30s) is more and better market thanks to some more and better regulation and administration.<sup>84</sup>

This comes to show that the principle of "more market and less State" and consequently less regulation and less administration is once more questionable.<sup>85</sup>

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<sup>80</sup> T. Gorman and H. Stewart, "Is There a New Sheriff in Corporateville? The Obligations of Directors, Officers, Accountants, and Lawyers after Sarbanes-Oxley of 2002", *Administrative Law Review*, vol.56, 2004.

<sup>81</sup> See "The Lax Enforcement of Section 304 of Sarbanes-Oxley: Why is the SEC Ignoring its Greatest Asset in the Fight Against Corporate Misconduct?", 70, *Ohio St.L.J.*, 2009.

<sup>82</sup> B. Simmons, "The International Politics of Harmonization. The Case of Capital Market Regulation" in D. Vogel and R. Kagan (ed.), *Dynamics of Regulatory Change* (University of California Press, 2004) p. 62.

<sup>83</sup> A. Slaughter, *A New World Order* (Princeton, 2004).

<sup>84</sup> D. Chalmers, "Administrative Globalization and Curbing of the Excesses of the State" in Joerges *et al.*, *Constitutionalism... op.cit.*, p. 357. Likewise, in this second surge the minimum salary and unemployment insurance were regulated, the Federal Communications Commission was created in 1936 and the Civil Aeronautics Board began to regulate the new air transportation system.

<sup>85</sup> E. Tafara, "A Race to the Top: International Regulatory Reform Post Sarbanes-Oxley", *Int'l Fin L. Rev.*, Sep. 2006.

The actual financial crisis is the consequence of the creation and development of the derivatives market in the 90's. The derivatives market is partially built to avoid the register, disclosure and leverage requirements that the traditional market used to demand since the 1933 securities regulation.<sup>86</sup>

**1. Administrative Procedure Act (1946). The Pluralist Participation of the Groups as an Example of Globalization-Americanization**

This period culminated with the approval of the Administrative Procedure Act ("APA") in 1946. This true Code of Administrative Law is still in force today. It is inspired in the 1958 Spanish Law of Administrative Procedure. This is another example of the Americanization of the Spanish and the European Administrative Law. The APA also meant to introduce the vertebral principle of the pluralist and federal American Constitutional System in the administrative procedure and in the entire system of Administrative Law.<sup>87</sup>

It is important to point out the constitutional principles which constitute the Americanization of the administrative procedure law. Many of these are referred to in the work of the founders of the American Constitution, especially Madison. The APA materialized and finalized more than one of the three guidelines of the federal constitutional system. The *Federalist* does collect the essential pieces of the system of *checks and balances* articulated in three pillars.

First, the horizontal separation of powers, understood to be an authentic counter-power system. The most tangible example is the constitutional control of laws by the judicial power, but also the fact of having a separate and different election system from the Executive and the Legislative powers produces effective checks and balances. In two hundred years of US Democracy only during a few decades, has there been the same majority in the Legislative and Executive branches.

Second, the vertical separation of powers (central-state and local powers).<sup>88</sup>

Third, and perhaps the most forgotten by the European tradition, is the spinal active system of groups representing interests in order for the

<sup>86</sup> R. Posner, *A Failure of Capitalism. The Crisis of '08 and the Descent into Depression* (Harvard University Press, 2009). N. Poser, "Why the SEC Failed: Regulators Against Regulation", *Brooklyn Journal of Corporate, Financial and Commercial Law*, 3, spring 2009.

<sup>87</sup> McNollgast, "The Political Origins of the Administrative Procedure Act", *Journal of Law and Economic Organization* Vol. 15, 1999.

<sup>88</sup> M. Ballbé and R. Martínez, *Soberanía dual...., op cit.*

majority not to be able to oppress minorities. This articulation of the representation of the groups was already acknowledged in legislative power with the recognition of *lobbying and lobbyist*.<sup>89</sup> It is from this old parliamentary procedure (and the judicial one) that the principles of the administrative procedure of participation of the groups have their origin. Thus, the fundamental rights cannot be guaranteed only through the Constitution and laws but through the establishment of a balance of powers and groups in the judicial and political processes, just as Madison (the father of the Constitution) explains in *The Federalists Papers*:

(...) the fewer the distinct parties and interests, the more frequently will a majority be found of the same party (...) Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.

As Sunstein indicated, the dangers of fragmentation and representation in one's own interests have been the main concern of the modern US administrative law. The majority of regulatory reform proposals comes from the same concern.<sup>90</sup>

On the other hand, the European administrative law emerged as a principle to reinforce executive and administrative power to the maximum. One of the techniques to strengthen this centralized and concentrated administration was, at first, a mechanism to elude judicial control by the executive power and its administration. The French revolution and its constitutional regime – which restored the old principle of justice “retained” by the Catholic Church and the Richelieu Edict – were implementing it with the famous 1791 regulation. It ruled all over Europe and prohibited judges from controlling administrative acts or having the public administrators adjudicate.

This “retained” and later “delegated” justice (to the French *Conseil d'Etat*) where the administration itself is both judge and party, was not a simple, temporary or territorial parenthesis circumscribed to France or Spain. Indeed almost two centuries later, in most of Europe, this limitation of the right to effective judicial guaranty of the citizen before the administration was still in force. This remains apparent in the 1986 European Court of Human Rights (“ECHR”) decisions in *Bentham v. The Netherlands* (later against Sweden, Austria and Switzerland). In *Bentham* was deemed necessary to establish a judicial system to check

<sup>89</sup> T. Susman, “Lobbying in the 21<sup>st</sup> Century-Reciprocity and the Need for Reform”, *Administrative Law Review*, 58, fall 2006.

<sup>90</sup> C. Sunstein, “Constitutionalism after New Deal”, *Harvard Law Review*, núm. 101, 1987.

administrative actions through independent contentious judicial courts (until then only one administrative recourse before the Queen existed).<sup>91</sup>

On the other hand, the US administrative law has its origin in the opposite constitutional and administrative principle: the pluralist and federal principle of *checks and balances*. The same configuration of the American administrative agencies, independent from the executive power, has this characteristic.<sup>92</sup> The APA specified the principle of ensuring that a variety of groups can engage in administrative procedures and thus formed a framework where the interests are balanced. These two characteristics of administrative law (independence of the agencies, participation of the interested groups and stakeholders in the procedures, and their joining within the federal constitutional system) are perfectly explained by Landis, who said that the administrative procedure is essentially the response of the generation of insufficiencies at the judicial and legislative process. It represents an effort to find an answer to these insufficiencies through a method which is not simply an extension of the executive power. If the doctrine of the separation of powers implies a division, it also implies balance and the balance requires equality. The creation of administrative power may be the means to preserve said balance.<sup>93</sup>

The challenge of administrative law in globalization is the same as in the US and Europe. It is a matter of creating a pluralist participation system in the procedures, not necessarily as a mechanical representation of the different interests, but to assure a public deliberation seeking a new solution. The independent agencies and courts have become true assures and arbitrators of a collective deliberation.

The effects of the APA expanding "the rights revolution" are expressed by Stewart. Increasing the function of administrative law is not to protect private autonomy but to provide a new political process to guarantee the fair representation of a wide range of interests affected in the process of the administrative decision. Public interest is a texture of multiple strands, that it is not a 'monolith' and involves a balance of

<sup>91</sup> See study of these decisive decisions that have passed unnoticed because of having harmonized European Law (at the margin of and parallel to the EU and its TJCE) as well as for having installed the judicial control of administration in multiple European countries, in C. Padrós and J. Roca, "La armonización judicial en el control de la Administración. El papel del Tribunal Europeo de Derechos Humanos" *RAP*, N. 136, 1995. It is worth mentioning that France not having signed this article of the Agreement maintains the non judicial administrative system of the *Conseil d'Etat*.

<sup>92</sup> Concerning the little Independence of administrative agencies in Spain. See M. Ballbé and C. Padrós, "Spanish Independent Authority and its Role in a New Competitive Environment" in Giuliano Amato (Ed.), *The Anticompetitive Impact of Regulation* (Edward Elgar, 2001).

<sup>93</sup> Landis, *The Administrative Process* (Yale University Press, 1941) p. 45.

many interests (...) Agencies must consider all of the various interests affected by their decisions as an essential predicate to balancing all elements to a just determination of public interest.<sup>94</sup>

On the other hand, Sunstein indicates that "(...) a large part of modern administrative law must be understood as an effort to assure that the government action reflects a certain type of deliberation by its actors".<sup>95</sup>

## **VI. The Third Large Administrative and Regulatory Wave: Rights Revolution and the Activism of Social Movements. The Birth of the Risk Regulation Administrative Law**

In this period the origin of new laws and administrative regulations was the activism of social movements.<sup>96</sup> The social movements during the sixties there movements argued that the regulatory system did not represent general interests but the interests of certain privileged groups.<sup>97</sup>

### **1. Regulation Through Litigation**

One of the first movements to litigate was the civil rights movements National Association for the Advancement of Colored People ("NAACP"). The NAACP initiated legal strategies called "regulation through litigation". They had some success with the Warren jurisprudence of the Supreme Court, the anti-tobacco movement and the AIDS generic medicine.<sup>98</sup>

In 1964, the Civil Rights Act, the creation of Civil Rights Division of the Justice Department and the network of civil rights offices in all administrations marked the beginning of a new era of administrative

<sup>94</sup> R. Stewart, "The Reformation of American Administrative Law", *Harvard Law Review*, vol. 88, 1975. See also A. Aman, "Law, Markets and Democracy: a Role for Law in the Neo-liberal State", *NY Law School. L.R.*, 2006-2007. See also C. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1993); and C. Sunstein, "Interest Groups in American Public Law", *Stanford Law Review*, Vol. 38, 29, 1985.

<sup>95</sup> C. Sunstein, "Legal Interference with Private Preferences", *The University of Chicago Law Review*, Vol. 53, 1986.

<sup>96</sup> W. Eskridge, *Some Effects of Identity-based Social Movements on Constitutional Law in the Twentieth Century*, Michigan Law Review Association, vol.100, p. 2062.

<sup>97</sup> R. Siegel, "Constitutional Culture, Social Movements Conflict and Constitutional Change: the Case of the De Facto Era", *California Law Review*, October 2006. Concerning the importance of the problems of the community administration. See also the article of Barack Obama when working as community promoter: B. Obama, "Why Organize? Problems and Promise in the Inner City" in Knoepfle (ed), *After Alinsky: Community Organizing in Illinois* (Sangamon State University, 1990). See also B. Obama, *Dreams of my Father* (Three Rivers Press, 2004).

<sup>98</sup> W. Viscusi, *Regulation Through Litigation* (AEI-Brookings Joint Center for Regulatory Studies, 2002).

law in the field of regulatory fairness.<sup>99</sup> All of this included a huge package of regulations of new civil rights and the introduction of affirmative action techniques to protect minorities, especially against discrimination of women.<sup>100</sup> In response to the vague prohibition against discrimination, organizations often created symbolic structures such as special affirmative action officers, anti-discrimination rules, and, affirmative action officer's positions.<sup>101</sup>

Equal employment opportunity and affirmative action ("EEO", "AA") mandates to improve the employment status of minorities and women, like many other laws regulating organizations, do not clearly define what constitutes compliance. Thus compliance depends largely on the initiative and agenda of those managing compliance efforts. In the case of civil rights, "affirmative action officers have a responsibility to act as an extension of the State". Also "[t]he proportion of women, minorities and other protected workers increased every year".<sup>102</sup>

The AA is one of the institutions and regulations which presently has the highest global reach and is one of the proofs of the most positive aspects of US oriented globalization.<sup>103</sup>

Fairness techniques like AA (understood as unequal treatment upon unequal individuals), are still the object of heated debates. However, they have just been consolidated for at least "twenty-five years more" as indicated in the famous decisions of the Supreme Court *Grutter v. Bollinger and Gratz* (2003).<sup>104</sup> It deals with an institution having values and administrative law techniques that already had resonance and progressive implantation in the US oriented globalization.<sup>105</sup>

<sup>99</sup> "Beginning in 1970, the agency was subjected to a series of [law] suits by civil rights groups charging deficient enforcement of its regulations and the plaintiffs prevailed in every case- even though legal challenges of this kind were virtually unprecedented in federal administrative law before the 1970s". J. Rabkin, "Office for Civil Rights" in J. Wilson (ed), *The Politics of Regulation* (Harper, 1980) p. 305. See also *Muller v. Oregon* (1908).

<sup>100</sup> The history of the fight for rights of women and its relationship with the fight for labor rights. See A.R. Barzilay, "Women at Work: Towards and Inclusive the Narrative of the Rights of the Regulatory State", *Harvard Journal of Law and Gender*, Winter, 2008.

<sup>101</sup> L. Edelman et al., "Legal Ambiguity and the Politics of Compliance: Affirmative Action Officer's Dilemma", *Law and Policy*, vol. 13, núm. 1, January 1991.

<sup>102</sup> L. Edelman et al., *Legal ...*, op.cit., p. 73.

<sup>103</sup> N. Thompson, "Does the International Violence Against Women Act Respond to Lessons from the Iraq War?", *23 Berkeley J. Gender L & Just.*, 2008.

<sup>104</sup> R. Post, "Affirmative Action and Higher Education: The View from Somewhere", *Yale Law and Policy review*, n.23, 2005.

<sup>105</sup> C. Williams, *The Securities and ...*, op.cit. "When the U.S. Labor Department announced awards for companies with effective affirmative action procedures, the companies' stock prices went up (...). Mattel creates system to monitor conditions in overseas factories, Wall St.J., Nov. 21, 1997, at B9A (discussing Mattel's move, joining Nike, Levi Strauss, Reebok, Walt Disney, and Gap, to enact a code of conduct for its overseas factories and an

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The citizenry political movements still sensitize new and old risks. It was precisely these movements that denounced the "capture" of the Administration by the vested interests of the industry.

With his book *The Theory of Economic Regulation*, Stigler, Nobel Prize of Economy, showed that regulations favored an economic, monopolistic sector and not the general interest (as expressed by the classic theory of administrative law) and, curbed innovation and induced inflation.

The two most typical forms of capture were *information asymmetry* and *revolving door*. Asymmetry of the information occurs when large corporations (such as power companies or banks) release scientific and technical information which is favorable to their interests. The Government and the Administration, who do not have such specialized information, end up regulating as per the information received by the specific sector. Even with the introduction of competition, handful of companies formed an information cartel through the creation of think-thanks, study services or employer associations.

Another form of capture is the *revolving door*, by which administrators are influenced by the fact that they shall later seek work or activity from regulated industries.<sup>106</sup>

The conservative scientific perspective of the Chicago School of Economics was corroborated by what the activism of the community had been denouncing in the streets since the fifties: the regulation did not serve the general interest but those of a sector (*i.e.* white v. black, men v. women and big industry v. consumers). The divergence was in the alternatives. On one hand, economists proposed the deregulation or liberalization of the regulated sectors, privatization and introduction of competition even in the sectors of natural monopoly through third-party access (*i.e.* Airline Deregulation Act of 1978, telecommunications industry, trucking industry, electricity, Natural Gas Policy Act of 1978, etc.).<sup>107</sup>

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independent audit and monitoring system to ensure compliance with its work standards worldwide" as a result of criticisms of its global labor practices)".(FN440).

<sup>106</sup> C. Sunstein, *The Second Bill of Rights: FDR's unfinished revolution* (Basic Books, 2006). C. Sunstein, *Constitutionalism after the New Deal* (Harvard Law review, 1997) p. 450. "Agency officials mindful that their days as public servants will not last forever keep their eyes set on what they will do once they leave office. The once sure place where they can cash in on their expertise and personal contacts is with organized agency constituents. In the view of some capture theorists, agency officials eager to guarantee their future employability fashion policies favorable to special interests regulated by said administration. In short, officials take care of clients so that the clients take care of them". Schlozman and Tierney *Organized interest and American democracy*, New York 1986, p. 342. In France it bears the name of "pantouflage". Meny, Y., *La corruption de la république* (Paris, Fayard, 1994).

<sup>107</sup> M. Derthick and P. Quirk, *The Politics of Deregulation* (The Brookings I., 1985).

Even if some of these measures were carried out by the leading liberals [t]he deregulations, concentrated in the period 1977-80, were the product of a coalition of 20<sup>th</sup> century liberals and conservatives, beginning in the Ford Administration, and carried to fruition under President Carter, with the active leadership of Senator Ted Kennedy (ably assisted by Professor and now Supreme Court Justice, Stephen Breyer). Leading non-governmental members of the coalition were the Consumer Federation of America, Common Cause, Ralph Nader's Public Citizen.<sup>108</sup> The community did more to counteract the corruption and capture of the administration and politicians by promoting transparency measures, citizen's right to know, right of access to information (on companies and administration), right to participation of the groups in the administrative procedure, etc., as well as the creation of new administrations to regulate traffic, environmental and labor security, among others.

## 2. Citizen's Right to Know

Perhaps one of the fundamental human rights developed during the last decades is what has been called "the citizen's right to know". Administrative transparency, through guaranteed access to information, would be hampered by the inactivity of the Administration and the capture of the regulator when risks (such as contaminating chemical products, carcinogens, additives, etc)<sup>109</sup> are hidden or undetected.<sup>110</sup>

This has also forced the Government and the Administration to react and develop a cost/benefit analysis to evaluate health hazards and environmental risks. But above all, the deregulatory processes have strengthened the department of evaluation of cost and impact of the regulations<sup>111</sup> to curb the regulatory activism of the agencies – that not representing a non-proportional cost with regard to the benefit to be obtained.<sup>112</sup> The key presidential regulatory power is located at the

<sup>108</sup> A. Kahn, *The Threat of Latter-day Progressives to an Authentically Liberal Economic Policy*, Reg-Markets Center, January 2008. Kahn was a national celebrity of the deregulatory policy. See also "Kahn and the Economist's Hour" in T. McCraw, *Prophets of Regulation* (Belknap Harvard, 1984).

<sup>109</sup> P. Brown, *Toxic Exposures. Contested Illnesses and Environmental Health Movement* (Columbia, 2007). "Science alone does could not produce an appropriate regulation to reduce toxics. It took a concerted social movement beginning in the 1960s, pioneered by black and latino rights groups", p. 7, See also T. MacGarity and W. Wagner, *Bending Science. How Special Interests Corrupt Public Health Research* (Harvard, 2008).

<sup>110</sup> J. Graham, "Saving Lives Through Administrative Law and Economics", 157, *U.Pa.L.Rev.*, Dec. 2008.

<sup>111</sup> The OMB (Office of Management and Budget), L. Bressman and M. Vandenberg, "Inside the Administrative State, a Critical Look at the Practice of Presidential Control", *Michigan Law Review*, 105, 2006.

<sup>112</sup> L. Schultz Bressman and M. Vanderbergh, "Inside the Administrative State: a Critical Look at the Practice of Presidential Control", 105 *Mich. L.Rev.* Oct. 2006. See also S. Katzen, "A reality check on an empirical study: comments on inside the administrative state", 105 *Mich.L.Rev.*, May 2007.

Office of Information and Regulatory Affairs ("OIRA").<sup>113</sup> This model is known as the "cost-benefit-state".<sup>114</sup>

The asymmetry of the information has transformed administrative law within an "evaluative State" where mortality rates in relation to the different economic activities (*i.e.* traffic security, environmental issues, etc.) are the fundamental element for the administrative neo-interventionism. The regulations that have come during the last decades have saved "lives through administrative law".<sup>115</sup>

This lack of transparency and the fear to the *capture of the regulator* is what caused the first transparency and access to information laws, such as the 1965 *Freedom of Information Act* ("FOIA") and the 1976 *Sunshine Act*... On this matter, Brandeis said: "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants. And publicity has already played an important part in the struggle against the Money Trust".<sup>116</sup>

Justice Breyer stated that the "FOIA is the most voluminous and technical field of federal administrative laws".<sup>117</sup> The law includes mechanisms to correct failures of the administrative agencies, providing greater public knowledge and a scrutiny of administrative practices and offering other procedural systems besides judicial control to involve the citizens in the government. Thus, most important litigations have been proposed by public interest groups.<sup>118</sup>

These laws were the beginning and one of the most positive aspects of US oriented globalization. It is said that FOIA has been a model emulated in many other countries and has already been considered an essential element in a democratic regime.<sup>119</sup> In any multinational

<sup>113</sup> OIRA is located within the office of management and budget (OMB) which is an agency within the Executive Office of the President. Senators voted 57-40 to approve Harvard professor Cass Sunstein as the "regulatory czar", in the OIRA, in September 2009.

<sup>114</sup> C. Sunstein, *The Cost-benefit-state. The Future of Regulation Protection*, ABA 2002. R. Parker, "The Empirical Roots of the Regulatory Reform Movement: a Critical Appraisal", 58 *Administrative Law Review*, p. 359, spring 2006. See also E. Kagan, "Presidential Administration", 114 *Harv. L.Rev.*, 2001. It is worth mentioning that the evaluation of the impact of norms was already contemplated in Spanish procedure administrative law of 1958 with the provision of article 129 to guarantee the legality, good judgment and opportunity inspired in APA 1946.

<sup>115</sup> J. Graham, *Saving lives through administrative law...*, *op.cit.* See also D. Kahan and P. Slovic, D. Braman and J. Gastil, "Fear of Democracy: a Cultural Evaluation of Sunstainable Risk", *Harvard law review*, 119, Feb. 2006, p. 1071.

<sup>116</sup> Brandeis, *Other People's Money*, *op.cit.*, chapter V: "What Publicity Can Do".

<sup>117</sup> Breyer, Stewart, Sunstein, Spitzer, *Administrative Law and Regulatory Policy* (Aspen law and Business, 2002) p. 879.

<sup>118</sup> S. Kreime, "The FOIA and the Ecology of Transparency" 10 *U. Pa. J. Const. L.*, 2008, p.1011.

<sup>119</sup> A. Roberts, *Blacked Out. Government Secrecy in the Information Age* (Cambridge, 2006).

or regional integration agreement it is the US Administration that the one that often recommends the introduction of these new laws, like in the case of Free Trade Agreements. In many countries this type of US regulation pattern already exists.<sup>120</sup>

This regulatory surge ends in the 70s. During this period, environment federal regulation stands out with the creation of the Environmental Protection Agency ("EPA"),<sup>121</sup> the approval of the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and the Superfund Act or NEPA. Likewise, new procedures were introduced such as the Environmental Impact Assessment ("EIA"). This advance is the fruit of environmentalist movements.

Environmentalist movements brought a new and wider concept of security as a protection. These movements fought for the defense of consumer rights to security. An outstanding social movement led by Ralph Nader developed the strategy "regulation through information".<sup>122</sup> The objective was to legalize the protection through the regulation of all the sectors which affect the right to health and life of the citizen and which had a very superior number of deaths, higher than those due to common criminality.

Nader's book *Unsafe at any speed* (1965) denounced a much larger number of victims from traffic accidents than the number of victims in the Vietnam War or those caused by crime. This created an awareness that security ought to prevail over the benefits from the business of high speed cars.<sup>123</sup> The National Highway Transportation Safety Administration ("NHTSA") was created and its regulations were imposed upon the automobile industry in order to introduce new prevention devices such as safety belts.

We cannot forget to mention the creation of regulations on food safety and food composition and the expansion of the Food and Drug Agency ("FDA"), which has become an almost international regulator of drugs<sup>124</sup> due to its prestige and good reputation. The Consumer Product Safety Commission ("CPSC") was also created.

<sup>120</sup> J. Ackerman *et al.*, "The Global Explosion of Freedom of Information Laws", *Administrative Law Review*, 2006. See also A. Florini (ed), *The Right to Know. Transparency for an Open World* (Columbia, 2007).

<sup>121</sup> Landy, Roberts, Thomas, *The Environmental Protection Agency. Asking the Wrong Questions. From Nixon to Clinton* (Expanded Edition, 1994).

<sup>122</sup> J. Martin, Nader. *Crusader-Spoiler-Icon* (Perseus Pub., 2002). Braithwaite said that Nader "had a wider influence across a range of regimes than any other individual in the history of the globalization of business regulation", in J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge U.P., 2000) p. 31.

<sup>123</sup> R. Nader, *Crashing the Party. Taking on the Corporate Government in an Age of Surrender* (Thomas Dunne Books, 2002).

<sup>124</sup> M. Lumpkin *et al.*, "The FDA goes global", *FDA Consumer*, Vol.40, 2006, p. 68.

Recently, the Office of Information and Regulatory Policy of the G. W. Bush Administration has requested the FDA to disclose the matter of trans-fat acids found in numerous foods<sup>125</sup> in the Nutrition Facts Panel, declaring that the information could avoid up to 17.000 coronary cases per year at a relatively low cost.

An early example of what US oriented globalization would be was the approval of the 1946 Atomic Energy Law and its Nuclear Regulatory Commission. The countries that wanted to build nuclear centers for energy use had to comply with the standards and the obligations imposed by the United States.<sup>126</sup> Likewise, many of its protocols came not only from the American "administrative side" but from the "States community" or rather the private side considering that US companies developed said protocols (normalization norms).<sup>127</sup>

Nader's movement claims regarding nuclear radioactivity risks, advanced nuclear terrorism risk, and the capture of the regulator were confirmed with the accident of the Three Mile Island Nuclear Central (Harrisburg) in 1979. It left the regulatory organization discredited. All of this produced a reaction from the private industry. However, with this accident and, later on, Chernobyl, the companies themselves realized that they had to be more strictly regulated and establish mutual control. They learned a *laissez-faire* regulator was detrimental to the nuclear industry and would cause a nuclear moratorium or the definite elimination of the production of this kind of energy.

Rees explained how the companies radically changed their attitude of "[I am] not my brother's keeper to one that everything my brother does is going to affect me".<sup>128</sup> Because all nuclear companies were hostages of each other and any accident in one of them would endanger the nuclear world market, they established a private regulatory organization in 1980: the Institute of Nuclear Power Operations ("INPO").<sup>129</sup> This organization was much stricter than the discredited public regulator and introduced the principle according which safety comes first, before productivity or competition in the nuclear sector.<sup>130</sup>

<sup>125</sup> R. Williams, "Safe but not Wholesome: the Troubling State of Transfat Regulation", *Journal of Food Law and Policy*, spring, 2007.

<sup>126</sup> A. Morales, *La regulación nuclear globalizada* (La ley-WoltersKluwer, 2009).

<sup>127</sup> The same occurred with the IATA and the air transportation global regulation". See. J. Freeman, "Extending Public Laws Norms Through Privatization", *Harvard Law Review*, n. 116, 2003. "For years, some Air safety standards have been written by the Boeing Corporation in Seattle". See also J. Braithwaite and P. Drahos, *Global...*, *op.cit.* p. 301.

<sup>128</sup> J. Rees, *Hostages of Each Other. The Transformation of Nuclear Safety TMI* (U. Chicago Press, 1994).

<sup>129</sup> In 1989 came into a private global regulator called WANO (World Association of Nuclear Operations).

<sup>130</sup> Regarding this matter it is surprising to see how the EU, pretending to imitate the American law and economy has not seen the spectacular failure that the experience of

Also, in the 70s due to unions claims, administrations and regulations were created, such as Occupational Safety and Health Agency ("OSHA") that would be implanting important regulations for the prevention of labor risks: We have further examples from history of the occupation safety and health movement, where workers and their unions have been in the first line of discovery of harmful effects of unsafe machinery and production processes, as well as variety of toxins.<sup>131</sup>

Departments of Risk Management was established and prevention delegates (officers) and technical specialists are employed by companies. External audits, accreditation, certification systems, etc. are now compulsory. Needless to say, the administrative model designed by Landis and Frankfurter as a precautionary measure for financial risks and auditing is now expanded to labor risks and to other fields (*i.e.* environmental risks, precautionary or discrimination risks, etc).<sup>132</sup>

This entrepreneurial co-responsibility model for the active compliance of the regulation has inspired the legislations of the European countries and this is another example of globalization like Americanization.

### **3. Regulating the Corporate Responsibility and the Risk Prevention Officers**

Corporate Responsibility is already an instrument imposed in other fields (*i.e.* human rights<sup>133</sup>) by social movements and which dynamic companies have assimilated and rendered profitable.<sup>134</sup> It is presently a sign of ineludible identity in the more modern and competitive companies.

The business regulatory agencies grew to be more significant law enforcers than the police because the corporatization of the world in the 20<sup>th</sup> century changed the world to a place where most of the important

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deregulation of electricity implied in California in the year 2000. In the Endesa takeover, the Spanish administration as well as the European one have not taken into account this principle of security to prevail over competition as if it were a matter of a sector such as automobiles or washing machines. This Spanish and European complex of inferiority that reveal neoliberal positions and in favor of competition without distinctions has an answer in American Law as expressed to be by the General Council through the *Nuclear Regulatory Commission*, when indicating to us that in the American Laws the purchase of an American electric energy enterprises by another foreign enterprise is prohibited. And this precisely because of the prevalence of the principle of nuclear security (now more due to the terrorist threat) above competition.

<sup>131</sup> P. Brown, *Toxic Exposures*, *op.cit.*, p.9.

<sup>132</sup> R. Epstein, *How Progressives Rewrote the Constitution* (Cato Institute, 2006).

<sup>133</sup> T. Maassarani, "Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment", *Cornell Int'l L.J.*, vol. 30, p.135.

<sup>134</sup> D. Vogel, *The Market for Virtue, The Potential and Limits of Corporate Social Responsibility* (Brookings, 2005).

things done for good or ill in the world were done by corporate rather than individual actors.<sup>135</sup>

As we have already said, it is necessary to have a self-regulation system under government supervision<sup>136</sup> through the creation of health and safety labor and environmental risk prevention delegates (*environmental officer*), as a self-control and preventive vigilance internalized in the organization, besides the functions developed by the inspecting public administration.<sup>137</sup>

As Power observes, "far from being a private organizational matter, the effectiveness of internal control has come to play a very significant external public role".<sup>138</sup> "Administrative rules become part of the defensive risk management of everything".<sup>139</sup> Fisher adds that "[t]his regulatory environment creates a radically new and expanded role for public administration. Risk assessment becomes not only a tool for converting uncertainty into risk, but also a way of governing corporate entities and their decision-makers".<sup>140</sup>

These officers represent, in the up-to-now impenetrable precincts of a company under *laissez faire*, personnel who is to a certain point independent from the owner and in charge of security and public interest.<sup>141</sup>

Hawkins found that the field agents in an antipollution enforcement agency were subject to conflicting pressures because of a multiplicity of roles. The field agent may sometimes be consultant and analyst; sometimes investigator and policeman; but he must also be negotiator and judge, inspector, educator, and public relations representative.<sup>142</sup>

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<sup>135</sup> J. Braithwaite and P. Drahos (ed), *op. cit.*

<sup>136</sup> J. Seligman, *op.cit.*, p. 158.

<sup>137</sup> Revesz, Sands, Stewart, *Environmental Law and Economy and Sustainable Development, the United States. The European Union and the International Community* (Cambridge University Press, 2001).

<sup>138</sup> M. Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* (Demos, London, 2004) p.25.

<sup>139</sup> R. Ericson, *Crime in an Insecure World* (Polity, 2007) p.18. R. Ericson and K. Haggerty (ed.), *Policing the Risk Society* (Oxford University Press, 1997).

<sup>140</sup> L. Fisher, *The Rise of the Risk Commonwealth and the Challenge for Administrative Law*, (Public Law, 2003) p. 445.

<sup>141</sup> L. Breunung and J. Nocke, "Environmental Officers: A Viable Concept for Ecological Management?" in Teubner, Farmer and Murphy, *Environmental Law and Ecological Responsibility. The Concept and Practice of Ecological Self-Organization* (Wiley and Sons, 1994). See also works of the German specialist Rehbinder.

<sup>142</sup> L. Edelman *et al.*, "Legal Ambiguity and the Politics of Compliance: Affirmative Action Officer's Dilemma", *Law and Policy*, vol. 13, 1, 1991, p. 78. K. Hawkins and J. Thomas (eds), *Enforcing Regulation* (Kluwer Pub., 1983).

This new regulatory system where the defense of public interest is located in a department and consists of *officers* within companies will be the most important characteristic of the new administrative law which constantly extended itself to other sectors.<sup>143</sup> The companies must comply with the regulation but also experience and innovate new policies in these fields (*i.e.* promote the equality of women, environmental safety, etc.).

Power denominates this growing figure *chief risk officer*. This is an "occupational category within management and regulation of risk" which merges two professions which up-to-now, ignored each other, the administrator and regulator.<sup>144</sup>

Thus, as it occurs with financial, occupational health and safety labor or environmental risk prevention delegates, the officers maintain constant tension between their role of public meta-regulator and their private function as company management agent.<sup>145</sup> There is no doubt that the regulatory model of the officers does not represent an escape from administrative law. On the contrary. It is a Trojan horse in the precinct of the company in charge of having the regulation complied and experimenting and innovating new formulas of compliance in order to respond to specific problems of public interests.

Due to global warming concerns, these departments may have to evaluate climate change. Environmental movements (*i.e.* Environmental Defense, CERES, among others) demand SEC to order companies to audit, evaluate and disclose their "climate change risk" on their annual reports and other financial documents. Then they should declare not only their company concerns, financial and judicial risks, but also reveal the environmental risk; let's say their degree of responsibility according to the greenhouse effect.

The climatic change risks has become a threat for business. That is why these steps aim to be an investors' protection. The companies are compelled to reveal the risks they have to deal with, and to explain to

<sup>143</sup> Concerning compliance by the enterprises with the OSHA EPA regulations, See M. Deily and W. Gray, "Agency Structure and Firm Culture: Osha, EPA and the Steel Industry", *Journal of Law, Economics and organization*, 2007, p.23.

<sup>144</sup> M. Power, "Organizational Responses to Risk. The Rise of the Chief Officer" in Hutter *et al.* (ed.), *Organizational Encounters with Risk* (Cambridge, 2005). R. Kagan, "On Regulatory Inspectorates and Police" in K. Hawkins and J. Thomas (eds), *op.cit.* "There are no 'Academies of Regulatory Enforcement' comparable to modern police academies, no schools of regulatory justice comparable to schools of criminal justice. No novels or television series portray the moral crises of workplace safety or air pollution inspectors. (...) One step in that direction, perhaps, is to develop a sense of what is distinctive about regulatory law enforcement by contrasting it with the more familiar characteristics of law by police", p. 38.



their investors which measures will take to mitigate them. Finally, the aim is to achieve a change on companies' "behavior" and force them to work out strategies in this sense.<sup>146</sup>

For economists, "regulation" means restraints imposed upon firms by government. "In today's society, any industry as conspicuous as the major home appliance industry is continually faced with the threat of government regulation. In my opinion, the only way to avoid government regulation is to move faster than the government. The alternative to government regulation is judicious self-regulation."<sup>147</sup>

#### 4. Regulation Through Revelation

In 1986 the Emergency Planning and Community Right-to-know Act ("EPCRA") was published. This law obliged companies to reveal to the administrations the amount of potentially dangerous chemical substances stored or emitted to the environment, indicating their location, types and quantities.<sup>148</sup>

One significant success story for disclosure requirements is the EPCRA, a law enacted by Congress in 1986 in the aftermath of the Chernobyl nuclear reactor disaster in Ukraine. Originally a modest and uncontroversial measure, the law was not designed to produce environmental benefits by itself. It was essentially a bookkeeping measure, intended to give the EPA a sense of what was out there. The statute turned out to do a lot more. In fact, the requirement of disclosure, captured in the Toxic Release Inventory (TRI), may be the most unambiguous success story in all of environmental law. To create the TRI, firms and individuals must report to the national government the quantities of potentially hazardous chemicals that have been stored or released into the environment. The information is readily available on the EPA Web site to anyone who wants it. More than twenty-thousand facilities now disclose detailed information on more than 650 chemicals, covering more than 4,34 billion pounds of on-site and off-site disposal or other release. Users of hazardous chemicals must also report to their local fire departments about the locations, types, and quantities of stored chemicals. And they

<sup>145</sup> Power, *op. cit.*

<sup>146</sup> The legal proceedings of New York's general attorney Andrew Cuomo follow this bias when he sent summons to five companies planning to build up energy coal plants. The letter he sent to the biggest coal company, says "the increase in CO2 emissions from the operation of these units, in combination with Peabody Energy's other coal-fired plants, will subject Peabody Energy to increased financial, regulatory and litigation risks". And he added: "we are concerned that Peabody Energy has failed to disclose material information about the increased climate risks Peabody Energy's business faces". See Nocera, J., *Public policy or green tyranny?*, The New York Times, Sep 22, 2007.

<sup>147</sup> Herbert Phillips, in J. Maxwell *et al.*, "Self-regulation and Social Welfare: the Political Economy of Corporate Environmentalism", *Journal of Law and Economics*, 43, oct.2000, p. 583.

<sup>148</sup> See J. Hamilton, *Regulation Through Revelation* (Cambridge U.P., 2005).

must disclose information about potential adverse health consequences. The surprising fact is that without mandating any behavioral change, this law has had massive beneficial effects, spurring large reductions in toxic release throughout the United States. This unanticipated consequence suggested that all by themselves, disclosure requirements might be able to produce significant emissions reductions.<sup>149</sup>

This is another positive example of US oriented globalization. These are no more than new social laws concerning well-being and the recognition of human security as integral security.<sup>150</sup> Public powers and companies are obligated not only to preserve the same but to have the responsibility to experiment with innovations in order to avoid new risks and prevent dangers.

Thus, to better understand the global regulatory system we must study the other interventionist regulation aspects in US companies. There is the US *Foreign Corrupt Practices Act* of 1977, which allow prosecution to US companies facing bribery charges abroad.<sup>151</sup> The knowledge of this law by the jurists of the rest of the world is a key factor for a better defense of their country and their companies. It can be said that the US companies have been the most feverous agents for the implementation of a world anticorruption system as they were under unequal conditions when attending privatizations, bids, or contracts in other countries (such as in Latin America).

On this matter, It is important to point out the global evaluation and regulatory function of the non-governmental organization *Transparency International*.

Another regulation field has emerged from all this effervescence (in this case from regulating to regulator) through the "Code of Good Administrative Behavior"<sup>152</sup> and the new public management perspective.<sup>153</sup>

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<sup>149</sup> R. Thaler and C. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale U.P., 2008) p.190. See also C. Sunstein, *Risk and Reason*, *op.cit.*, p. 258.

<sup>150</sup> E. Posner, "Human Welfare, Not Human Rights" 108, *Colum.L.Rev.*, Nov. 2008.

<sup>151</sup> J. Ndumbe Anyu, *The Foreign Corrupt Practices Act. A Catalyst for Global Corruption Reform* (Publishamerica, 2006). See also S.R. Ackermann, *Corruption and Government* (Cambridge University Press, 1999).

<sup>152</sup> See J. Ponce, "Good Administration and Administrative Procedures", *IND.J. Global Legal Stud.*, n. 12, 2005.

<sup>153</sup> M. Barzelay, *Breaking Through the Bureaucracy: A New Vision for Managing in Government* (Berkeley, University of California Press, 1992). M. Barzelay, *The New Public Management* (University of California Press, 2001).

<sup>154</sup> Thaler, R., Sunstein, C., *Nudge...*, *op.cit.*, p. 252.

## 5. Choice Architecture: Regulation Through Information

Choice architecture, both good and bad, is pervasive and unavoidable, and it greatly affects our decisions. Choice architects can preserve freedom of choice while also nudging people in directions that will improve their lives.<sup>154</sup>

Research in the field of behavioral economics indicates that humans stumble in their decision making in predictable ways that can often be corrected by a gentle nudge from the appropriate regulatory authority.<sup>155</sup>

It is not a coincidence that a psychologist, Kahneman, who won the Nobel Prize for Economics on 2002, has analyzed this matter. The belief that human beings take rational decisions is a dubious principle: "There is little doubt that the major new theoretical approach to law and economics in the past two decades does not come from either of these two fields. Instead it comes from the adjacent discipline of cognitive psychology, which has now morphed into behavioral economics".<sup>156</sup> The legal community in recent years has focused on creating policies that take into account the limits of human rationality.

Thaler and Sunstein's have studied the findings of behavioral research on predictable patterns in human decision-making.<sup>157</sup> Finding patterns of how we stumble and designing systems that can prevent common behavioral failures is the subject of the new field of behavioral economics which attempts to incorporate the vast knowledge accumulated by cognitive and social scientist into predictive models.<sup>158</sup>

Thaler and Sunstein analyzed the vision of gentle nudges and the concept of choice architecture, the idea that law should focus on the organization of the context process, and environment in which individuals make decisions. These concepts are closely related to a growing body of regulatory studies that can be grouped under the label "new governance" and fall between command-and-control regulation and deregulated markets.<sup>159</sup>

<sup>155</sup> O. Amir and O. Lobel, "Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy", *Colum. L. Rev.*, 108, 2008.

<sup>156</sup> R. Epstein, "The Neoclassical Economics of Consumer Contracts", 92, *Minn.L.Rev.* 803, 2008. See also C. Sunstein and D. Kahneman, *Behavioral Law and Economics* (Cambridge, 2000).

<sup>157</sup> R. Thaler and C. Sunstein, *op.cit.*

<sup>158</sup> P. Glimcher, *Decisions, Uncertainty, and the Brain. The Science of Neuroeconomics* (MIT Press, 2004).

<sup>159</sup> O. Amir and O. Lobel, *op.cit.*, p. 2100.

In fact, the tradition of introducing transparency in public activity and management on the American administrative law is developed and enlarged. This regulatory law began when the Railroad Massachusetts Commission (called *Sunshine Commission*) was created on 1869: “[a] commission that would shed the cleansing light of disclosure on the hitherto secret affairs of business corporations”.<sup>160</sup>

The 1929 crash developed this regulatory law with the Securities Act on the 30’s that enlarged the companies’ and banks’ obligations on disclosure, framed by the regulation through information and revelation. Now the experts intend to enlarge it in all the fields after long periods of deregulation and pervasive effects of information asymmetry.

Anyway, the term created by Sunstein and Thaler, “libertarian paternalism” is vague.

Many of the key implications of the behavioral field involve designing more effective and less interventionist regulation systems than command-and-control, but these systems cannot be described as libertarian. They too entail costs, have distributional effects, and are inevitably value driven. Similarly, many of Nudge’s proposals can be explained by better regulatory responses to third-party externalities and the need for central coordination, planning, and macro-policies rather than paternalist goals. Because of the limits of the corrective solutions to cognitive failures as well as competing interest that coexist in any given policy field, it is important to identify those challenges that cannot be addressed by new governance approaches and will continue to require more traditional regulatory approaches.<sup>161</sup>

During the actual 2008 and 2009 financial crisis, the lack of institutions to secure the democratization on the information available for the consumers in the US has become more evident. In Europe, thanks to a body of elite civil servants like the notaries who exercising good faith functions, this problem may be reduced. Shiller pointed out that:

Another possible default option would be a requirement that every mortgage borrower have the assistance of a professional akin to a public notary. Such notaries practice in many countries, although not in the United States. In Germany, for example, the civil law notary is a trained legal professional who reads and interprets the contract and provides legal advice to both parties before witnessing their signatures. This approach particularly benefits those who fail to obtain competent and objective legal advice. The participation of such a public figure in the mortgage lending process would make it more difficult for unscrupulous mortgage lenders to steer their clients toward sympathetic lawyers, who

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<sup>160</sup> T. McCraw, T., *op.cit.*, p. 15.

<sup>161</sup> O. Amir and O. Lobel, *op.cit.*, p. 2100.

would not adequately warn the clients of the dangers they could be facing.<sup>162</sup>

Thaler and Sunstein said that "it is crucial to design policies that will prevent similar problems in the future. Behavioral economics provides specific suggestions not just for mortgages but also for credit cards, cellphone plans, prescription drugs, and student loans. The basic idea is that for complex financial products, the government should strive for what might be called 'simplified transparency'. This proposal illustrates the essence of good policymaking from the standpoint of behavioral economics. Government does not tell people what to do. Instead, it tries to improve markets by making it easier for busy people to make good decisions".<sup>163</sup>

## VII. Deregulation Paradox: Regulation and the Rise of the New Agencies. The Economic-administrative Law: Regulatory Law v. Antitrust Law

Through the pressure of social movements, new rights and security standards are being introduced in agreements and international regulations (*i.e.* environmental, food, anti-tobacco, protection of minorities, women, children, etc.).<sup>164</sup> The paradox is that, during its time of economic deregulation, the US saw a new re-regulation which was, in the words of Majone, *a regulatory law*.<sup>165</sup>

And even in sectors of economic deregulation such as telecommunications, electricity and gas, there have been a complex and essential regulation (*i.e.* aimed to create sector markets) and a multiplication of ad-hoc regulatory organizations indispensable for the arrangement of the new markets to be in a competitive framework. At the same time these organizations as well as their regulation (like the Federal Energy Regulatory Commission) have been emulated in many countries.<sup>166</sup>

<sup>162</sup> R. Shiller, *The Subprime Solution* (Princeton U.P., 2008) p. 134.

<sup>163</sup> R. Thaler and C. Sunstein, "Economic Policy for Humans", *Boston.com*, April 17, 2008.

<sup>164</sup> J. Freeman and M. Minow (Eds), *Government by Contract. Outsourcing and American Democracy* (Harvard University Press, 2009).

<sup>165</sup> The Australian Professor J. Braithwaite has been the most influential theoretician of the new regulation approach. See I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford U.P., 1992); See also J. Braithwaite, J., *Markets in Vice. Markets in Virtue* (Oxford U.P., 2005); and *Regulatory Capitalism* (E. Elgar, 2008). See also *Regulation and Governance* and C. Parker and J. Braithwaite, *Regulation, Oxford Handbook of Legal Studies* (Oxford U.P., 2005).

<sup>166</sup> Gaspar Ariño has introduced American economic regulation in Spain. See also J. Zeitlin and G. Herrigel (8 edn), *Americanization and its Limits* (Oxford, 2000). See also Muñoz Machado, *Servicio público y mercados* (Civitas, 1998). See also M. Ballbé and C. Padrós, "Spanish Independent Authority and its Role in a New Competitive Environment" in Giuliano Amato (ed.) *The Anticompetitive Impact of Regulation*, op.cit.

In Britain, privatization proliferated in a way that created a need for new regulatory agencies. When British telecommunications were deregulated in 1984, OFTEL was created to regulate it; OFGAS was created for the regulation of a privatized gas industry in 1986, likewise OFFER with electricity in 1989, OFWAT with water in 1990, and the Office of the Rail Regulator in 1993.<sup>167</sup>

What has been called deregulation has sometimes had the paradoxical effect of increasing the regulator's power.<sup>168</sup>

That is, by favoring particular models of re-regulation, governments set the terms of market competition. The model of re-regulation affects [companies that] enter the market, what services they offer, what investments they make, and what strategies they pursue. ... Even re-regulation has probably done more good than harm. The disengages have found fairer and more effective ways to maintain ... quality standards and to protect investors from fraud, and the reinforces have generally replaced unreasonable regulations with more beneficial ones.... In the end, the paradoxes all but disappear. Once we recognize that regulatory reform has been more about re-regulation than deregulation. ... But re-regulation is a creative process, and thus we should not be surprised to find distinct national variants. Likewise, we should not be surprised that state actors have played a central part in the process. Deregulation would imply a retreat of the state, and we would hardly expect state actors to rally to the cause of retreat. But re-regulation merely implies a reorganization of control, and state actors are deeply interest in the terms of this reorganization. (...) In most cases of deregulation governments have combined liberalization with re-regulation, the reformulation of old rules and the creation of new ones. Hence we have wound up with freer markets and more rules. In fact, there is often a logical link: liberalization requires re-regulation.<sup>169</sup>

Facing the dilemma of whether regulatory law and the *ad-hoc* regulatory organs (*i.e.* in energy, telecommunications, and other sectors) should predominate on anti-trust law, the administration and the courts of antitrust law.<sup>170</sup> The recent *Verizon v. Trinko* case of the U.S. Supreme Court is of great importance. The decision will have effects not only in the U.S but in the whole world. Therefore, this signals of pre-eminence of the regulatory commissions and the sector specific regulation

<sup>167</sup> J. Braithwaite, *Regulatory Capitalism* (Edward Edgar, 2008) p. 9. See also H. Schröter, *Americanization of the European Economy* (Springer, 2005).

<sup>168</sup> S. Vogel, *Freer Markets, More Rules* (Cornell U.P., 1996) p.137.

<sup>169</sup> S. Vogel, *op.cit.*, pp. 256-269 and p.3.

<sup>170</sup> D. Geradin and M. Kerf, *Controlling Market Power in Telecommunications. Antitrust vs Sector-specific Regulation* (Oxford, 2003). See also D. Geradin and R. O'Donoghue, "The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector", *Journal of Competition law and economics*, June 2005, pp. 418-419.

confronted of the generic Administration of competition and antitrust courts, are explained in this ruling:

One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, '[t]here is nothing built into the regulatory scheme which performs the antitrust function', *Silver v. NY Stock Exchange* (1963), the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, (...) it may also be a consideration in deciding whether to recognize an expansion of the contours of section 2. The regulatory framework that exists in this case demonstrates how, in certain circumstances, 'regulation significantly diminishes the likelihood of major antitrust harm'. (...)

Allegations of violations of §251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. (...) Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of unending litigation. (...) Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of highly detailed decree.(..)

An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.<sup>171</sup>

Federal administrative are important beyond their national impact; they have also projected and developed the administrative and global regulatory system.<sup>172</sup> It would be difficult to understand the entire interstate system without knowing the coordination and harmonization mechanisms that Washington D.C. and the fifty states of the US have carried out during more than a century.<sup>173</sup>

Obviously, the study of American law and institutions does not mean that it is necessary to stick to continuity. On the contrary, giving the power, the impact and the global influence which US law has had and will have, it is essential to have a thorough knowledge of this legal

<sup>171</sup> Supreme Court of the US, *Verizon v. Trinko*, January 2004.

<sup>172</sup> D. Kelemen and E. Sibbitt, *The Globalization of American Law*, International Organization, 2004.

<sup>173</sup> D. Geradin, "Regulatory Co-opetition Transcending the Regulatory Competition Debate" in J. Jordana and D. Levi-Faur (eds), *The Politics of Regulation* (Edgar, 2004). We already explained ten years ago this non dividable cooperation and regulating competitiveness dynamic. See M. Ballbé and C. Padrós, *Estado competitivo...*, op. cit.

and administrative system. The EU represents a counter power which inspires itself from the US regulation but by being stricter, turns into a reference model for governments outside the US and the EU.<sup>174</sup> The EU model is based on an ample regulatory law, in powerful public regulatory administrations and on specialized professionals.<sup>175</sup>

The rising of the US Administrative procedure in the 60s came with the activism of the community. This phenomenon is being reproduced today and is being projected in the global administrative system. Shapiro said: [T]rue access requires not only that the groups get to speak but that the agencies do listen and modify their decisions in the light of the demands made..<sup>176</sup>

### VIII. Security and Police in Globalization: EU Model Confronted to US Model

Administrative law has traditionally forgotten security and police.<sup>177</sup> Police administration is important for many reasons, but the most important is that the law enforcement administration is responsible for non-complying with its regulation.<sup>178</sup>

The Police administration and the security regulations have not been taken into account when speaking of global administrative law. There are two opposite models between the EU and the US.

In the US Puritan Christian tradition created an anti-administrative, anti-civil service, anti-centralist and anti-regulatory system. Consequently, the constitutional rights of the citizens to carry arms as well as assuming the police functions (through *posse comitatus*) formed the State model. It is erroneous to believe that US administrative and regulatory structures are similar to those in the EU in the field of security.<sup>179</sup>

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<sup>174</sup> Z. Laidi, *Norms over Force* (Palgrave, 2008).

<sup>175</sup> See *ibid.*

<sup>176</sup> M. Shapiro, "On Predicting the Future of Administrative Law", *Regulation*, vol. 6, 1982. See also M. Landy, M. Levin and M. Shapiro (eds.), *Creating Competitive Markets: The Politics of Regulatory Reform*, 2007. Schuck said: "Effective market design-even when seeking deregulation and increased competition-requires lots of rules, perhaps even more rules than before" (p. 347).

<sup>177</sup> J. Wood, C. Shearing, *Imaging Security* (Willan Pub., 2007).

<sup>178</sup> R. Kagan, "On Regulatory Inspectorates and Police" in K. Hawkins and J. Thomas (eds.), *op. cit.* p. 37. See also A. Reiss, "Selecting Strategies of Social Control over Organizational Life" in K. Hawkins and J. Thomas (eds.), *op. cit.*, p. 23.

<sup>179</sup> Bush's Plan Mexico consisted of having the United States subvention in military material and the training of the Mexican Army for the fight against drugs. The idea is to extend the war against drug trafficking to neighboring countries in Central America following the model of Plan Colombia. It is a matter of cooperation between the North American and the Mexican Army instead of being a police cooperation, by helping to cover the deficit of 200.000 policemen in Mexico.



American intelligence services are like a superstructure disconnected from those who really have the information (the police agents).<sup>180</sup> Therefore, the present unsatisfactory results of this model abroad could be predicted when considering the poor results in the fight against crimes in the country compared to the EU. US exports the massive resort to arms, strategies and war terminology, military profession and techniques, repression and not the European model of prevention, regulation, police, justice and social integration.

The U.S. Supreme Court decision on *District of Columbia vs. Heller*, 2008 consolidates this model and curbs the regulation and administrative intervention on arms.<sup>181</sup> It can impede the efforts of the States and of the cities to limit the right to carry arms outside of the homes, that had supposed a reduction of the criminality just by these regulatory controls. The danger of this decision can have pro-guns effects.<sup>182</sup>

If the United States is a violent society, it is mainly due to the freedom for buying and carrying weapons. This is the cause of the multiplication and aggravation of social conflicts. We must keep in mind that a third of the US population owns a weapon (approximately 100 million people) which brings tragic consequences. There are 300 million fire arms in circulation that bring mortality to an average of 30.000 victims per year (including homicides, suicides and accidents).<sup>183</sup>

Although the volume of non-violent delinquency is similar in both continents, it is not so the case regarding criminal violence. The big difference is that only 5% of the EU population own arms (mainly for hunting) whereas 30% do it in the US (mainly short weapons), and consequently, mortality is much lower in the EU. When comparing the mortality figures of 300 million Europeans<sup>184</sup> with 300 million US citizens we find that the number of victims per homicide associated with fire arms is 17 times higher in the United States (700 victims per year in Europe compared to 12.000 in the United States).<sup>185</sup> This shows

<sup>180</sup> This model of intelligence is due to the lack of professional policemen.

<sup>181</sup> See Posner "In Defense of Looseness", *The New Republic*, August 27, 2008.

<sup>182</sup> D. Kopel, "The Natural Right of Self-defense: Heller's Lesson for the world", 59 *Syracuse L.Review*, p. 235, 2008. The contradictions of the pro-guns (that maintain self - protection through firearms is a fundamental right) are evidenced in the article of Kopel. Without doubt the global programme of the U.N to restrict the possession of firearms and the remaining of arms in Uganda y Kenya is criticised by him, given that there is no American presence. D. Kopel, P. Gallant and J. Eisen, "Human Rights and Gun Confiscation", 26 *QLR*, p. 385, 2008.

<sup>183</sup> R. Martínez, *Armas: Libertad americana o prevención europea?* (Ariel, 2002).

<sup>184</sup> For example, the population of Germany, France, Italy, Great Britain and Spain.

<sup>185</sup> Dr. Kellerman's team published in the *New England Journal Medicine* of 1993 that for each death caused by firearms there are three wounded, one of which remain paralytic, that is 10.000 a year.

that the "availability" factor of guns multiplies the culture of violence, a situation totally different in EU due to restrictive regulations.

Common sense shows how the violence risk reduction is related to the arms possession: there are 100 million armed US citizens compared with 15 million armed Europeans. We cannot imagine how much violent crimes would be lessened in the US if a restrictive European type regulatory law would be applied in the US, guns were to be removed from 75 millions US citizens. The EU applies the principle "Less guns, less crime",<sup>186</sup> which seems to be effective.

Comparative data between Spain and the US on the total number of homicides and murders with or without firearms are very illustrative. During the 90s, Spain had approximately 1 homicide per 100,000 inhabitants per year, while "the United States had 10 per 100.000 inhabitants (from 1970 to 1997)".<sup>187</sup>

This situation is due to the interventionist and regulatory concept of this sector in Europe responding to the principle of legitimate violence monopoly by the government compared with the American right to carry arms. An estimated 50,000 persons die each year in the United States as a result of violence-related injuries.<sup>188</sup>

In opposite models of possession of firearms by governments or by the citizen we have the existence of a protective administrative government oriented to prevent crime vis-à-vis a individual oriented government with a comparative smaller public police.

The difference in the size of Police administration is another key to differentiate the EU and the US model. Spain has 240,000 policemen for

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<sup>186</sup> J. Lott, *More Guns, Less crime. Understanding Crime and Gun Control Laws* (Chicago University Press, 1998). See also D. Kates and G. Mauser, "Would Banning Firearms Reduce Murder and Suicide?", *Harvard Journal of Law and Public Policy*, spring 2007. Progun movements tries to demonstrate that the countries with more guns are those having less murders. However, they never mention the fact that ninety per cent of European guns are just for hunting. Furthermore, firearms circulation is restricted and there is an obligation – in France specially – to lock them in sport facilities. The European Union shows in an undeniable way the principle "less guns, less crime". The European principle of handguns almost absolute restriction means less crime and that means at least from five to ten times less homicides.

<sup>187</sup> J. Gilligan, *Preventing Violence* (Thames and Hudson, 2001) p. 42. Mexico has 20 homicides per 100.000; Brazil has 30 homicides per 100.000 and Guatemala has 41 per 100.000. See also E.G. Krug, K.E. Powell and L.L. Dahlberg, "Firearm-related Deaths in the United States and 35 Other High and Upper-middle Income Countries", *International Journal of Epidemiology*, 27, 1998, p.216.

<sup>188</sup> D. Karch et al, *Surveillance for Violent Deaths-National Violent Death Reporting System, 16 States, 2005*, Centers for Disease Control and Prevention (CDC) - Morbidity and mortality weekly report (MMWR) Surveillance Summaries, March 20, 2009.

45 million inhabitants, compared to 900,000 policemen for 300 million inhabitants in the US.<sup>189</sup> So in Spain there is one policeman for every 200 inhabitants and in the US they have 1 for every 325 inhabitants.

The same occurs if we compare the penitentiary systems: Spain has 140 prisoners per 100,000 inhabitants and, on the other hand, the US, has 740 prisoners per 100,000 inhabitants.

The conclusion is evident: All the money saved in public administrations and prevention professionals is spent to fight crime. For not having a preventive administration, the U.S. has at least five times more homicides,<sup>190</sup> five times more prisons, criminal judges, prison officials, forensic doctors, laboratories, etc.

Europe saves an enormous budget dedicated to repression and choose to invest much more in prevention and community services,<sup>191</sup> educators and social assistants, more professional preventive policemen,, more administrative interventionism and more safety regulations among others. It is important to point out that the main factor for security is the size of a preventive Administration.

The US is gradually turning towards the EU model of integral and human security through State regulations for gun control.<sup>192</sup> In the structural aspect of globalization, Europeans are not conscious of their exemplary security model despite irrefutable comparisons.<sup>193</sup> Europeans are still debating if they should impose a US oriented or a EU oriented model for globalization of security.<sup>194</sup>

<sup>189</sup> The United States has only 100.000 Federal policemen, 100.000 policemen for the 50 states and 700.000 local policemen who obviously carry out 80% of all the criminal investigations

<sup>190</sup> J. Gilligan, *Preventing ...*, op.cit, p. 42.

<sup>191</sup> *ibid.*, p. 23.

<sup>192</sup> "Despite a recession that knocked down global arms sales last year, the U.S expanded its role as the world's leading weapons supplier, increasing its share to more than two-thirds of all foreign armaments deals, according to a new Congressional study. The U.S. signed weapons agreements valued at \$37.8 billion in 2008, or 68.4 percent of all business in the global arms bazaar, up significantly from American sales of \$25.4 billion the year before". Italy was a distant second, with \$3.7 billion in worldwide weapons agreements in 2008, while Russia was third with \$3.5 billion in arms sales last year". T. Shanker, "U.S. Increases its Share of Worldwide Arms Market", *The New York Times*, Sept. 7, 2009.

<sup>193</sup> It is also worth saying that there are positive aspects in the Americanization of security such as the regulation of the fight against money-laundering. J. Wessel, "The Financial Action Task Force: a Study in Balancing Sovereignty with Equality in Global Administrative Law", *Widener L. Review*, 13, 2006. It is necessary to remember that money-laundering crime has a reference in the arrest of Al Capone. This example of Globalization-Americanization may also be seen together with the inside trading crime.

<sup>194</sup> P. Andreas and E. Nadelmann, *Policing the Globe. Criminalization and Crime Control in International Relations* (Oxford U.P., 2006). See also Nadelmann, *Cops Across Borders. The Internationalization of U.S. Criminal Law Enforcement* (Pennsylvania State University Press, 1993).

## IX. Human Security and Criminology as Regulatory Law

The administrative law establishes preventive regulations about safety and security.

There is a definite correlation between human security policies, public health,<sup>195</sup> and social regulations in the prevention and reduction of criminal violence.<sup>196</sup>

From a human security perspective, this state-centered view is displaced by a much broader conceptualization of the security of people. The human being is now the central reference, whereby people's interests or the interests of humanity, as a collective, become the focus. This conceptual move is advanced in the United Nations Human Development Report of 1994.<sup>197</sup> There is an evolving dialectic between State-centric and human-centric security.<sup>198</sup>

We will emphasize the reasons of one of aggressiveness as a criminological factor that has been scientifically demonstrated through neurological research. Thanks to the institutional development and to the specific regulatory law – risk regulation of administrative law – the rates of violent criminality have decreased.<sup>199</sup>

Brain damage and poor brain functioning have been shown to predispose to violence, and one possible source of this brain damage could be birth complications. The implications is that providing better pre-and post-birth health care to poor mothers may help reduce birth complications and thus reduce violence.<sup>200</sup>

More recent views suggest that while some parts of brain (such as the cerebellum) are indeed impacted by malnutrition, such effects appear to be reversible with nutritional rehabilitation:<sup>201</sup>

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<sup>195</sup> D. Hemenway, *Private Guns. Public Health* (University of Michigan Press, 2007).

<sup>196</sup> Regarding the concept of the United Nations, see P. Fernández, *Seguridad humana* (Ariel, 2006).

<sup>197</sup> United Nations Commission on Human Security, *Final Report*, N.Y, 2003, in J. Wood and C. Shearing, *Imaging ...*, op.cit., p. 64.

<sup>198</sup> *Ibid.*, p. 65.

<sup>199</sup> R. Redding, "The Brain-disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century", *American University Law Review*, 56, 2006, p.51.

<sup>200</sup> A. Raine, "The Biological Basis of Crime" in Wilson and Petersilia (ed.), *Crime* (ICS, 2002).

<sup>201</sup> J. Liu, A. Raine et al., "Malnutrition, Brain Dysfunction and Antisocial Criminal Behavior" in Raine (ed.), *Crime and Schizophrenia* (Nova Science Pub., 2006). See also A. Freeman, "Fast Food: Oppression Through Poor Nutrition", *California Law Review*, 95, Dec. 2007.

[t]his finding and recent work on the effects of nutritional supplements in reducing antisocial/aggressive behavior in prisoners are not consistent with the traditional view that negative effects of early malnutrition are permanent.<sup>202</sup>

Also "It has long been suspected that exposure to pollutants, particularly metals that have neurotoxic effects, can lead to mild degrees of brain damage which in turn predisposes to antisocial and aggressive behavior".<sup>203</sup> "Prenatal and postnatal blood lead concentrations are associated with higher rates of total arrest and/or arrests for offenses involving violence. This is the first prospective study to demonstrate an association between developmental exposure to lead and adult criminal behavior. In 1978, 13.5 million US children had a blood lead level above 10 µg/dl, the current US Centers for Disease Control and Prevention blood lead level of concern (the average US blood lead level is 2 µg/dl). Lead paint and solder were banned in 1978 and 1986, respectively, by the US federal government; leaded gasoline was finally phased out in 1996. By 2002, only 310,000 US children had a blood lead level above 10 µg/dl".<sup>204</sup>

So "in developing my analysis of criminal law's regulatory aspects, I shall think of the field of criminalization as a 'regulatory space' populated by a number of distinctive regulatory actors, regulatory modalities, and regulatory tasks".<sup>205</sup>

Accordingly to this preventive regulatory law vision "a steady and dramatic decline in the prevalence of elevated blood-lead-level cases is due in significant part to law based interventions, federal and local programs. Law continues to play an important role in mitigating the harmful effects of lead hazards in households. While traditional

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<sup>202</sup> A. Raine, op.cit. See C.B. Gesch, S.M. Hammond, S.E. Hampson, A. Eves and M.J. Crowder, "Influence of Supplementary Vitamins, Mineral and Essential Fatty Acids on the Antisocial Behavior of Young Adult Prisoners", *The British Journal of psychiatry*, 181, 2002.

<sup>203</sup> One of the best studies to date is that of Needleman in 1996 who assessed lead levels in the bones of 301 eleven-year-old schoolboys. "Boys with higher lead levels were found to have significantly higher levels of delinquent and aggressive behavior with teachers, higher ratings of delinquent and aggressive behavior with their parents, and higher self-report delinquency scores". Raine, A., *The Biological...*, op.cit., pp. 65-66. See also Rosner, D., Markowitz, G., *Standing up to the Lead Industry: an Interview with Herbert Needleman*, Special Report on Lead Poisoning in Children in Public Health Reports, vol.120, 2005.

<sup>204</sup> Wright, J.P., et al., *The Association of Prenatal and Childhood Blood Lead Concentrations with Criminal Arrests in Early Adulthood*, <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050101>. However, children exposed to lower levels of lead than this—through ingesting flakes or dust residues of old lead paint, for example—can have poor intellectual development (decrease in intelligence quotient, attention deficit hyperactivity disorder, and behavioral problems including aggression).

<sup>205</sup> N. Lacey, *Criminalization as Regulation: the Role of Criminal Law, Regulating Law* (Parker, Scott, Lacey, Braithwaite (ed), Oxford) p.147.

public health interventions have been used to address environmental health hazards, an effective public health response to childhood lead poisoning will require models of innovative laws and policies with solid enforcement provisions".<sup>206</sup>

The result of all this is an environment and a culture respecting the citizen's right to life and health, which are considered relevant in environmental criminology, in order to reach a preventive security culture and respect for human rights.<sup>207</sup> As the world becomes more interconnected, the actions of one country affect other countries with greater frequency and impact than ever before. Globalization has created an international marketplace where borders have vanished and goods are bought and sold by vendors and purchases throughout the world. The lead problem has only one solution: a global regulatory law.<sup>208</sup>

#### X. Other Examples of Global Administrative Law

Among the global administrations, the World Health Organization ("WHO") is a specialized agency of the United Nations ("UN") that acts as a coordinating authority on international public health.

One of the impacts of globalization is the rapid spread of diseases across borders (*i.e.* AIDS, avian and swine flu, to name a few). This has made necessary to intensify cooperation between States as well as the constant increase of global supranational authority given to WHO.

WHO operates as a supranational regulatory administrative agency with powers delegated by States.<sup>209</sup> It uses soft law, and works with supervision and multilevel cooperation with governments, regional and local administrations, public audiences, negotiations with the private sector, NGOs, etc. Its coordinated and fast response legitimates its existence more than any formalistic and administrative procedures. In fact, when facing an epidemiological crisis, States resort to WHO to address strategies to a relevant public health problem.

<sup>206</sup> M. Ransom, M. Thombly and C. Ekechi, "Toward Eradication: How Law and Public Health Practices Can Be Used to Prevent Childhood Lead Poisoning", *Tulane Environmental Law Journal*, 22, winter 2008.

<sup>207</sup> M. Ballbé, "Seguridad humana: Del estado anómico al estado regulador", Prologue to the book of C. Hood, *The Government of Risk* (Oxford University Press, 2001; Spanish translation, Ariel, 2006).

<sup>208</sup> G. Allen, "Get the Lead Out: a New Approach for Regulating the U.S. Toy Market in a Globalized World", *Georgia Journal of International and Comparative Law*, vol.36, spring 2008, p.615.

<sup>209</sup> D. Esty, *Good Governance*, *op. cit.*

The WHO is a vehicle to use for expanding risk regulations globally – for instance the water and health regulations.<sup>210</sup>

The less formal but more effective regulations are the new forms of regulation. These should respond to the US model of administrative agencies. The WHO gives recommendations, epidemiologic instructions, security alerts, scientific counseling, risk evaluations, laboratory tests, etc. In this administrative agency you get to see one of the characteristics of the present global regulatory system that is the decisive role of *ad-hoc* scientific commissions formed within each administration. This is what Jasanoff has called “the fifth branch of Power”.<sup>211</sup>

The UN, often questioned as to its political efficiency, has been the institution that has most contributed to the development of human security laws and the risk prevention regulations thanks to the creation of specialized administrative agencies, the establishment of regulations often very informal and voluntary (from WHO to IPCC), and through the strengthening of a global administrative law.<sup>212</sup>

1. The Intergovernmental Panel on Climate Change (“IPCC”) of the United Nations, an Example of Globalization of the Environmental Administrative Law: *Massachusetts v. EPA* (2007)

The UN Kyoto Protocol (the United Nations Framework Convention on Climate Change), is the most evident proof of the impact of a world regulation and of the new forms of global administrative law<sup>213</sup> upon governments,<sup>214</sup> having no more than a solid administrative organization or a formal legal Corpus.

Already in the 80’s the executive director of the UN Environmental Program (“UNEP”) raised his concern over the depletion of the ozone layer. The informal regulatory efficiency of the CFC prohibition became evident.

Today the UNEP has lost protagonism it had before. However, back in 1988, it established a scientific intergovernmental body of major

<sup>210</sup> R. Rabin, S. Sugarman (eds), *Regulating Tobacco* (Oxford, 2001). See also, M. Dertithck, *Up in Smoke. From Legislation to Litigation in Tobacco Politics* (CoPress, 2002).

<sup>211</sup> S. Jasanoff, *The Fifth Branch. Science Advisers as Policymakers* (Harvard, 1994).

<sup>212</sup> J. Alvarez, “Governing the World: International Organizations (IO) as Lawmakers”, *Suffolk Transnational Law Review*, 31, summer 2008: “In the traditional account, IOs are seen as producing only one kind of law that is unique to them and to the age of IOs: public administrative law”, p.2.

<sup>213</sup> C. Sunstein, “Of Montreal and Kyoto: a Tale of Two Protocols”, *Harvard Environmental Law Review*, n. 31, 2007.

<sup>214</sup> B. Lozano, *Derecho ambiental administrativo* (Dykinson, 2007).

importance: the Intergovernmental Panel on Climate Change ("IPCC"). The authority of this intergovernmental panel derives from its scientific expertise, the publication of its report and the evaluation of the emissions of the different countries. This makes clear the efficiency of the new regulation forms that we have already called, "regulation through evaluation" and auditing.

The Kyoto Protocol is a proof of Global administrative law, including with regulatory consequences for countries like the US who refused to sign it.<sup>215</sup> Even though the US is not a signatory, the regulation has had an influence on its domestic law and on its public administration and tribunals. They are impregnated with the global prevention and regulatory principle set in the Kyoto Protocol.

In June 2005, Schwarzenegger, the Governor of California unveiled a plan to drop greenhouse gas emissions of the State of California down to its 1990 levels within 15 years. In 2006 a strict legislation was issued in order to lower levels of gas emissions (by 25%). This more aggressive and preventive policy evidenced measures which only took into consideration the voluntary implication of companies for the reduction of pollution. Likewise, seven US States signed a memorandum to reduce emissions from industrial energy plants. It was also signed by the mayors of three hundred and fifty cities which represent fifty five million US citizens engaged to develop city-level policies to comply with the Kyoto Protocol.

Subsequently, twelve States led by Massachusetts and California and various NGOs demanded to the federal Environmental Protection Agency ("EPA") that it does not abdicate from its responsibilities and that it take measures regarding the 1970 Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. EPA said:

As it happens, the EPA has weighed in by denying the waiver request. It concluded that California cannot satisfy the extraordinary or compelling need' test because the State's waiver request refers only to local (not global) problems and that its proposed rules would undermine the uniformity now promised by the recently enacted energy bill.<sup>216</sup>

Considering the inactivity of the G. W. Bush Administration and their refusal to interpret the law as an obligation to take preventive measures

<sup>215</sup> Kyoto would have not have existed without previous work of ecologists, including American movements and state and federal regulations of the 70s, who showed the rest of the world the risks and the new environmental laws they.

<sup>216</sup> Letter from S.L. Johnson, EPA Adm'r to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007), in D. Barron, "From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization", *George Washington Law Review*, August 2008.



in this field, these States went to the Supreme Court and a transcendental decision was issued on April 2007: *Massachusetts v. EPA*.<sup>217</sup> The Supreme Court held – while referring to the Kyoto Agreement – that the Bush Administration and specifically the EPA had to comply with the Clean Air Law and also had the obligation to take protective measures to avoid damages (even though these were inevitable)<sup>218</sup>. The Court qualified as “arbitrary and capricious” the Administration’s refusal to consider whether it establishes or not emissions control.<sup>219</sup>

The effect of the judicial globalization influences the US Administration which pretended to practice unilateral practices in the global environmental field.<sup>220</sup> In fact, global administrative environmental law is an effective instrument in the application of some kind of international environmental constitutional values.<sup>221</sup>

## 2. The “California Effect”: the Multilevel Influence between the State, Federal and Global Administrative Law

California has been a pioneer in the regulation of emissions by setting stricter limits than those imposed by the federal administration. As previously said, a centralization of environmental competences came about since 1970. The EPA was created and this took away said attributions from the states with the Clean Air Act (“CAA”). However, the federal CAA exceptionally allowed California to experiment and innovate with stricter standards to obtain less contamination in the atmosphere considering their specific problem of the so called smog. This gave rise to a dual regulation in this matter, the federal and State regulation.

In response to the demand of other States for having their own regulation and to avoid to have fifty standards on fifty States, “the CAA allows other States to opt-in to California’s more stringent standards”. Vermont and nine other states did follow California. Thus, for instance,

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<sup>217</sup> See 127 S. Ct 1438 (2007). See also A. Morris, “Litigating to Regulate: *Massachusetts v. Environmental Protection Agency*”, *Cato Supreme Court Review*, 193, 2007. See also J. Smith, “*Massachusetts v. EPA*: a Change of Climate at EPA Clouds the D.C. Circuits Review of Risk-based Policy Decisions”, *Ecology L.Q.*, 33 2006. See also E. Posner and C. Sunstein, *Climate Change justice*, Joint Center for Regulatory Studies, August 2007. See also C. Sunstein, “Of Montreal and Kyoto: a Tale of Two Protocols”, *Harvard Environl. L. Review*, 31, 2007.

<sup>218</sup> C. Sunstein, “On the Divergent American Reactions to Terrorism and Climate Change”, *Columbia Law Review*, 107, 2007.

<sup>219</sup> G. Metzger, “Administrative Law as the New Federalism”, 57, *Duke L.J.*, May 2008.

<sup>220</sup> Holzinger, et al., *Environmental Policy Convergence: the Impact of International Harmonization, Transnational Communication, and Regulatory Competition*, INTL. Org., 2008.

<sup>221</sup> D. Bodansky, “Is there an International Environmental Constitution?”, *Indiana Journal of Global legal studies*, 16, 2009.

there are two types of cars in the United States: "the federal cars" and the less contaminating ones, "the cars from California".<sup>222</sup>

The car industry and car sellers filed a suit against the State of Vermont, alleging that States do not have competence to establish their own standards in this matter and that only the federal power has it, especially through a recent more centralized law of the year 2005 (US Energy Policy and Conservation Act). It is worth saying that the California standards contemplate diminishing the carbon emissions in the atmosphere, demanding a combustion technology reducing the CO<sub>2</sub> emissions.<sup>223</sup> The EU is not a model of Environmental Globalization in this field because of the opposition of the carmakers lobby. Specifically, 160 grams of carbon dioxide per kilometer is presently emitted when some vehicles only generating 95 grams already exist. This limit will be only imposed in the EU as of the year 2020.<sup>224</sup>

In September 2007, the federal judge has rejected the claim of the automobile industry and confirmed the *dual model*. The recent and above mentioned jurisprudence of the Supreme Court (*Massachusetts v. EPA*) was referred to: the administrations have the obligation to reduce emissions that provoke global warming.<sup>225</sup> This case is an additional example of the dual model of competition between State and federal regulations. California, making use of its competences, has imposed standards and regulations in other fields (*i.e.* food, chemicals, power, etc.). Vogel has denominated this as the "California effect":<sup>226</sup> a State with a vigorous economy and stricter regulation conditions has an effect on all company owners of the rest of the US and beyond. Effectively they have to declare if they manufacture their product as per the most lax standards permitted in the forty nine remaining states or, if not, in order

<sup>222</sup> J. Hoffman, "Engine Manufacturers ASS'N v. South Coast Air Quality Management District: States Gain a New Avenue for Vehicle Emissions Regulation as the Market Participant Doctrine Allows an Escape from Preemption under the Clean Air Act", *Tulane Environ. L.J.*, 2007.

<sup>223</sup> See J. Chaffin, "Defeat for Carmakers in Plea of Emissions", *Financial Times*, Sept, 26, 2008.

<sup>224</sup> China on the contrary is leading this sector. See E. O'Carroll, *Report : China is world's leading renewable-energy producer*, *The Christian Science Monitor*, 8.3.2008. A report from the Climate Group points out that China "has introduced automobile fuel-efficiency standards that are 40 percent higher than those in the United States".

<sup>225</sup> Concerning the constitutionality or non constitutionality of these agreements between states. See K. Leske, "A Closer Look of Green Mountain Chrysler vs. Crombie", *Vermont Law Review*, spring 2008. See also K. Maxwell, "Multi-state Environmental Agreements: Constitutional Violations or Legitimate State Coordination?", *Penn State Environmental Law Review*, 2007.

<sup>226</sup> D. Vogel, *Trading up: Consumer and Environmental Regulations in a Global Economy*, 2005. See also on the same author with R. Kagan, "National Regulations in a Global Economy", 1995, in Vogel (ed), *Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies* (University of California Press, 2007).

to have access to the California market, they manufacture the product with the strictest quality and security standards. This responds to the American *dual model*<sup>227</sup> in which States are laboratories of democracy, experimentation and innovation.

This is a constitutional principle since the Brandeis' famous dissenting opinion, in which he said:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.(...) We must be ever on our guard, lest we erect our prejudices into legal principles.<sup>228</sup>

If they have beneficial results, those will be copied by others. Now, this is a perfect representation of the sense of the new term "global". On the opposite side, if the States reject innovations, the Federation will impose a centralized regulation (preemption).

This is what happened with the 1970 Environmental Federal Laws which were imposed upon the entire country when facing the passive attitude and the complicity of the polluting industry of some Southern states. These Federal Laws were the copy of California Laws and of other more innovating and ecologist States which had already applied them and had seen their positive results (*i.e.* clean air and water, less carcinogen, etc.).<sup>229</sup>

With the problem of climate change, it is once more recognized that new solutions will only be found if local and State powers and the corporations themselves are involved in new formulas, technologies, policies and regulations to reduce contamination.<sup>230</sup> This model

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<sup>227</sup> See M. Ballbé and C. Padrós, *Estado competitivo y armonización europea* (Ariel, 1997).

<sup>228</sup> Brandeis' dissenting opinion, *New State Ice Co. v Liebmann*, 1932. ("The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs").

<sup>229</sup> S. Singh, "Brandeis Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law", *George Washington International Law Review*, n. 37, 2005. See also Dorf, M., Sabel C., "A constitution of Democratic Experimentalism", n. 98, *Columbia Law Review*, 1998.

<sup>230</sup> R. McKinstry, "Laboratories for Local Solutions Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change", *Penn State Environmental Law Review*, winter 2004.

will also happen in the globalization sphere as, if a centralized and rigid legislation is approved, it would not be worthwhile innovating through partial experiments. This escape valve will always exist in the environmental field so that there is the possibility to experiment with more innovating regulations at the State, regional or local level and later on the global arena.

Even if the US never signed the Kyoto Protocol, it can be said that the US were the pioneers of the Protocol, with the clean air regulations of the 70s. Now once more the US project from the State and local administrations is an innovative regulatory model of environmental globalization and compliance with this global environmental administrative law.

### 3. The European Union Effect

The book written by Rachel Carson, *Silent Spring* (1962) caused a great impact. It became a classic of environmental thoughts and of the need to regulate the industry. It already indicated the relationship between technology, nature and risk and is considered one of the most influential works concerning environmental regulations, which a decade later would be promulgated in the US and Europe.<sup>231</sup>

The UN, the most important risk regulatory Administration in the world, has worked during the last 25 years to get agreements aimed to minimizing and eliminating chemical contamination risks, and toxic and bio-accumulative substances.

The Stockholm Convention on Persistent Organic Pollutants (2004) is the UN promoted international instrument which regulates the treatment of toxic substances, sponsored by the UNEP. This agreement is the result of long negotiations regarding the elimination of the Persistent Organic Pollutants ("POPs"). The Agreement determines a dozen of compounds against which it is important to take a priority action known as "dirty dozen" which includes chemical products intentionally produced as pesticides, PCBs, dioxins, furans. The Stockholm Convention has been signed by 151 countries.

Presently, the EU is more advanced than the US in these matters.<sup>232</sup> The EU has investigated and regulated through REACH (*registration,*

<sup>231</sup> R. Carson, *Silent Spring* (Houghton Mifflin, 1962) p. 10. ("For the first time in the history of the world all humans are now subjected to contact with dangerous chemical substances from the moment they are conceived until their death, since synthetic pesticides started to be used 2 decades ago (...) these chemical substances are now stored in the bodies of the great majorities of human beings". The impact that his study caused DDT to be forbidden in United States).

<sup>232</sup> However, we must not forget that it was first the American ecologist movements who fought for and obtained a regulation on this matter.

evaluation, authorization and restriction of chemicals)<sup>233</sup> and certain europeanization of the US and the world is taking place in this regard. As in the US, this EU regulation has come about by the activism of the community.<sup>234</sup>

In 1999 Greenpeace established the basic principles which eventually formed part of REACH. In its report Greenpeace said:

[t]he way forward out of the chemical crisis, they argued that companies should not be allowed to sell a chemical substance without first offering information as to its security (the principle of "no data, no market") and that the most dangerous chemical substances should systematically be substituted by safer alternatives. In order for REACH to be effective as to the protection of people and environment, legislation should be able to promote innovative solutions leading to a progressive elimination of the most dangerous chemical substances, substituting them by better alternatives. This is the "Principle of Substitution".

In 2001, the European Commission published its proposal for a European policy regarding chemicals: the "white book". The proposal was attacked by the anti-REACH lobby which was mainly organized by German and American big companies and the US Government, but it was eventually approved and REACH regulation came into force in 2007 (albeit with amendments).<sup>235</sup>

The US opposed this regulation and brought the matter before the WTO. The US considered it contrary to free trade. The same occurred with the Stockholm Agreement regarding Persistent Organic Contaminants<sup>236</sup>. But the WTO "has emerged as the most effective forum for the resolution of international environmental controversies based on its responsive and evolving nature".<sup>237</sup> The dispute on REACH before the WTO will serve as a precedent in the conflict between the principle of precaution and the prevention of risks.<sup>238</sup> REACH being in force in Europe and the subsequent decision of the WTO have already produced "The European Effect" because the other States know that sooner or later they shall

<sup>233</sup>D.A. Motaal, "Reaching Reach: The Challenge for Chemicals Entering International Trade", *Journal of International Economic Law*, vol. 12, sep 2009.

<sup>234</sup>S. Bugdahn, "Travelling to Brussels via Aarhus: Can transnational NGO Networks Impact on EU Policy?", *Journal of European Public Policy*, 2008.

<sup>235</sup>Regulation created in 2008 by the European Chemical Agency (ECHA) with headquarters in Helsinki (Finland) take steps in favor the REACH procedures.

<sup>236</sup>D. Batchelder, "An Analysis of Potential Conflicts Between the Stockholm Convention and its Parties' WTO obligations", *Mitch. J. Int'l L.*, 28, 2006.

<sup>237</sup>S. Harrell, "Beyond REACH: an Analysis of the European Union's Chemical Regulation Program Under World Trade Organization Agreements", *Wis. Int'l L.J.*, 24, 2006.

<sup>238</sup>S. Charnovitz, "The WTO's Environmental Progress", *Journal of International Economic Law*, 2007. See also V. Sunstein, *Law of Fear: Beyond the Precautionary Principle* (Cambridge U.P., 2005).

have to conform with these requirements for their reputation. This is aggravated with China and other countries causing authentic health catastrophes, which go against the right to life.<sup>239</sup>

The REACH regulation is an example of the evolving, interdependent relationship between WTO and its Member States. The regulation was crafted to comply with WTO requirements as they have evolved. REACH applies equally to all products imposing no greater burden on same than those imposed on domestic products. The incorporation of risk assessment measures prevents any regulatory bans in the absence of a proven risk. While the program will affect other WTO member nations importing chemicals into the EU, the primary goal is protection of health and the environment based on the EU's chosen level of protection. This is a legitimate goal under WTO agreements.<sup>240</sup>

The US deregulation process can be seen in this field: it is true that although the US was a pioneer with EPCRA in 1986 (by new administrative law patron of "regulation through revelation") and inspired the Stockholm Agreement and the European REACH twenty years earlier, it is now proven that the deregulation, the relaxation or the inactivity of the US administration has made the EU the leader of the global impact regulation. Laidi says:

REACH also constitutes a source of enormous change for U.S. firms, which must now comply with European regulation. But at the same time, REACH is extremely influential in the sense that it has forced the U.S. Congress to work on national legislation.<sup>241</sup>

<sup>239</sup> S. Cho, "The WTO'S Gemeinschaft", *Alabama Law Review*, 2004. (We must not forget the case of the substance imported from China which was introduced in the composition of certain cough remedy certified with no analysis in a Barcelona enterprise and which caused more than 70 deaths in Panama. Likewise the case of September 2008 of adulterated milk for children having melamine. However, there are other arguments from the point of view of developing countries. Cho criticizes developed countries (such as the European Union) for carrying out a regulatory "unilateralism" when creating health protection standards, environmental standards, etc which it simply considers commercial barriers prejudicing developing countries. For example, Cho says that China uses asbestos in its construction procedures and in the preparation of products, which would be very costly to be substituted. Cho's argument, who seems to be in defense of the third world with a neoliberal posture, states that a developing country is permitted to trade carcinogens in order to reach a larger market quota. With regard to the prohibition to trade asbestos, see the 2001 *EC Asbestos* decision in which the EU approved a measure restricting the import of products containing asbestos to avoid health damages to individuals, based on the exception to free trade, moral, public order and security. The WTO appellate tribunal, held that each WTO member is free to determine its own adequate level of health (art. 20B of the GATT). In accordance with the *Correa Beef* resolution, the member may choose their level of compliance as per the different grades of restriction).

<sup>240</sup> S. Harrell, *op. cit.*

<sup>241</sup> Z. Laidi, *Norms Over...*, *op.cit.*, p. 66.

Consequently, the paradox of globalization as a global integration through law is that there is a EU driven globalization. Moreover, the initial US environmental regulatory law has not kept the pace as world leader. Such process is now led by a strong and active EU regulation, which was indeed inspired to a certain extent by the US law.

## XI. The Two Sides of US Oriented Globalization

### 1. The Global "Law's Empire" and the Exemplary Model of the World Trade Organization ("WTO") as US Oriented Globalization

The WTO success is mainly due to the rejection of the purely economic and politicized model of its predecessor: the GATT. Instead, WTO comprises the implementation of an administrative and judicial procedure. In other words this is the establishment of a world economic integration system through law.

These were the first steps to establish a global system under the genuine federal principle of *checks and balances* and of the rule of law<sup>242</sup> (law's empire or the submission of the States and their administrations to global law such as it is case with the WTO). In this context the law will have a decisive role in the balance of powers and in the process of integration through global law.<sup>243</sup> The WTO has almost a "universal jurisdiction" in trade matters,<sup>244</sup> over its 151 Member States.<sup>245</sup>

There is no need to dwell on the consequences of the United States agreeing for the first time to abide by agreements of a global institution and the resolutions of a global economic administrative constitutional court such, as the WTO Appellate Body ("AB").<sup>246</sup> This court settles disputes derived from laws and trade regulations issued by different states that do not comply with WTO norms and principles. This entails, as in other international organizations, an administrative and constitutional legal mechanism, generating a sort of common law, from which global legal principles and values emerge.<sup>247</sup>

<sup>242</sup> D. Dyzenhaus, "The rule of (Administrative) Law in International Law", *Law and Contemporary Problems*, 2005.

<sup>243</sup> See Ballbé reviewed Cappelletti et al., "Integration Through Law. Europe and the American Federal Experience", *Harvard International Law*, vol. 28, 1987. (Integration through WTO law has been influenced by two systems: European Community and the United States).

<sup>244</sup> Kinney, E., "The Emerging Field of International Administrative Law: its Content and Potential", *Administrative Law Review*, 2002.

<sup>245</sup> J. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge U.P., 2006).

<sup>246</sup> T. Cottier, P. Mavroidis (eds), *The Role of the Judge in International Trade Regulation. Experience and Lessons for the WTO* (Michigan, 2003).

<sup>247</sup> McGinnis and Movsesian, "The World Trade Constitution", *Harvard Law Review*, Cont.

Pauwelyn analyzes the American influences in this organization and indicates that "the most important differences between GATT and the WTO dispute settlement is that the veto power for States to block the establishment of panels and the adoption of panel reports has been abolished".<sup>248</sup> It has been said "in the shadow of the law (as opposed to "in the shadow of the veto") weaker States feel more confident to resist diplomatic pressure [from important powers such as the US and the EU] to conclude an unwanted settlement."<sup>249,250</sup> Also, "[I]legalization takes the form for example of a dramatic increase in procedural claims and objections raised by disputing parties, as well as in the number of pages, spent by panels and the Appellate Body on procedural issues. This focus on alternative dispute resolution (ADR) modes could, in itself, be seen as a call for Americanization, US legal culture".<sup>251</sup>

Thus, if we accept that the constitutional principle *par excellence* – mainly in the federal tradition – is the principle of *checks and balances*, embodied in different ways (*i.e.* separation of vertical or horizontal powers, constitutional control of the laws, veto of the President to Congress, limitation of Presidential mandate, judicial control of the acts and regulations of the administration, etc.) it is evident that there are clear administrative and constitutional elements in the WTO treaties and in their administrative procedures, in the mechanisms of judicial control and annulment of legal and administrative decisions taken by States for being contrary to the WTO regulations.<sup>252</sup>

Consequently, the AB has reproduced the model of the US Supreme Court which as judicial review has carried out a judicial activism that has led important legal developments. This model of US oriented globalization of the court as law making<sup>253</sup> came about once more with the protagonism of the European Court of Justice<sup>254</sup> in the European integration process. This has also occurred with the European Court of Human Rights.

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2000. See, Gerhart, "The Two Constitutional Visions of the World Trade Organization", *University of Pennsylvania Journal International Economic Law*, 2003. See also M. Ballbé and R. Martínez, *Soberanía dual ...*, op.cit.

<sup>248</sup> J. Pauwelyn, "The Limits of Litigation: Americanization and Negotiation in the Settlement of WTO Disputes", *Ohio State Journal on Dispute Resolution*, 19, 2003.

<sup>249</sup> M. Busch, "Democracy, Consultation, and the Paneling of Disputes Under GATT", 44, *J. Conflict Resol.*, 2002, quoted in Pauwelyn, op. cit.

<sup>250</sup> Li, J., "From see you in the court! To see you in Geneva!: An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution", *Yale Journal of International Law*, 2007.

<sup>251</sup> Pauwelyn, op. cit.

<sup>252</sup> See R. Howse, *The WTO System* (Cameron May, 2007).

<sup>253</sup> R. Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints", *The American Journal of International Law*, 2004.

<sup>254</sup> M. Poiares Maduro, *We the Court. The European Court of Justice and the European Economic Constitution* (Hart Publishers, 2003).



It is no coincidence that the US model has been reproduced in the AB, which "is a court in all but name and it even has a constitutional dimension" according to Weiler.<sup>255</sup> It is in fact becoming a world constitutional court because in practice, it annuls or does not apply laws issued by States that infringe world trade rights contained in the WTO agreements.<sup>256</sup> Finally, the AB is accused of judicial activism and of being a lawmaking court. "As a matter of fact, a common law style judicial legislation has been a hallmark of the GATT/WTO jurisprudence".<sup>257</sup> These accusations come mainly from the losing country as occurred to the US in the Antidumping and Zeroing Sentence of 2008<sup>258</sup>. The Zeroing issues have sparked a vivid debate over the role of the AB, which the [Bush Administration] claims "is making, rather than interpreting WTO rules".<sup>259</sup> "In particular, this proliferation of antidumping measures is devastating to poor countries whose economic growth is linked critically to access to rich countries' markets". The Zeroing AB ruling "seems to have delivered a clear message to the global trading community that the era of zeroing is gone".<sup>260</sup>

Also, "the WTO jurisprudence developed by the WTO panels and the AB should be given more weight in terms of the WTO's nuanced institutional balance than in terms of the Montesquian notion of separation of powers that are better suited to the domestic context. After all, this is a useful manifestation of *judicial prudentialism*, rather than as reckless judicial activism".<sup>261</sup>

<sup>255</sup> J. Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement", *Am. Rev. Int'l. Arb.*, 13, 2002, p.177.

<sup>256</sup> M. Fischer, M., "Is the WTO Appellate Body a Constitutional Court? The Interaction of the WTO Dispute Settlement System with Regional and National Actors", *Georgetown Journal of International Law*, 40, 2008. See also C. Koch, "Judicial Review and Global Federalism", *Administrative Law Review*, 54, 2002.

<sup>257</sup> S. Cho, "Constitutional Adjudication in the World Trade Organization", Inaugural conference of the Society of International Economic Law, Geneva, July, 2008.

<sup>258</sup> Dumping is a pricing strategy under which foreign producers export their products at less than fair (normal) value, such as prices lower than their domestic prices or prices below the cost of production plus normal profits. Zeroing refers to an asymmetrical calculative methodology in obtaining final dumping margins which omits any negative results occurring when export prices exceed normal values (such as home prices) and instead includes only positive results occurring when home prices exceed export prices. According to one study, zeroing tends to inflate dumping margins nearly by 90%. The AB has viewed that this unfair result from zeroing renders any pro-zeroing interpretation of the Antidumping Agreement as impermissible even under Article 17.6 (ii). S. Cho, *op.cit.* ("When calculating how much product had been dumped, would ignore (or set at zero) examples in which the imported product had a negative dumping margin"). See also J. Goldstein and R. Steinberg, "Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics", *Law and Contemporary Problems*, 2008.

<sup>259</sup> "WTO Courts Rules Antidumping Zeroing is Illegal", May, 1, 2008. G. Hamel, the spokeswoman for the US Trade Representative, stated: "The AB has, unfortunately once again gone beyond the agreement that WTO Members negotiated...".

<sup>260</sup> S. Cho, *op. cit.*

<sup>261</sup> S. Cho, *op. cit.*

The advantages of this judicial model have been decisive in the integration processes through law and this is perfectly demonstrated in the US, in the EU, and in this decade, in the process of global mutual adjustment of the AB. Consequently, it has turned into the main globalization agent through law.<sup>262</sup> Perhaps "this is the reason why most criticisms on judicial activism are staged by political scientists or politicians whose main language is power not norms",<sup>263</sup> or only markets oriented for the economists. WTO AB world governance shifted from politics or economics to global integration through law.<sup>264</sup> Prof. Cottier notes:

[W]hile the GATT was an agreement the purpose of which was almost exclusively the reduction of trade barriers, the WTO increasingly assumes constitutional functions in a globalizing economy.<sup>265</sup>

On the other hand it is also an international administrative court, because the resolutions deal with regulations or administrative actions of the States which violate the laws of the WTO.<sup>266</sup> Indeed, one of the most paradigmatic cases is the *Shrimp Products* case, according to which the *Appellate Body* observed that the US had not provided information to any of the countries exporting shrimps to them that shrimp imports had been prohibited because the basic guarantees established in their administrative procedure had been prohibited by inside administrative regulations. In fact, the US denied the "formal opportunity for an applicant country to be heard, or to respond to any arguments that maybe made against it".<sup>267</sup>

This decision gives a global reach to the principles of administrative procedure of the States. Third parties have the right to minimal procedural guarantees when they deal with administrations of other States.<sup>268</sup> That means to let them have the right to be heard and argue before taking any unilateral decision as did the US in the *Shrimp products* case.<sup>269</sup>

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<sup>262</sup> I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford U.P., 2009).

<sup>263</sup> Cho, op. cit.

<sup>264</sup> AB was the U.S. proposal in 1990. J. Goldstein and R. Steinberg, "Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics", *Law and Contemporary Problems*, 2008.

<sup>265</sup> T. Cottier, "The WTO and Environmental Law", *Trade and Development Center Essay Series*.

<sup>266</sup> E. Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, 2007).

<sup>267</sup> WTO Appellate Body Report, United States-Import Prohibition of Certain Shrimp products, WT/DS58/AB/R adopted 6.11.1998. See S. Charnovitz, "The WTO'S Environmental Progress", *Journal of International Economic Law*, 10, Sep, 2007.

<sup>268</sup> S. Cassesse, "Global Standards for National Administrative Procedure", *Law and Contemporary Problems*, 68, 2005.

<sup>269</sup> B. Marchetti, "The WTO Dispute Settlement System: Administration, Court, or Tertium Genus?", *Suffolk Transactional Law Review*, 32, 2009, p.567.

In this same line we can cite the still disputed Antigua Barbuda case of 2005 against the US because of its restrictions on internet gambling. The AB determined that the American restrictions contained in their legislation against betting on the internet that do not operate in this territory are illegal.<sup>270</sup> One of the arguments clearly having to do with administrative law is that the less restrictive measure regarding trade is the one to be taken. The WTO indicates that the US could have taken less radical measures than the complete prohibition of gambling and accepted the argument of Antigua that the US had abstained to negotiate in order to adapt itself to the WTO regulations and to its claims. The WTO recognized this point and decided against the US for not having complied with the consultation procedure and denied the use of Art. XIV(a).<sup>271</sup> It hereby proclaimed the principle of communication and prior negotiation, that is, a country before taking a unilateral resolution prejudicing other States must communicate this to them, give audience as well as establish a negotiation with said affected States.

However, the *Antigua Barbuda* decision is still the object of heated debates. The US has not complied with it, and it has also approved a new legislation on gambling.<sup>272</sup> It must be said that the WTO recognizes "the right to retaliate"<sup>273</sup> and lets the countries make compensation decisions as to non-compliance (in this case the US) (*i.e.* suspend copyright royalties having their origin in non-compliance countries). In this case the WTO has recognized Antigua "the option to retaliate in case of non-compliance" and in December 2007, "arbitrators therefore

<sup>270</sup> M. Grunfeld, "Don't Bet on the United States's Internet Gambling Laws: the Tension between Internet Gambling Legislation and World Trade Organization commitments", *Colum. Bus. L. Rev.*, 439, 2007.

<sup>271</sup> D. Chalmers, "Administrative Globalization and Curbing the Excess of the State" in Joerges, C., et al., *Constitutionalism...*, op.cit., p. 372.

<sup>272</sup> Unlawful Internet Gambling Enforcement Act, 2006.

<sup>273</sup> T. Sebastian, "WTO Remedies and the Assessment of Proportionality Equivalence and Appropriateness", 48 *Harv. Int'l L. J.*, 337, summer 2007. ("The essence of the mechanics by which the dispute-settlement system enjoys such a high compliance rate is rooted in decentralized enforcement – a legitimized retaliatory threat that reconfigures domestic politics in the contravening country. If the member does not, the adversely affected complainant can retaliate. Retaliation takes the form of raising tariffs on goods originating in the territory of the contravening country to a level intended to have the effect of eliminating demand for the imports in proportion to the adverse effect of the contravening measures". With the growth of competition at home, more firms are likely to find themselves aligning on the left, stopping any attempt to open the U.S. market; likewise, the growth of export opportunities, or the threat of retaliation, will mobilize exporters on the right-hand side and could move policy in that direction. In the end, it is the preferences of U.S. industries that will move policy in one direction or the other". "Mechanically, at the end of each individual dispute, the threat of retaliation usually pits one of the offending protectionist subsectors against a large number of export-oriented interest"). See also J. Goldstein and R. Steinberg, "Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics", *Law and contemporary problems*, 2008, pp. 275-280.

confirm Antigua's Right under Art. 22 DSU to request of suspension of TRIPS obligations".<sup>274</sup>

Administrative and constitutional law commentators have trouble perceiving the global administrative and constitutional historic moment<sup>275</sup> which is occurring with this trade macro-administration, with its bodies, procedures and dispute settlement (DSB or Dispute Settlement Bodies) and with its judicial AB.<sup>276</sup> This supposes a model – progressively extended to other sectors such as the environment – which is submitted to administrative law and to the principle of *checks and balances* for all major players, including the US, their economic groups and multinational companies. All this mixed with elements of global constitutional law or of what is called multilevel constitutionalism.<sup>277</sup>

This idea of shared and limited sovereignty among the States and the international administrations (such as the WTO) that is, of mutual limitation between the powers of the States and the powers of the international organizations, is a true representation of the US Federal and Constitutional dual sovereignty.<sup>278</sup> The dual constitution of organized and spontaneous sectors promotes a mutual control which can be seen as a part of the constitutional checks and balances in the open modern societies.<sup>279</sup>

Denying the constitutional traits that are evident in the WTO is not possible.<sup>280</sup> Rejecting the name does not mean that there are no such constitutional characteristics of the principle of checks and balances.<sup>281</sup> This is what has occurred with the rejection of the European constitution. The European treaties and the functioning between the European institutions and all member States have almost all the constitutional and federal traits. The simple fact of approving a Constitution did not represent a great advancement but would have rather provoked, as it has now

<sup>274</sup> H. Grosse Ruse-Khan, "A Pirate of Caribbean? The Attractions of Suspending TRIPS Obligations", *Journal of International Economic Law*, June 2008.

<sup>275</sup> A. Slaughter, "An International Constitutional Moment", *Harvard International Law Journal*, vol. 43, 2002.

<sup>276</sup> S. Picciotto, "The WTO's Appellate Body: Legal Formalism as Legitimation of Global Governance", *Governance*, vol. 18, 2005.

<sup>277</sup> C. Joerges and E. Petersmann, *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart P., 2006). See also Habermas, *The divided West* (Polity Press, 2006). Habermas, *Between Naturalism and Religion* (Polity Press, 2008).

<sup>278</sup> M. Ballbé and R. Martínez, *Soberanía dual...*, op. cit. See also E. Petersmann, "Why Rational Choice Theory Requires a Multilevel Constitutional Approach to International Economic Law", *University of Illinois L.R.*, 2008.

<sup>279</sup> C. Joerges and E. Petersmann, op. cit., p. 14.

<sup>280</sup> E. Wet, "The International Constitutional Order", *ICLQ*, vol. 55, Jan. 2006, pp. 51-79.

<sup>281</sup> D. Cass, *The Constitutionalization of the World Trade Organization. Legitimacy, Democracy and Community in the International Trading System* (Oxford, 2005). The author emphasizes the non existence of constitutional elements at the WTO.

occurred, a rejection effect in the countries who are not willing to lose their sovereignty when submitting to European or international laws.

As Monnet had already begun to see, mentioning the words *constitution* and *federalism* in these multilevel systems –intergovernmental and/or supranational – is counterproductive. On the other hand, the Anglo American *muddling through* entertains practices sometimes even more federal and more constitutional, without the need of nominalism and the spirit of the code.<sup>282</sup> The process of constitutionalization is more representative of this method of functionalism. It is about a global integration through law, but mainly through administrative or regulatory law. WTO law means the submission of the States to the law, to a global law with unimaginable material effects caused by such submission. On this matter, Cabrera says:

Then I look at some current theorizing about the “process of constitutionalization” with gradually has transformed the E.U. from an intergovernmental organization to one exercising significant supranational powers over members states. The change is especially striking in the EU Court of Justice, with has issued rulings strongly opposed by members states. But also accepted by them I look at a broadly similar process under way in the adjudicative arm of the WTO. I discuss the possibility of a route being opened to a more transparent and accountable global trading regime, and no more just forms of economy and eventually political integration, up to the global level.<sup>283</sup>

However, with this discrete methodology, it obtained power and notable efficiency. The spirit of Monnet and the incremental creative process of the EU shows once more how beneficial the “integration through (administrative) law”<sup>284</sup> is and how its represent a multilevel constitutionalism in action.<sup>285</sup>

<sup>282</sup> C.M. Lindblom, “The Science of Muddling Through”, *Public Administration Review*, vol. 19, 1959.

<sup>283</sup> L. Cabrera, *Political Theory of Global Justice* (Routledge, 2004) p. 6. (“This important role for the WTO dispute-settlement system is reminiscent of the crucial liberalizing role played by the ECJ in the 1960s through the late 1980s until the Single European Act (SEA). In that period, the EU Council was paralyzed by the Luxemburg compromise, which effectively required unanimity for any important action. The ECJ’s exercise in “negative liberalization”, striking down national protectionist measures in such famous cases as *Rheinheitsgebot* and *Cassis de Dijon*, is credited with being the main engine of internal market liberalization in the period. Moreover, as we have argued here about compliance with WTO Appellate Body decisions, domestic politics have been crucial to compliance with ECJ decisions. (...) To be sure, the Doha Round negotiations have increasingly operated under the shadow of the law”. See also J. Goldstein *et al.*, *Negotiate or Litigate...*, op.cit., p. 281.

<sup>284</sup> M. Kuo, “Between Fragmentation and Unity: the Uneasy Relationship Between Global Administrative Law and Global Constitutionalism”, *San Diego International Law Journal*, Vol. 10, 2009.

<sup>285</sup> I. Pernice, “The Treaty of Lisbon: Multilevel Constitutionalism in Action”, 15 *Columbia Journal of European Law*, sum. 2009.

It is worth questioning if the Member States would have accepted the WTO treaty if the AB had been called World Constitutional Court or Global Trade Supreme Court. As Petersmann has indicated, a constructive ambiguity of treaty language has served to build consensus around rules without specifying their precise meaning.

This successful experience of limits and integrated powers through a deliberate ambiguity in treaties or constitutions, even in unwritten constitutions, is a core value of Anglo-American tradition of common law and judicial review.<sup>286</sup> Goldstein indicates that:

WTO judicial lawmaking has two dimensions, filling gaps and clarifying ambiguities. Gap-filling refers to judicial lawmaking on a question for which there is no legal text directly on point, whereas ambiguity clarification refers to judicial lawmaking on a question for which there is legal text that needs clarification. First, the DSU's silence on many procedural questions has been seen by some as an invitation to the AB to make procedural rules. In some cases, the Appellate Body has created law that fills procedural gaps in WTO agreements (...). In a number of instances, the AB has given precise and narrow meaning to language intentionally left vague by negotiators, either because they could not agree on more specific language, or in order to permit a range of alternative behaviors or national practices.<sup>287</sup>

WTO configures a key US oriented globalization process (in the sense of constitutional and federal values of checks and balances) in which the US, as a consequence of these principles, must remain checked and balanced by the rest of the Member States, which must co-participate in the political and legal decisions that affect this more and more united and integrated world.

WTO has gained supranational institutional independence and its legal personality influences 6600 million people through their policies, decisions and regulatory mechanisms which change laws and regulations of the States if they violate the rules of free trade. Curbing US unilateralism was one of the most salient elements of the WTO AB. Consequently "some degree of democratic functioning is necessary to gain legitimacy"<sup>288</sup> and therefore "requires institutional development and administrative procedures and regulations".<sup>289</sup>

<sup>286</sup> J. Pek, "Things Better Left Unwritten? Constitutional Text and the Rule of Law", 83 *NYULR*, Dec. 2008.

<sup>287</sup> J. Goldstein and R. Steinberg, *op.cit.*, pp. 268-270. See also B. Dickson (ed.), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007).

<sup>288</sup> J. Srivastava, "Legitimacy and Global Governance Institutions. Challenges and Possibilities from the WTO's Experience", Annual meeting of GARNET, University of Warwick, 2007. See also T. Wuertenberger and M. Karacz, "Using an Evaluative Comparative Law Analysis to Develop Global Administrative Law Principles", *Michigan State Journal of International Law*, 17, 2008-2009, p. 567.

The harsh critics to WTO that began in Seattle during 1999 through the activism of social groups and NGOs seeking modifications of the structures and the tight procedures which the organization originally had. This has been referred to as "initiative of a good governance".<sup>290</sup> Procedures of participation and deliberation, control of lobbies, transparency, neutrality, clarity, fair play, efficient functioning, scientific legitimacy by experts, among others were suggested.<sup>291</sup>

There is still a *club model* for developed countries (*i.e.* US, EU, Japan and Canada and now open to Brazil, India and China). However, WTO is adapting itself to the participation of developing countries and NGOs. The same process previously occurred with the US Administrative Agencies. Initially the budget did not include objectives such as the environment, human rights, labor rights, public health, consumer rights, etc. Now, in the light of the damages caused by free trade and also because of external pressure, these are progressively being integrated as principles within trade law.<sup>292</sup>

It is precisely the highest WTO Court, AB, that has played a proactive role, establishing rules and procedures "extending the bases of administrative law". For instance, the introduction of *amicus curiae* briefs allowed group representatives such as NGOs to be present in procedures previously reserved to the States parties.<sup>293</sup> This reinforced WTO's legitimacy before social movements that enjoy another type of legitimacy.

Directives of the General Council of the WTO have been applied for the Secretariat to have a more active and direct relationship with NGOs. The participation of social movements in ministerial conferences, symposiums, etc., and also the constitution of an informal council composed of the ten most important NGOs, have been part of the many procedural formulas. WTO's Director-General, former European Commissary, Pascal Lamy, also represents a degree of influence from the European regulatory model.<sup>294</sup>

<sup>289</sup> D. Esty, "Good governance at the Supranational Scale: Globalizing Administrative Law", *Yale Law Journal*, May 2006; and "Good Governance at the World Trade Organization: Building a Foundation of Administrative Law", *Journal of International Economic Law*, vol.10, Sep 2007.

<sup>290</sup> Srivastava, J., *Legitimacy...*, op.cit.

<sup>291</sup> Esty, D., *Good governance...*, op.cit.

<sup>292</sup> T. Cottier, J. Pauwelyn and E. Bürgi (eds), *Human Rights and International Trade* (Oxford, 2005).

<sup>293</sup> P. Van den Bossche, "NGO Involvement in the WTO: a Comparative Perspective", *Journal of International Economic Law*, Vol. 11, 2008, p. 717.

<sup>294</sup> P. Lamy, *Global Governance: Lessons from Europe, Gunnar Myrdal Lecture*, United Nations, 2005.

As indicated by Daniel Esty, the WTO has gained reputation for having introduced administrative participation procedures, dialogue, deliberation and control, and in the future it would "develop a system of administrative law granting the institution greater legitimacy and a better capacity to take steps towards economic interdependence".<sup>295</sup>

Finally, we can say that WTO has also established systems of regulation not only through uniform standards but also through the other classical model of harmonization: "the mutual recognition of regulation between member states".<sup>296</sup> This model is inherent to the US.<sup>297</sup> Likewise, it has also promoted horizontal cooperation between Member States through which the regulatory acts of one state are automatically valid in the other.<sup>298</sup>

From the plethora of international organizations, some are real global administrations as they have autonomy with regard to the States to which they submit their regulations and their procedures of decision and resolution. It is very important to stress that after more than ten years, the US submitted to WTO judicial decisions, and this institution is the embryo of the global constitutional and administrative law in the future.

By 2005, the US had won around forty cases but also lost a similar amount.<sup>299</sup> This is an exemplary model of submission to the rule of law which unfortunately is not followed in other fields where the US still exercises unilateralism as if it were a *global sheriff*.

This submission to the rule of law through the courts and the WTO law is perfectly coherent with its most genuine constitutional principles of *checks and balances* and dual sovereignty.<sup>300</sup> Principles which, as indicated by the jurisprudence of the US Supreme Court, consider that the Executive Branch cannot act unilaterally within the US because "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government".<sup>301</sup> Likewise and in accordance with its

<sup>295</sup> D. Esty, *Good governance...*, op.cit.

<sup>296</sup> K. Nicolaidis, G. Shaffer, "Transnational Mutual Recognition Regimes: Governance Without Global Government", *Law and Contemporary Problems*, 2005.

<sup>297</sup> To understand the mutual recognition of legislations in USA and EU, see M. Ballbé and C. Padrós, *Estado competitivo y armonización europea* (Ariel, 1997).

<sup>298</sup> B. Kingsbury, R. Stewart and N. Krisch, N., "The Emergence of Global Administrative Law", *Law and Contemporary Problems*, 2005.

<sup>299</sup> S. Malawer, *Litigation and Consultation in the WTO. 10Th. Anniversary Review*, Virginia Lawyer, June/July 2005. See also G. Shaffer, *Defending Interests. Public-private Partnerships in WTO Litigation* (Brookings, 2003).

<sup>300</sup> M. Ballbé and R. Martínez, *Soberanía dual ...*, op.cit.

<sup>301</sup> Decision by the Supreme Court of New York, 1992.



constitutional and federal values, they cannot act nor give unilateral orders to the rest of the countries of the world.

In this sense, although the WTO is the result of a legal globalization that was forged first by US influence, and later by EU model, Many of WTO's own developed principles now revert to the domestic constitutional and administrative law of all Member States, including the U.S.<sup>302</sup> which have to adapt their laws to the new decisions that emanate from these organs of global law.<sup>303</sup>

It is worth saying that the future dynamics will show the development, interaction and mutual influence between administrative laws, the products of globalization, US or EU models<sup>304</sup> and the contributions of other parts of the world, especially India, China and Latin America.<sup>305</sup>

## 2. The Failure of the *Global Sheriff*. The US Supreme Court Overrules the Guantanamo Model: "The Administrative Law Goes to War"<sup>306</sup>

The 2001 Authorization for Use of Military Force Against Terrorists ("AUMF") granted the US President special powers to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks".

The government construes that these powers include privileges to avoid judicial control, as well as other measures such as the practice of torture, the use of military as police, the use of private security as police and military force, wire tapping by the National Security Agency ("NSA") without judicial authorization,<sup>307</sup> arrests and moving of detainees (*i.e.* as those carried out in Europe), the Abu Graib and Guantanamo events, the establishment of military trials, among others.

<sup>302</sup> G. Zonnekeyn, *Direct Effect of WTO Law* (Cameron May, 2008). See also S. Bhuiyan, *National Law in WTO Law. Effectiveness and Good Governance in the World Trading System* (Cambridge, 2007).

<sup>303</sup> D. Livshiz, "Updating American Administrative Law: WTO, International Standards, Domestic Implementation and Public Participation", *Wisconsin International Law Journal*, 2007.

<sup>304</sup> G. Cananea, "Beyond the State: the Europeization and Globalization of Procedural Administrative Law", *European Public Law*, vol. 9, 2003. See also Cassese, "Global Standards for National Administrative Procedure", *Law & Contemporary Problems*, 2005.

<sup>305</sup> For a perspective of global administrative law from India see B.S. Chimni, "Co-option and Resistance: Two Faces of Global Administrative Law", *New York University Law Review*, Oct. 2006. See also "International Institutions Today: An Imperial Global State in the Making", *EJIL*, 2004.

<sup>306</sup> C. Sunstein, "Administrative Law Goes to War", *Harvard Law Review*, 2005.

<sup>307</sup> There is already a sentence in a Federal Court (ACLU vs. NSA) of June 2006, by which the NSA phone tapping program is declared illegal.

The US, as of September 11 2001, has not followed the dynamic of implementing the rule of law in the world by means of a judicial, constitutional and administrative globalization. On the contrary, it has recuperated all the old 19<sup>th</sup> century techniques and practices prior to its administrative and regulatory condition. As a consequence thereof, there is a tendency to extend this nineteenth century law to the rest of the world with all its perversions.<sup>308</sup>

In this war against submission of the administration to the law and the intent to evade the control of the courts, the U.S Supreme Court, in spite of having a conservative majority, has disapproved this extensive interpretation. In fact, in four cases, it objected these supposed powers and limited and put under judicial control the acts of the G. W. Bush Administration, including those dealing with the military administration outside of the territory of US sovereignty, recuperating the Anglo-Saxon liberal principle according to which "Magna Carta follows the flag".

In *Rasul v. Bush* the issue of jurisdiction of US courts in Guantanamo was raised, despite it is a territory leased by Cuba to the US. Is US jurisdiction limited to national territory or does it extend to other parts of the world?

The Supreme Court stated that wherever the US administration or its troops "exercise jurisdiction and control", the US courts have competence to accept and take cognizance of *habeas corpus* resources of detainees, including aliens outside the sovereign territory of the US as in *Rasul*.<sup>309</sup> The Court held that "[a]s Lord Mansfield wrote in 1759, even if a territory was 'no part of the realm', there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown'".

In *Rasul*, a minority of U.S. Supreme Court justices pronounced in disagreement with the majority:

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<sup>308</sup> P. Stephens, "A Sheriff in Need of Deputies", *Financial Times*, 5 de abril de 2002. Haas, R., "The Reluctant Sheriff. The United States After the Cold War", Council on Foreign relations press, 2002, specially chapter4 "Foreign policy by posse". Stiglitz, J., "The Lawless Sheriff" at <http://www.project-syndicate.org/commentary/stiglitz46>. Etzioni, A., *From Empire to Community*, Palgrave, 2004.

<sup>309</sup> The decision was based on the doctrine of the great jurist Lord Mansfield who established the principle of submitting to ordinary courts and not to military courts when the army was called by the authorities to maintain public order the motto that the military have been called to intervene "not as soldiers but as civilians" under the obligation of all citizens to help the authorities that so required. Therefore, since 1780 in the English tradition in any extra limitation or aggression of/against the soldiers, it is not the military jurisdiction which is competent but the ordinary jurisdiction. See On this matter M. Ballbé, *Orden público y militarismo en la España constitucional* (Alianza, 1985) p. 70.

In abandoning the venerable statutory line drawn in *Eisentrager* [where it decided that U.S. courts had no jurisdiction over German war criminals held in a U.S.-administered German prison], the Court boldly extends the scope of the habeas statute to the four corners of the earth.

*Rasul* has global consequences and is a step towards the judicial control of the US administration in the entire world. It means that the US military force or even the intelligence service and the police cannot be prosecuted by the International Criminal Court. However, paradoxically, although they may evade the international judicial control, the U.S. Supreme Court has stated in this case that they cannot elude the ordinary federal judicial control even if the acts are perpetrated outside the territory of U.S. sovereignty.

On the other hand, in *Hamdi v. Rumsfeld*, a US citizen under arrest and imprisoned in Guantanamo filed a petition for a writ of Habeas Corpus. The US Supreme Court recognized that although the administration has the power to detain unlawful combatants, their arrest cannot be indefinite.

The 2005 Detainee Treatment Act<sup>310</sup> approved by the Republican majority of Congress to be adapted to the holdings in *Rasul* and *Hamdan* established that no court has jurisdiction to consider habeas corpus petitions filed by foreigners arrested in Guantanamo Bay, except the Court of Appeals for the District of Columbia.

In *Hamdan*, the majority of the U.S. Supreme Court declared that a sentence pronounced by military commissions violated the principle of the separation of powers and declared them illegal.

The majority of the Supreme Court declared that:

A judicial decision regarding military commissions affects the highest order concerning the separation of powers. Located within a sole branch of power, these military commissions run the risk that the offences that will be defined, persecuted and sentenced by officers of the executive will not have an independent judicial control. (...) Power concentration puts personal liberty at risk of an arbitrary action committed by the officers. A tripartite system of division of constitutional powers is conceived to avoid this type of incursions (...). It is an imperative reality when military courts are established; the presidential guidelines and his own authority completely dominate this process.

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<sup>310</sup> Detainee treatment Act (DTA). It is worth saying that "The Government accepted to introduce a clear normative clause regarding the prohibition of torture, but in return won the elimination of the habeas corpus of those detained in Guantanamo". S. Ellmann, "The Rule of Law and the Military Commission", *New York Law School Law Review*, No. 51, 2006-2007.

In fact, the majority of the Supreme Court held “no” with regard to the actions taken by the President after September 11 in the name of national security.<sup>311</sup>

On the other hand, the G. W. Bush Administration and the Republican majority in Congress approved the Military Commissions Act of October 2006 to try and modify the regulation on military commissions which the Supreme Court had declared to be contrary to the law. In the 2007 *Omar Khadr* case,<sup>312</sup> the military commission judge Colonel Brownback dismissed the charges as improper and sustained the illegality of the decision. The argument was that the recent law refers to “unlawful enemy combatant” and, Khadr was however considered by the American administration only as an “enemy combatant”.<sup>313</sup>

The legal battle of Guantanamo expresses this military administrative law and that of national security which the presidential administration pretended to assume, exonerating itself from judicial control and which eventually was completely unauthorized by the Supreme Court. As Sunstein declared “After *Hamdan*, presidential unilateralism stands on very shaky ground”.<sup>314</sup>

Finally on 12 June 2008 the Supreme Court issued a decision in *Boumediene v. Bush* which ratified the right of the detainees to go before the US civil courts.<sup>315</sup> The G. W. Bush Administration did accelerate the first military sentencing of the *Hamdan* case to demonstrate the viability of these sentences and provide exemplary measures. But the military commission showing dignity and praiseworthy independence, later issued a very lesser sentence which practically had already been served.<sup>316</sup>

<sup>311</sup> G. Fletcher, “Hamdan Confronts the Military Commission Act of 2006”, *Columbia Journal of Transnational Law*, No. 45, 2007.

<sup>312</sup> It is about a 15 year old Canadian citizen detained in Afghanistan, who was transferred to Guantanamo.

<sup>313</sup> As indicated in the editorial “Guantanamo’s great charade” of the *Financial Times* dated June 6 2007, “now military judges seem in no hurry either to play their part in the absurd charade of justice Though the administration all but wrote relevant provisions of the law – and must have been familiar with what it required – the government did not classify the two men as unlawful combatants, as the law doubtless demands. It is unclear whether this blunder reflects stunning incompetence or arrogant disregard for the law. Mr. Bush should abandon this farce and bring the suspects before the martial courts. That will doubtless be harder than trying them in kangaroo courts”.

<sup>314</sup> C. Sunstein, “Clear State Principles and National Security: Hamdan and Beyond”, *Supreme Court Review*, 2006.

<sup>315</sup> C.D. Burnett, “A Convenient Constitution? Extraterritoriality After *Boumediene*”, *Columbia Law Review*, Vol.109, 2009, p. 973.

<sup>316</sup> Effectively Hamdan was condemned with a 5-year jail sentence in the first sentence before the US Guantanamo military commission. The District Attorney has requested a sentence of at least 30 years.

Pause states that these cases reaffirm a fundamental understanding that security and liberty require that all persons within the Executive Branch remain bound by the law even in time of war or when there are other serious outside threats to national security. If democracy is to be preserved each generation must ensure that law forms a barrier that will hold against any attempted break or circumvention.<sup>317</sup>

In the context of these decisions, a federal judge ordered on October 8, 2008 the liberation of 17 Chinese Muslims (members of the Uigur ethnic group) held for 7 years in the military base of Guantanamo because there was no proof that they were "enemy combatants" or that they represented a risk to the US.

Bush pretended to declare war to the Administrative laws by evading any judicial control, but the US Supreme Court implicitly proclaimed that the administrative law is also going to war. That is, the ordinary courts are going to control the power, the administration, and the military, even outside of the American territory and although they are involved in war operations.<sup>318</sup>

The so called exorbitant powers of the presidential administration based on a *de facto* state of war ("AUMF") have been transformed into a fight for the maintenance of the rule of law whose most efficient instrument is and will be administrative law now even on a global scale.

Facing this military model, the fight against terrorism, unsuccessful due to its evident inefficiency, has set itself before the European model and especially the Spanish model that has at all times recurred to the professional police corps and to ordinary civil courts, with constitutional guarantees.<sup>319</sup>

Spain and Europe have shown in the terrorist attack in Madrid that the fight against international terrorism may only be successful if the co-operation between police, district attorneys and judges of the world is intensified, rather than favoring the military and the intelligence services as in the US. It is sufficient to examine that facing hundreds of thousands of US soldiers displaced in the world, there are no more

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<sup>317</sup> J. Paust, "Boumediene and Fundamental Principles of Constitutional Power", *Regent U.L.*, Vol. 21, 351, 2009.

<sup>318</sup> J. Meyer, "Supervising the Pentagon: Covert Action and Traditional Military Activities in the War on Terror", *Administrative Law Review*, 2007.

<sup>319</sup> A. Mac Kinnon, "Counterterrorism and Checks and Balances: the Spanish and American Examples", *New York University Law Review*, 2007. (The US argued that military sentences must be made for the protection of classified information, the physical security of the participants and of the witnesses, the protection of the sources and method provided by the intelligence and the police and others of interest to national security).

than a few hundred US policemen, trying to work in police cooperation, having hardly any resources. However, they are the only suitable professionals to relate themselves with the police of each place that have the authentic real information in the most recondite neighborhoods either in Islamabad, Barcelona or Tetuan.<sup>320</sup>

The EU model has given greater force and legitimacy to the fight against terrorism.

## XII. The Rise of European law's Empire in the World

The Wall Street Journal criticized EU with an editorial titled *Regulatory Imperialism*. It dealt with Europe's intents to force its norms on the rest of the world by taking advantage on the dynamism of its internal market, both affluent and attractive and in addition highly organized.<sup>321</sup> The examples given include the EU decision against *Microsoft*, the REACH norms regulating chemical substances which companies are obliged to prove that they do not present a health or environmental risk as well as the regulatory and fiscal measures regarding climate changes.<sup>322</sup>

The EU is one of the most influential protagonists in the world. As the US has a great influence due to its military power, the EU is putting itself on the same level through the force of its norms.<sup>323</sup> Now, it does not do so in an imperative way but as a mechanism for market functioning and guarantee of the rights of the citizens from everywhere in the world.<sup>324</sup> In reality "Europe should be a model and not a super power".<sup>325</sup>

Also, Europe is seen from inside the European market as a liberalization and regulatory process aimed to create a single market. On the other hand, outside, it is seen as a hyper-regulator who intends to export its norms to the rest of the world.<sup>326</sup>

<sup>320</sup> See P. Andreas and E. Nadelmann, *Policing the Globe*, op.cit. See Nadelmann, *Cops across borders*, op.cit. See also J. Casey, *Policing in the World* (Carolina Academic Press, 2010). Goldsmith and Sheptycki (ed), *Crafting Transnational Policing. Police Capacity-Building and Global Policing Reform* (Hart Pub., 2007).

<sup>321</sup> T.R. Reid, *The United States of Europe. The New Superpower and the End of American Supremacy* (Penguin, 2004). See also U. Mattei, "A Theory of Imperial Law: a Study on U.S. Hegemony and the Latin Resistance", *Indiana Journal of global legal studies*, 2003.

<sup>322</sup> WSJ, October 26, 2007, in Z. Laidi, "The Normative Empire. The Unintended Consequences of European Power", *Garnet Policy Brief*, 6, February 2008.

<sup>323</sup> Z. Laidi, *Norms over Force*, op. cit.

<sup>324</sup> M. Ballbé and C. Padrós, *Estado competitivo ...*, op. cit.

<sup>325</sup> Miliband, Britain's Foreign Secretary in November 2007 in Bruges, quoted in Z. Laidi, *The Normative...*, op. cit.

<sup>326</sup> S. Scheipers and D. Sicurelli, "Empowering Africa: Normative Power in EU-Africa Relations", *Journal of European Public Policy*, 2008

Europe influence appears in different fields: monetary stability pacts; the pressure it exercises on the other countries to sign the Kyoto Protocol; the expansion of universal jurisdiction from Spain based on the Pinochet case directed by Judge Garzon;<sup>327</sup> the effort dedicated to the International Criminal Court; the establishment of regulations on chemical products through REACH and of the new European Agency (ECHA); the development of human rights such as the prohibition of the death penalty and the limit of extradition; the regulation of the environment; the precautionary principle; labor and social norms, the restriction of the right to own arms, the laws of the sea: the norms on auditing, banks and markets; the restriction of hormones in meat and milk and of the transgenic production; the regulation of waste and recycling of electronic components.

As for the regulation of competition, the decisions of the European Court express an extraterritorial power and a limit to the domination of US companies in Europe and in the world. In one case the merger of two US Companies, Honeywell Bull and General Electric in 2001 was prohibited and more recently, Microsoft was condemned in 2007 for abuse of its dominant position with their refusal of giving competitors access to technical information regarding Windows.

In this instance, we can see the "EU effect" because the case was not called by European companies but by an American. Regulations on European competition is different because it not only provides rights and advantages for the consumer but wants additionally to create a framework of equal and balanced competition for all.<sup>328</sup>

In those fields, EU norms are becoming the highest in the world and, therefore, Europe is the norm-setter at the global level.

There is a risk of not understanding the real issues of globalization if it is not clear that what is now at stake is no longer simple competition between economies, but competition between social and legal administrative systems.<sup>329</sup>

In this way, the globalization has become an integration through law and a competence still exists between the EU administrative regulatory system and the US deregulatory system.

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<sup>327</sup> M. Jouet, "Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China and Beyond", *Georgia Journal of International and Comparative Law*, Spring 2007.

<sup>328</sup> Z. Laidi, Z., *The Normative . . . .*, op. cit.

<sup>329</sup> Z. Laidi, Z., *The Normative . . . .*, op. cit., p. 51. J. Alvarez, "Contemporary International Law: an Empire of Law or the Law of Empire?", *American University International Law Review*, 24, 2009, p.811.

Nobel Prize Joseph E. Stiglitz explains that the current global financial crisis carries a “made-in-America” label. Stiglitz explains how America exported bad economics, bad policies, and bad behavior to the rest of the world, only to cobble together a haphazard and ineffective response when the markets finally seized up.<sup>330</sup>

Maybe he forgets to emphasize that the most important thing exported by America has been bad law, let’s say deregulatory law, the same that became epicenter of the global economic and financial crisis.

The financial crisis was not an unpredictable, unforeseeable event that landed on the global economy from nowhere. Rather, it was the all too foreseeable consequence of a series of policy decisions made over decades that weakened a carefully constructed economic regulatory structure designed in part to guard the U.S. economy against the consequences of radical instability in the financial markets.<sup>331</sup>

Judge Richard Posner, from the University of Chicago, professor and father of the free-market-based law-and-economics movement, ruled:

The point is only that excessive deregulation of the financial industry was a government failure abetted by the political and ideological commitments of mainstream economists, who overlooked the possibility that the financial markets seemed robust because regulation had prevented previous financial crises. The depression is a failure of capitalism, or more precisely of a certain kind of capitalism (“laissez-faire” in a loose sense, “American” versus “European” in a popular sense), and of capitalism’s biggest boosters.<sup>332</sup>

### **XIII. Economic Crisis or a Crisis of Values and Regulations in the U.S?**

Europe has led a type of globalization not based on free trade but on a global integration through law (*i.e.* social, environmental, health, etc). Paradoxically, many of these norms were generated in the US but were later developed and put into practice by the EU.

Since Reagan’s presidency and mainly during the last 8 years of G. W. Bush Administration a process of deregulation or simply a lack of application or under-enforcement of the existing laws took place.

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<sup>330</sup> J. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* (W. W. Norton & Company, 2010).

<sup>331</sup> D. Silvers and H. Slavkin, “The Legacy of Deregulation and the Financial Crisis-linkages Between Deregulation in Labor Markets, Housing Finance Markets, and the Broader Financial Markets”, *Journal of Business and Technology law*, 4, 2009, p.308.

<sup>332</sup> R. Posner, *A Failure of Capitalism* (Harvard U.P., 2009) p. 260.



Paradigmatic cases were the non-application of the environmental regulation by the EPA and the decision in the case *Massachusetts v. EPA* in 2007 obligated the agency to intervene in the reduction of the greenhouse gases.

There was an under-enforcement of the Brady Law. This law obligates the federal administration to control arms sales by checking criminal records of the purchaser and waiting a period of 5 days before delivering the weapon.<sup>333</sup> However, the federal administration did not always keep tabs on these controls.<sup>334</sup> A Korean student of the Technical University of Virginia was able to acquire arms despite the fact that he had been trialed and even sentenced by a local judge, causing the death of 20 persons. The US deregulation of arms has culminated in the 2008 sentence of the Supreme Court, *District of Columbia v. Heller* which proclaimed the constitutional right to own arms, though not unlimited but restricts many of the local and state regulations existing in this field. "It is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology".<sup>335</sup>

The only economic and financial American deregulation which has not collapsed and which has had a global influence is precisely because a re-regulation took place when creating and developing independent *ad-hoc* agencies and specific regulations for each sector (*i.e.* telecommunications, energy, etc.).<sup>336</sup>

However deregulations carried out to an extreme without the control of these specific regulatory organizations and due to the *laissez-faire* of the administrative agencies directed by republican appointment ended up provoking the energy crisis in California and the bankruptcy of Enron, all this, in the words of the Economy Nobel Prize winner, Stiglitz, defined as the "capitalism of small friends".<sup>337</sup>

The last proof of this degradation of American law is the recent economic crisis. The situation caused by the deregulation of some financial products of the U.S. investment banks (mortgages), has once

<sup>333</sup> D. Braman and D. Kahan, "Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate" *Emory Law Journal*, 2006

<sup>334</sup> See B. Siebel and E. Haile, "Trivial Violations: The Myth of Overzealous Federal Enforcement Actions Against Licensed Gun Dealers", Brady Center to prevent gun violence, 2006.

<sup>335</sup> A sentence hugely criticized by the conservative judge and father of the School of Law and Economics of the Chicago University: R. Posner, "In Defense of Looseness", *The New Republic*, August 27, 2008.

<sup>336</sup> See Parker, Scott, Lacey and Barithwaite (Ed.), *Regulating Law* (Oxford U.P., 2004).

<sup>337</sup> J. Stiglitz, *The Roaring Nineties: a New History of the World's Most Prosperous Decade* (Norton, 2003).

more underlined the need for a new series of regulations in this financial sector. "The Bush administration and its free market orientation, assisted by a Republican-controlled Congress advocating the same principles, systematically dismantled or under-enforced a range of rules that could have prevented the situation spiraling out of control", meaning where no disclosure is requested from these unregulated mortgage companies and on these financial products. [In July 2009], seven years (...) late and after millions of loans had gone to foreclosure – the Fed finally invoked the Home Ownership and Equity Protection Act of 1994 and barred those unfair, abusive or deceptive home mortgage lending practices. Similarly, the Office of the comptroller of the currency in 2003 overrode efforts by states to protect their consumers from predatory mortgage lending. The Securities and Exchange Commission in 2004 permitted Wall Street Investment banks- the primary creators of the loan pools now dubbed toxic mortgage assets – to vastly increase their leverage ratio, borrow more money and lend more to mortgage brokers generating more sub-prime loans".<sup>338</sup>

Because of all of this, the U.S. has lost part of this regulatory legacy it had developed from the progressive movement of president Wilson in the early 20<sup>th</sup> century, the New Deal of the Roosevelt presidency after the 1929 crash, the period of the Supreme Court sentences of the fifties, the regulations of the Kennedy and Johnson presidencies, and the environmental, health and labor security laws of the seventies, a legacy which paradoxically inspired the European regulation and that now forms part of the European regulatory legacy which is a model for the globalization understood as integration through law.<sup>339</sup>

Although the global financial crisis,<sup>340</sup> the main cause has not been the lack of regulation and of global administration which could have supervised the matter, but the deliberated deregulation of banking investments in the US. Now, unfortunately too late, all coincide in the fact that the technique of the company obligation to disclosure must be regulated and reproduced by applying the traditional model of regulation through revelation. As indicated by the President of the Federal Reserve, Bernanke:

(...) regulation can serve to strengthen market discipline, for example, by *mandating* a transparent disclosure regime for financial firms. (...) The regulators were concerned not only about individual banks but also about the system risks associated with excessive *industry-wide* concentrations

<sup>338</sup> D. Abromowitz, "DE Regulators Brought us the Meltdown", *Los Angeles Times*, Oct 14, 2008

<sup>339</sup> R. Kagan, "Globalization and Legal Change: the Americanization of European Law?", *Regulation and Governments*, 2007.

<sup>340</sup> H. Davies and D. Green, *Global Financial Regulation* (Polity, 2008).

(of commercial real estate or non traditional mortgages) or an *industry-wide* pattern or certain practices (for example, in underwriting exotic mortgages). Rather, their task is to determine the risks imposed on the system as a whole if common exposures significantly increase the correlation of returns across institutions".<sup>341</sup>

Likewise, we saw how a good regulatory system can improve the functioning of the market, as it has been the case in Spain which has been recognized as a model regulator in this field: The *Economist* has affirmed:

[V]ery few regulators emerge from this crisis looking good. The Americans did not see the poison from unregulated mortgage originators seeping into the credit system. The Germans did not spot the huge exposures to off-balance-sheet entities at various Landesbanks, and the Swiss missed the grenades strapped to UBS's investment-banking arm. Following the Northern Rock affair, the reputation of Britain's Financial Services Authority (FSA) has taken the biggest knock of all the regulators. In Madrid, by contrast, a sense of quiet satisfaction prevails, thanks to two distinctive policies. One helped Spanish banks to avoid the worst of the subprime fallout and the other to prepare to the downside of an economic cycle.<sup>342</sup>

The Spanish regulatory model shows that the efficiency of the markets and of the solution of many challenges such as health, environment, security, etc, depend on balancing "a larger and better market with more and better regulations". Thus, the regulatory law and the global administrative law will be essential for an economic and social development based on human security. The inefficiency of the Public Administration and the US regulations in recent years is the result of a crisis of values.

As Paul Volcker, former Chairman of the Federal Reserve System, says "for financial regulation in general, competition in regulatory laxity cannot be a tolerable approach".<sup>343</sup> In this sense, he said "I think I said crisis time, not dollar crisis and I said that about four years ago, and we're in it. You don't have to predict it, you're in it. The quarreling in Washington, the inability to get things done, the amount of money being spent to affect political outcomes or to create political outcomes or to create political roadblocks is, I think, damaging the ability of this country to meet the very huge problems before it. Whatever it is, foreign policy, global warming, Medicare, medical expenses, even something as

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<sup>341</sup> B.S. Bernanke (Chairman) "Reducing System Risk", Board of Governors of the Federal Reserve System, Annual Economic Symposium, Kansas, August 22, 2008

<sup>342</sup> "Spanish Steps", *The Economist*, May 15th 2008. See also G. Tett, "Time for Central Bankers to Take Spanish Lessons", *Financial Times*, Sept. 29, 2008,

<sup>343</sup> P. Volcker, 101st Year, 39th meeting, The Economic Club of New York, April 8, 2008

simple and straightforward as social security, that you've been talking about for five years and nobody does anything. That's got to change."<sup>344</sup>

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<sup>344</sup> *Idem*, page 10.