Into GAL's Fragmention and Unity Debate: Governance in Environmental Law[1]

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I Introduction: GAL, Environmental law, and the Unity/fragmentation debate

1. The Theory of Global Administrative Law (GAL) is particularly attractive regarding the unity/fragmentation debate. In my opinion, GAL should be composed of a plurality of elements. GAL presents a very large number of examples related to interconnexions and I would like to reassert three of the most important arguments concerning its emergence. 1) The main idea consists of applying administrative principles of procedure to global organizations[3]. A quick glance at those principles[4] reveals that they can be found in most Western democracies and developing countries, although they may not always be enforced. Thus, American administrative law and European administrative law[5] establish similar values regarding those principles of administrative procedural law. Nevertheless, this assertion ought to be moderated[6]. Although their understanding may be different, these principles are rarely opposed

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[3] **B. KINGSBURY**, **N. KRISCH**, **R. STEWART**, The Emergence of Global Administrative Law, *Law and Contemporary Problems*, n°68, 2005, p.15; **S. CASSESE**, Shrimps, Turtles and Procedure: Global Standards for National Administrations, *IILJ Working Paper* 2004/4, Global Administrative Law Series, <www.iilj.org>; S. CASSESE, Global Standards for National Administrative Procedure, *Law & Contemporary Problems*, n°68, 2005, p.109; **C. HARLOW**, "Global Administrative Law: The Quest for Principles and Values", *European Journal of International Law*, n°17, 2006, p. 214.

[4] Principle of transparency, accountability, participation, review...

[5] For instance, **J.-B. AUBY**, **J. DUTHEIL de LA ROCHERE** (ed.), *Droit administratif européen*, Bruylant, 2007, 1122 p.; **S. CASSESE**, Le droit administratif européen présente-t-il des caractères originaux ?, *in Mouvement du droit public, Mélanges en l'honneur de Franck Moderne*, Dalloz 2004; **P. CRAIG**, *EU Administrative Law*, Oxford University Press, 2006, 888 p.; **R. NICKEL**, Participatory Governance and European Administrative Law: New Legal Benchmarks for the New European Public Order, *EUI Working Paper*, Law n°2006/26; **J. SCHWARZE**, *Droit administratif européen*, Vol. 1 Bruylant, 1994. European Administrative Law (EAL) and GAL has a lot in common. According to **J.-B. AUBY, J. DUTHEIL de la ROCHERE**, "Introduction générale" in **J.-B. AUBY**, **J. DUTHEIL de la ROCHERE**, *Droit administratif européen*, Bruylant, 2007, pp.7 and 9, EAL is composed of "*l'analyse de toutes les facettes du brassage multilatérale des droits administratifs et du droit communautaire, faisant émerger et donnant une place déterminante à des principes que l'on peut qualifier de commun*". They precise: "*un droit administratif de l'Union prend alors progressivement forme, sans que soit caractérisé ni un véritable "exécutif" au sens du droit constitutionnel national, ni un juge administratif spécialisé. Ce droit administratif de l'Union emprunte le vocabulaire du droit administratif national: légalité, responsabilité, marchés publics, fonction publique, hiérarchie des normes, marge d'appréciation, exception d'intérêt général,etc*. This definition and the focus of EU Commission on governance, with the White book, appear sufficiently clear in terms of GAL to include European Administrative Law in our study.

[6] **P. LEGRAND**, "Public Law, Europeanization, and Convergence: Can Comparatists Contribute ?", in **P. BEAUMONT**, **C. LYONS**, **N. WALKERS** (ed.), *Convergence & Divergence in European Public Law*, Hart Publishing, 2002, p.244: "*Even the same inscribed words will not generate the same understanding in two different legal cultures. Consider this statement drawn from ongoing anthropological research on cognition: "The fact that exactly the same word gets printed or uttered again and again does not mean that exactly the same meaning (which is half the world) spreads*

to one another. Indeed these standards are useful to protect citizens in most parts of the world. 2) The composition of organs can illustrate GAL theory[7]. Interdependences are growing between administrations. According to the definition of GAL, hybridity and network are characteristics of administrative bodies in globalization. Global bodies share means, goals, and officials. 3) Lastly, GAL focuses on public/private governance[8], and particularly on the management of public goods. Martin Shapiro states that "*Health, safety, environmental, consumer protection, and labour regulations designed to mitigate the downsides of capitalist free markets have been a major feature of the political economies of individual states for a long time*[9]". One can assume that public goods have always been common, due to the protection of the public order, the public health or public salubrity. They are shared values in national and international regulations. In other words, beyond the fragmentation of laws, regimes and organs, emerges, *a priori*, a kind of unity, if not a clear convergence of interests in managing the administrative sphere[10]. GAL's specific purpose is to reorganize, with a strong search of legitimacy, a legal system which works according to democratic principles. Furthermore, GAL should not be based on the accumulation of laws/authorities, but rather on their interconnexions. Fragmentation of laws and disaggregation of states[11] are analysed through GAL's lens. It appears particularly useful to stimulate a theory of unity around some major concerns. Considered as a common good, the environment can be easily introduced into the debate. And it calls for GAL explanations.

2. One usually defines "environment"[12] as "*the natural world, as a whole or in a particular geographical area, especially as affected by human activity*". As a whole, environment has neither a unified system of laws, nor an environmental world organization as asked by some NGO's. Nowadays, more than 500 international treaties have been elaborated, including 323 regional treaties[13]. It could thus be qualified as a "common good". Regarding climate change due to human activities, the tragedy is not so far away[14]. On a more detailed level, the

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from minds to minds". As words cross boundaries, there intervenes a different morality to underwrite and effectuate them: every culture continues to articulate its moral inquiry according to traditional standards of justification". See also **P. LEGRAND**, On the singularity of Law, 47 *Harvard International Law Journal* 517 (2006).

7 For instance, **M. S. BARR**, **G. P. MILLER**, "Global Administrative Law: The View from Basel", *European Journal of International Law*, n°17, 2006, p.46.

8 **A. C. AMAN, Jr.**, "The Limits of Globalization and the Future of Administrative Law: From Government to Governance", 8 *Indiana Journal of Global Legal Studies* 379 (2001); **L. AZOULAY**, The Court of Justice and the Administrative Governance, *European Law Journal*, n°7, 2001, p.425; **B. KINGSBURY**, **N. KRISCH, R. B. STEWART**, **J. B. WIENER**, "Global Governance as Administration – National and Transnational Approaches to Global Administrative Law", *Law & Contemporary Problems*, n°68, 2005, p. 1; **N. KRISCH**, **B. KINGSBURY**, "Introduction: Global Governance and Global Administrative Law in the International Legal Order", *European Journal of International Law*, n°17, 2006, p.13; **K. NICOLAIDIS**, **G. SHAFFER**, "Transnational Mutual Recognition Regimes: Governance without Global Government", *Law & Contemporary Problems*, n°68, p. 263, 2004-2005.

9 **M. SHAPIRO**, "'Deliberative', 'independent' technocracy v. Democratic politics: will the globe echo the E.U ?", *Law and Contemporary Problems*, Summer/Autumn 2005, p.1.

10 It does not mean that we could not find a high interest in divergence issues but that is not the point of this article.

11 **A. -M. SLAUGTHER**, *The new world order*, Princeton University Press, 2004, 370 p.

12 The Oxford Dictionary.

13 <http://www.ecologie.gouv.fr/-Conventions-internationales-sur-l-.html> consulted on April 11th. For instance in environmental law: Montego Bay Convention (1982) about the law of the sea, Vienna Convention and Montreal Protocol about the protection of the ozone layers, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), Kyoto Protocol (1997), ...

14 **G. HARDIN**, "The Tragedy of the Commons", *Science*, Vol. 162, N° 3859 (December 13th, 1968), pp. 1243-1248.

environment is composed of a multiplicity of natural elements (seas and rivers, forests[15], air) protected by law against degrading human activities. Environment is fragmented. So is environmental law. First of all, "nature" cannot be efficiently protected with the mere use of one instrument. Juridical tools have to be appropriate to the situation (land, types of danger ...). Protecting the environment is obviously a question of preventing and governing the risks[16], that are increasing when transboundary issues are at stake. Secondly, environmental law is transversal by nature[17]: it depends upon various scientific data, economic objectives, and political willpower. Environmental law may often look like a new law because of its dependence on other laws. The European Court of Human Rights (ECHR) used, for instance, the letter of the Convention to bring out enforced environmental principles i.e., environmental protection relies here on human rights[18]. ECHR ensures a compensation for environmental damages. On the contrary, should a real environmental law be formed in a legal order, it would create new obligations filling the gap of protection in partial regimes. It completes the law of

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15 **E. MEIDINGER**, "The administrative Law of Global Private-Public Regulation: the Case of Forestry", *The European Journal of International Law*, Vol. 17 n°1, 2006, p.47-87.

16 **C. HOOD**, **H. ROTHSTEIN**, **R. BALDWIN**, *The Government of risk, Understanding Risk Regulation Regimes*, Oxford University Press, 2001, 217 p.; **N. CRAIK**, "Deliberation and Legitimacy in Transnational Environmental Governance", *IILJ Working Paper* 2006/10, Global Administrative Law Series: He promotes "*the ability of international commitments to conduct environmental impact assessments (EIAs) to foster public, reasoned and discursive interactions between actors in the transnational sphere*"(p.3). Associating the actors, this way could manage democratically the risks of an environment degradation.

17 **R. ROMI**, La "transversalité, caractéristique, moteur, et frein du droit de l'environnement", in *Confluences*, Mélanges en l'honneur de Jacqueline Morand-Deviller, Montchrestien, 2007, pp.913-923.

18 See for instance **ECHR**, 25/11/1993, Case of Zander v. Sweden, Application n°1482/88), §27: the Court protects the right to use the water in their well for drinking purposes. "*This ability was one facet of their right as owners of the land on which it was situated*". Protection of environment is based on the right of property; In the same vain, **ECHR**, 09/12/1994, Case of Lopez Ostra v. Spain, Application n°16798/90, particularly §34 : "*The applicant alleged that there had been a violation of Articles 8 and 3 of the Convention on account of the smells, noise and polluting fumes caused by a plant for the treatment of liquid and solid waste sited a few meters away from her home*", and §58: "*Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's ecnomic well-being – that of having a waste-treatment plant- and the applicant's effectivr enjoyment of her right to respect fot her home and her private and famlily life*". So, environment is here protected through article 8, the right to private life. In another case, **ECHR**, 18/06/2002, Case of Öneryildiz v. Turkey, Application n°48939/99, §65: "*In the Court's view, the positive obligation which derives form Article 2 (paragraphs 62 and 63) is indisputably also applicable to the sphere of public activities in question here; contrary to the Government's assertions* [...], *no distinction needs to be drawn between acts, omissions and "negligence" by the national authorities when examining whether they have complied with that obligation. Any other approach would be incompatible with the object and purpose of the Convention as an instrument for the protection of individual human beings which require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, for example, Mc Cann and Others v. The United Kingdom, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§146-47)*". Article 2 is applicable to protect life in the face of an environmental disaster. We can notice that the principle 1 of the United Nations Conference on the Human Environment (Stockholm from 5 to 16 June 1976) affirmed that "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*". Environment seems undoubtedly part of human rights but the relationship was again questioned during the Johannesburg Plan of Implementation (§169 *Acknowledge the consideration being given to the possible relationship between environment and human rights, including the right to development, with full and transparent participation of Member States of the United Nations and observer States*). For development relating with GAL, see particularly **E. MEIDINGER**, "Private Environmental Regulation, Human Rights and Community", 7 *Buffalo Environmental Law Journal* 123 (1999-2000).

the sea, of the forests, of real estate, of public domain, investment, energy, and so on[19]. Environmental law does not exist independently of the other laws. Moreover, it does not have any unity of enforcement on territories, except upon treaties' ratification – for instance the Kyoto Protocol – through national legislations – and the result seems up to now quite ambivalent.

3. Bringing together GAL issues and environmental law should enlighten the debate concerning unity/fragmentation. A brief *tour d'horizon* of the situation shows us that environment, as a public good, constitutes a common interest and can be treated through the lens of GAL. Pierre-Marie Dupuy argues that

> *there are mainly two technical causes which have given rise to a fear that international law is in the course of fragmentation. Both causes are linked to the general phenomenon of the ongoing expansion of international law's material scope. The first, normative, stems from the tendency towards greater autonomy of special regimes, the second, organic and institutional, is based on the growth of methods and procedures of control (not all judicial), which ensure the application of the law*[20].

This fear is justified in environmental law. Fragmented institutions and special regimes characterise it. At the same time, a global concern relayed by scientists, citizens, NGOs, public and private actors, push the international community to react.

4. Fragmentation of authorities in charge of the environmental protection should not be an obstacle to efficiency. Methods of GAL are welcome to govern environment in sectorial matters, because GAL can not work without diversity and fragmentation. It will not work either without a minimum of harmony. "*The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice*"[21]. This second part will focus on the fragmented governance[22]. (1) Public governance is far from being unified and the OECD's system shows us how to manage the diversity of administrative authorities in environmental matters. The OECD network composed of National Contact Points (NCP) is a remarkable way to encourage the implementation of

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19 The French code of environment is divided into five sections: 1) common rules (principles, institutions), 2) physic environment (water and air), 3) natural environment (littoral, mountains, forests, parks, nature reserve), 4) faune and flora, hunting and fishing regulations; 5) Prevention of risks and nuisances (noice and chemical nuisances ...).

20 **P.-M. DUPUY**, "A Doctrinal Debate in the Globalisation Era: on the "Fragmentation" of International Law", *European Journal of Legal Studies*, Issue 1, april 2007, vol. 1, p.2, available on <http://www.ejls.eu/index.php?mode=present&displayissue=2007-04>

21 Report of the Study Group of the International Law Commission, Fragmentation of international Law: difficulties arising from the diversification and expansion of international law, Finalized by **Martti KOSKENNIEMI**, A/CN.4/L.682, 13 April 2006, p.11.

22 We decided to adopt the definition of governance given by **M. KEATING**, "Europe's Changing Political Landscape: Territorial Restructuring and New Form of Government", *in* **P. BEAUMONT**, **C. LYONS**, **N. WALKER**, *Convergence & Divergence in European Public Law*, Hart Publishing, 2002, p.13: "*Governance seems to refer to the regulatory capacity of the whole gamut of organisations in the public sphere, including governments at all levels, private firms, and associations. Applied to local and regional restructuring, this takes the form of "multilevel governance" in which the states shares power with emerging bodies above and below it as well as with the institutions of market and civil society*".

Guidelines for Multinational Enterprises. The system constitutes both a specialized network linking together fragmented authorities and an excellent demonstration of unified principles – the Guidelines – which are adopted by companies and controlled by national bodies at the local level. (2) Fragmented public governance may also be unified thanks to private governance. The International Organization for Standardization (ISO) does not have the same instruments as a public authority. ISO uses different instruments for its implementation. This private governance, often conducted through public means, may lead to a distortion of public legislation and therefore conduct companies to a breach of environmental law. Once again, GAL could be significant. However, I do not wish to argue that GAL should help to unify the certification process. A better coordination between actors, enlightened by GAL principles, with strong mechanisms[23], may avoid situations in which everyone has something to lose (II).

5. (1) The emergence of a single entity in charge of environmental protection may appear as a solution to unify different regimes and rationalize environmental law. Nonetheless, it does not constitute an efficient solution. (2) GAL codifies some rules that can be adopted in every system taking into consideration every particular circumstance. It should be very useful to give a consistency to different systems and link regimes/authorities for a better implementation of environmental law, with the instruments that have been already conceived. GAL seems to organize plurality and unity should not be a goal in itself. Different governances should be harmonized as a result of this search for consistency between them (III).

6. The international community, through several institutions and state actions, seems to agree to give a chance to environmental law, even if the modalities are not entirely defined. The qualification of a GAL situation appears appropriate in environmental law and fragmentation looks more like an opportunity than a disturbing phenomenon. It lays the foundation for something possible, a step toward unity based on alterity. "*There is something about the act of naming that seems to work a kind of magic*[24]". It would be better not to just name but qualify environmental situations regarding global administrative law.

II Fragmented environmental authorities : governance and efficiency

1) Public networks guarantee an appearance of unity: connection and consistency (the OECD example)

7. According to the doctrine, GAL is characterised by "*international organizations, formal and informal transgovernmental networks, hybrid public-private institutional arrangements, and entirely private transnational institutions*[25]". This description applies also to administrative authorities in charge of environmental regulation[26]. Although authorities appear fragmented,

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[23] **B. KINGSBURY**, **N. KRISCH**, **R. B. STEWART**, **J. B. WIENER**, "Global governance as administration national and transnational approaches to global administrative law", *Law and Contemporary problems*, Volume 68, Summer/Autumn 2005, Numbers 3 & 4.

[24] **S. MARKS**, "Naming Global administrative Law", *International Law and Politics*, 2006, Vol.37: 995.

[25] **W. MATTLI**, **T. BÜTHE**, "Global private governance : Lessons from a national model of setting standards in accounting", *Law and Contemporary Problems*, Vol. 68:225, 2005.

[26] **N. CRAIK**, "Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments", *Victoria University of Wellington Law Review*, August 2007, n°38, p. 381: "*In terms of the institutional structure of environmental governance, the use of treaties as the primary mechanism for interstate cooperation is*

they are actually tightly linked to each other. Such an assertion takes a significant aspect in environmental law.

8. As far as the French ministry of environment ("*Ministère de l'Ecologie du Développement et de l'Aménagement durable*[27]"), the European Environment Agency[28], the European Commission's Environment Directorate-General (Environment DG)[29], the U.S. Environmental Protection Agency[30] are concerned, each deals specifically with environmental issues. Most of these authorities are connected, in one way or another, through different networks to govern transnational difficulties. Anne-Marie Slaughter gave two convincing examples in *a New World Order*:

> *Within the North American Free Trade Agreement (NAFTA), U.S., Mexican, and Canadian environmental agencies have created an environmental enforcement network, which has enhanced the effectiveness of environmental regulation in all three states, particularly in Mexico. Globally, the Environmental Protection Agency (EPA) and its Dutch equivalent have founded the International Network for Environmental Compliance and Enforcement (INECE), which offers technical assistance to environmental agencies around the world, holds global conferences at which environmental regulators learn and exchange information, and sponsors a website training videos and other information*[31].

Through formal or informal networks, agencies and ministers share information and advices. International Organizations can link administrative entities together. This is the case with the OECD since the creation of National Contact Points (NCP).

9. The OECD Guidelines for Multinational Enterprises[32] are guidelines addressed by the OECD's members to their multinational companies. They constitute the basis of the OECD's Declaration on international investment and multinational enterprises adopted in 1976. "*Environment figures prominently in the Guidelines and one chapter is specifically dedicated to enterprises' environmental performance; It broadly reflects the principles and objectives contained in the Rio Declaration on Environment and Development and in Agenda 21*[33]". Chapter V of the OECD Guidelines for Multinational Enterprises considers that

> *enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the*

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supplemented by less formal approaches to norm creation and implementation, such as trans-governmental networks, epistemic communities, and the extraterritorial application of domestic laws".

27 <http://www.developpement-durable.gouv.fr/>

28 <www.eea.europa.eu>

29 <http://ec.europa.eu/dgs/environment/index_en.htm>

30 <http://www.epa.gov/>

31 **A.-M. SLAUGHTER**, *A New World Order*, Princeton University Press, 2005, pp.3-4.

32 Available on <http://www.oecd.org/daf/investment/guidelines>

33 See the document "Environment and the OECD Guidelines for Multinational Enterprises. Corporate Tools and Approaches" on <http://www.oecd.org/dataoecd/12/1/34992954.pdf>.

need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.

They should establish and maintain a system of environmental management appropriate to the enterprise[34], taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights. They should as well assess and address in decision-making foreseeable environmental impacts associated with processes, goods and services of the enterprise, and finally, they should maintain contingency plans in order to prevent, mitigate, and control serious environmental and health damage from their operations.

10. NCPs are in charged with controlling the implementation of the Guidelines, promoting them, advising enterprises regarding the Guidelines, and compiling an annual report. Thus, according to the U.S. Department of State :

Countries adhering to the Guidelines agree to establish NCPs to promote the Guidelines, handle inquiries, and discuss with concerned parties matters covered by the Guidelines. The Guidelines also provide for NCPs to cooperate with each other where appropriate, to meet annually to share experiences, and to report on their activities[35].

Furthermore NCPs are, at the first sight, members of administrative bodies, or at least of public bodies. They are: the Belgium "Service Public Féderal Economie", the head of the OECD department in the Ministerio de Relaciones Exteriores de Chile[36], the Spanish General Secretariat for International Trade, the American Office of Investment Affairs (Bureau of Economic and Business Affairs), the French Sous-direction des Affaires Financières Internationales et du Développement (Ministère de l'Economie, des Finances et de l'Emploi), the Italian General Directorate for Productive Development and Competitiveness (Ministry of Economic Development), the Directorate General for Trade – Adeline Hinderer – for the European Commission, or the Dutch Trade Policy Department (Ministry of Economic Affairs), and so on.

11. Composition of NCP depends on national decisions. The French NCP is for instance composed of trade unions (CFDT, CGT, CGT-FO, CFE-CGC, UNSA), employers' association (MEDEF), and the administration (mainly Ministry of Economy, Finance and Industry, Ministry of Foreign Affairs, Ministry of Environment, Ministry of Labour...). The Treasury Direction of the Ministry of Economy is the NCP's Secrétariat, whose President is Claire Waysand, sous-directrice "Affaires européennes". The French NCP is a hybrid organ, directed by a government official, which is part of a network led by the OECD. It looks like a variation of the European competition framework where the European Commission is the leader, and national authorities are part of a network. However, this framework is not structured as the European one, and NCPs do not control companies with enforceable instruments. As a matter of fact, a hybrid organ composed of State official and private actors, working in network with NGOs sounds

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[34] That is: collection and evaluation of information regarding the environmental impacts of their activities, establishment of measurable objectives, regular monitoring...

[35] <http://www.state.gov/documents/organization/11078.pdf>.

[36] Chile is not a member country of the OECD but it has accepted to promote the Guidelines and handle enquiries in the national context.

like GAL. On the contrary, the NCP of Canada is an interministerial committee composed of several ministries (environment, foreign affairs, human ressources, finance, trade...)[37]. Social partners, i.e. the Canadian Chamber of Commerce, the Canadian Labour Congress and the confederation of national trade unions (*Conféderation des syndicats nationaux*) work alongside. The Italian contact point is a body founded by the Italian Government and organised within the Ministry of Economic Development. It is composed of a General Director (an administrative authority with decision-making power), a Committee with consultative functions (composed by representatives of the interested Ministries and major national Business Associations and Trade Unions) and a Secretariat[38]. As far as the American contact point is concerned, it is an Ambassador appointed by the President to serve as US Permanent Representative to the OECD. Here are four examples and four different frameworks[39]: a clearly hybrid one (in France, all the actors are presented by the official website with a complementary role); a clearly administrative one but plural (all the mains actors are ministries) with social partners; an administrative single one authority with decision-making powers in Italy (the Committee has consultative functions whereas the General Director has decision-making powers)[40]; and a diplomatic authority for the US. Independently of those compositions, NCP become both national and OECD's bodies, although it remains a question of a state's willpower. It means that some of the NCP have the legitimacy of national public authorities and act, as well, as OECD's "entity".

12. I wish to bring attention to the fact that it is possible to submit a matter to that entity as part of the OECD's "family". For instance,

> *a matter was submitted to the French NCP by the non-governmental organization "Les Amis de la Terre" (Friends of the Earth), on 26 November 2004, in connection with the project for the construction in Laos of a hydroelectric dam known as "Nam Theun 2[41]" by the NTPC consortium of which Electricité de France is the principal shareholder*[42].

According to the letter sent to Madame Claire Waysand by the NGOs on November 24th 2004,

> *Nam Theun 2 is a Build-Own-Operate-Transfer Project being developed by the Nam Theun 2 Power Company (NTPC). NTPC was created in September 2002 and the*

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37 <http://www.ncp-pcn.gc.ca/national_contact-fr.asp>

38 <http://www.pcnitalia.it/pcnitalia/about-us>

39 Decision C(2000)96/FINAL, p.4: "*The National Contact Point (1) may be a senior government official or a government office headed by a senior official. Alternatively, the NCP may be organised as a co-operative body, including representatives of other government agencies. Representatives of the business community, employee organisations and other interested parties may also be included (2) will develop and maintain relations with representatives of the business community, employee organisations and other interested parties that are able to contribute to the effective functioning og the Guidelines*", available on <http://www.olis.oecd.org/olis/2000doc.nsf/linkTo/NT00001016/$FILE/00080619.PDF>

40 For a description of every NCP structure (unique, bipartite, tripartite, quadripartite, inter-ministerial committees) with the supervision, the parnerships and comments on it, see in French Les principes directeurs de l'OCDE à l'intention des entreprises multinationales: Réunion annuelle des points de contacts nationaux, Rapport du Président, réunion du 15-16 juin 2005, Annexe 1, pp.26-36, available on <http://www.oecd.org/dataoecd/62/17/35412278.pdf>.

41 See <http://www.namtheun2.com/>

42 Recommendations of the French National Contact Point to EDF and its partners regarding the "Nam Theun 2" Project in Laos", Thursday 26 May 2005, available on <http://www.oecd.org/dataoecd/5/34/38032866.pdf>.

Concession Agreement with the Lao government was signed in October 2002. Shareholders in the company are Electricité de France (35%), Electricity Generating Public Company of Thailand (25%), Ital-Thaï Development Public Company Limited (15%) and Electricité du Laos (25%). The NT2 project includes the development, construction, and operation of a trans-basin diversion hydropower project that would use water from the Nam Theun River, a tributary of the Mekong River[43].

The complaint lodged against EDF with the French NCP is quite detailed. The NGO argued that EDF had made commitments that went beyond these Guidelines. I would like to quote some alleged breaches of the Guidelines introduced by the NGOs before the NCP. According to the NGOs,

the Environmental Assessment and Management Plan (EAMP) and the Social Development Plan (SDP) lack baseline data which are needed (1) to address the environmental, health and social-related impacts associated with the project and (2) to anticipate changes before the project commences. [...] The Nam Theun 2 EAMP chapter IV promises fair compensation to the more than 50,000 villagers living downstream of the Nam Theun 2 dam site where 'a collapse in the aquatic food chain' is predicted. [...] Key baseline information on the current livelihoods of villagers is lacking, and no clear compensation plan has been developed; The current plans are vague, lacking in detail, and provide no clear assurances for affected people. [...] Information on fish distribution, biology and ecology in both the Nam Theun and Xe Bang Fai Rivers remains basic, making it difficult or impossible to prepare a proper and detailed assessment of the impacts. [...] Experience from other hydropower projects in the region indicates that many fish species will be unable to adapt to the changed conditions and will die out. [...] Creation of the reservoir will "improve access to the NNT NPA. This could lead to increased pressure on timber and wildlife resources and will open up access to the protected area which is the single most important factor in increasing logging and hunting in protected areas. The EAMP lacks monitoring programs which are needed to prevent, mitigate, and control these risks and so on.

13. The NCP analyzed the situation on the basis of documents from the NTPC consortium, the World Bank, the Asian Development Bank and the international network of the Ministry for Economic Affairs. It consulted experts as well. The NCP concluded on 31March 2005 that EDF had not violated Guidelines' principles, but their members have decided to make recommendations consisting in reminding EDF of their obligations:

The NCP is of the opinion that EDF and its partners – through the NTPC consortium – must remain involved in the implementation of all compensatory measures, in the framework of the agreed sharing of responsibilities with the Laotian national authorities; The institutions participating in this project are also asked to ensure that there is an equitable sharing of responsibilities. The NCP takes note of the studies conducted by the consortium on the potential environmental impact of its activities and

[43] We would like to thank Sébastien GODINOT, from the NGO "Les Amis de la Terre", for sending us the letter addressed to the French NCP.

encourages NTPC, in accordance with its obligations, to continue these evaluations and participate actively in the appropriate protective measures. The NCP is also of the opinion that multinational enterprises doing business in countries where the legislative and regulatory system in the environmental and social field is considered to be weak should do their utmost to apply the same internationally recognized good practices that they follow in their own country at construction sites and with regard to the people affected by their activity. In this respect, the fundamental ILO standards – in particular regarding trade union rights – constitute appropriate rules of conduct for enterprises to follow in their activities[44].

14. What would have happened in case of violation? NCP does not have the same prerogatives than a traditional national authority. It could not take a decision with the "privilège du préalable". It means that it needs to ask a judge to get a decision enforced, or at least a competent national administrative authority. It acts like a conciliator, an arbitrator[45], between parties according to the OECD's principles. In the Zambia case "First Quantum Minerals Ltd and Oxfam Canada", the Canadian NCP had conciliated a NGO with a company accused of not respecting Guidelines relating to human rights, health, security, and environment. The main question was the expulsion of regional poor farmers out of the lands' companies. The NCP has transmitted the communications between both parties, and participated actively to find an issue, even if it ended up being a transitional one[46].

15. National authorities do not use the classic instruments of administrative coercion when they control the implementation of the OECD's Guidelines. In the case of "Nam Theun 2", the French NCP's decision not to conciliate the parties was not an administrative one. This has an impact on NGOs. But in classic French administrative law, NCP merely advised the companies according to the Guidelines. It acted like an OECD deconcentrated authority without any public prerogatives. This was not a referral to court, nor a general application for administrative review of EDF's actions, simply a control of conformity of EDF's actions with the OECD's Guidelines. As long as NCP gives advices, it should not be possible to contest its decision. It therefore makes sense that the U.S., for example, chose an ambassador to be the NCP, as it could be part of the U.S. diplomatic relationships.

16. Nevertheless, the French NGO and 64 other NGOs asked to the OECD to verify the control of the French contact point in the "Nam Theun 2" case. "Les amis de la Terre" argued that the NCP did not propose a resolution to solve the problem, and did not answer to the independent environmental impact assessments which had been presented during the case examination. Furthermore, the NGO affirmed that the NCP, as a member of the Ministry of Finance, was partial which determined the French position within the World Bank, the European Bank of

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[44] Recommendations of the French National Contact Point to EDF and its partners regarding the "Nam Theun 2" Project in Laos", Thursday 26 May 2005, available on <http://www.oecd.org/dataoecd/5/34/38032866.pdf>.

[45] In french: La Déclaration et les décisions de l'OCDE sur l'investissement international et les entreprises multinationales; textes de base, DAFFE/IME(2000)20, p.11 §9: "*Le recours à des mécanismes internationaux adéquats de règlement des différends, y compris l'arbitrage, est encouragé afin de faciliter le règlement des problèmes juridiques susceptibles de surgir entre les entreprises et les gouvernements des pays d'accueil*". Available on <http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002BE6/$FILE/00086088.PDF>

[46] See on <http://www.ncp-pcn.gc.ca/>.

Investments, the Asian Bank of Development and Coface[47]. This classical position could be related to the obligation of NCP according to the Procedural Guidance:

> *The role of NCP is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence*[48].

In parallel, NCP have met EDF in June 2006 and declared that it was satisfied with the measures taken by EDF to prevent and reduce the consequences of their activities[49].

17. However, one cannot conclude that the NGOs' application for OECD review is allowed according to OECD's rules. The Decision of the Council on the OECD Guidelines for multinational enterprises[50] empowered the OECD Investment Committee – a forum for international cooperation – to "review" NCP's decisions.

> *The Committee will (a) Consider the reports of NCPs; (b) Consider a substantiated submission by an adhering country or an advisor body on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances; (c) Consider issuing a classification where an adhering country or an advisory body makes a substantiated submission on whether an NCP has correctly interpreted the Guidelines in specific instances; (d) The Committee may seek and consider advice from experts on any matters covered by the Guidelines. For this purpose, the Committee will decide on suitable procedures*[51].

The procedural guidance on (b) and (c) does not mention any review procedure which would be opened to third parties. NGOs as non advisory bodies cannot ask for a review. The Committee which did not hesitate to talk about its "jurisprudence"[52] can control the NCP activities but theoretically not if it is asked by a third party.

18. Another case helps to clarify this view concerning this review procedure. The Center for Human Rights and Environment (CEDHA) made on 8 June 2006 a request for specific instance to the Finnish NCP concerning the financial activities of Finnvera Oyj in relation to the Botnia SA paper mill project in Uruguay[53]. The MONIKA Advisory Committee of International Investment and Multinational Enterprises, attached to the Finnish Ministry of Trade and Industry, on 12 October 2006, has qualified the situation according to the OECD guidelines and concluded that

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47 See in French: <http://www.amisdelaterre.org/Barrage-au-Laos-la-decision.html?var_recherche=ocde>

48 Decision C(2000)96/FINAL, p. 4., available on <http://www.olis.oecd.org/olis/2000doc.nsf/linkTo/NT00001016/$FILE/00080619.PDF>

49 <http://www.budget.gouv.fr/directions_services/dgtpe/pcn/pcn2006.pdf>

50 Decision C(2000)96/FINAL adopted at its 982nd session on 26-27 June 2000.

51 Decision C(2000)96/FINAL

52 The OECD Investment Committee, Promoting Investment for Growth and sustainable development worldwide, available on <http://www.oecd.org/dataoecd/63/10/35250560.pdf>: "*a new body of state practice and jurisprudence is expanding rapidly. The Committee aims to enhance the understanding of emerging legal and policy issues relating to international investment agreements and, ultimately, improve their outcomes for governments and investors*".

53 See **F.-G. TREBULLE**, Entreprise et développement durable, *Environnement* n°11, November 2007, Study 12.

1) Finnvera Oyj cannot be considered a multinational enterprise, as defined by the Guidelines, when contemplating the special nature of Finnvera Oyj as a provider of state's export guarantees 2) The OECD Guidelines cannot be considered to refer to state's export guarantee activities which are regulated nationally by special legislation and for which special arrangements exist within the OECD (such as environmental principles approved for export credit agencies) [...]; 3) The OECD Committee of Investment and Multinational Enterprises' (CIME) commentary on the Investment Nexus made in April 2003 does not entail that the Guidelines should be applied to Finnvera Oyj's special financing activities. 4) With respect to the investment view point taken by the Guidelines, applying them to the activities of Finnvera Oyj could not, ever otherwise, be considered appropriate[54].

So the Ministry considered that the request did not merit further examination.

19. The CEDHA had a completely different opinion. The Center sent a letter to the OECD Investment Committee on this Botnia case, arguing that

the closing of the Specific Instance filed against Oy Metsa Botnia for alleged breaches of the OECD Guidelines for Multinational Enterprises with respect to the Orion pulp mill project on the Argentine-Uruguyan border, and the implications of this closure are counter to the expectations and obligations set out by the OECD for National Contact Points, which clearly indicates that the NCP's should help resolve issues relative to concerns over business behavior and implementations of the Guidelines[55].

According to the CEDHA explanations,

this investment project has been the subject of great local strife, the birth of a massive environmental social movement, an intense international border dispute, numerous legal claim filings in national and international courts and various forums such as this one, a critical audit and conclusions by the World Bank's Compliance Advisory Ombudsman (CAO) which supported local stakeholders (and CEDHA's) claims of project violations to the IFC's Social and Environmental[56] *Safeguards, and an escalating bilateral conflict between Argentina and Uruguay, that has not only resulted in at least three international complaints filed at the International Court of Justice and at the MERCOSUR Regional Trade Block, but has even resulted in the mobilization of military troops by the Government of Uruguay (an unheralded decision) to guard the construction site*[57]".

CEDHA has rebutted the various arguments set out by the NCP: "*the role of Finnish NCP should not have been to pass judgment on the environmental and economic or human rights*

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54 Finland NCP Statement on Finnvera Specific Instance, 12/10/06, consulted on 25/04/08 and available on: <http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/>

55 <http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/oecd-invest.pdf>

56 See p. 7 of the document.

57 Same document, p.1.

soundness of Botnia's investment project". Once again, the independence of the body is used by a NGO against a NCP.

20. The end of the document is particularly enlightening:

> *In consideration of the lack of review mechanism available to CEDHA and the Investment Committee's role in supervising implementation of the Guidelines [the author underlines], we respectfully ask the Investment Committee to reflect upon the NCP Statement and the Finnish NCP's role in facilitating a constructive outcome to the dispute, and consider: (1) that the Specific Instance be reopened and that the focus of the Specific Instance be dialogue between the parties, (2) that the Investment Committee undertake a review of the Finnish NCP's interpretation of the Guidelines, and (3) that the Investment Committee review the possible conflict of interest of the NCP in light of the NCP Statement, and whether another NCP may deal with the Specific Instance*[58].

Thus, the request of CEDHA, as well as the one of "Les amis de la Terre" in the "Nam Theun 2" case, is taken as a simple letter which is not part of the OECD's official procedure. CEDHA complained to Finland's Parliamentary Ombudsman about the Finland's NCP[59] looking for a decision with enforcement against Finnish NCP. CEDHA contended that Finland's actions and statements with regards to the Botnia Specific Instance and the Finnvera Specific Instance were illegal for exceeding authority or abusing discretionary powers, inadequate presentation of ground for a decision, carelessness, failure to advise, inappropriate behavior or other procedure contrary to good governance, failure to discharge State obligations under international law and agreements with the OECD, and so on. Amongst other issues, CEDHA wishes the Ombudsman to issue a reprimand against the National Contact Point, requesting that the Finnish National Contact Point retracts its Statement and it re-opens the specific instance putting a special emphasis on dialogue.

21. In my opinion, these examples lead to various conclusions. Administrative authorities' decisions to open conciliation between parties do play a significant role regarding the protection's efficiency on environmental issues. NGOs which are particularly interested in environmental protection can push companies to change their behaviors according to OECD's rules. From this point of view, such a decision leads to such important consequences that it would appear normal to open them to the OECD's review. In fact, a review from the OECD would create an integrated system, which would be as efficient in terms of transparency as it currently exists in the European Union. It would reinforce the legitimacy of the OECD's positions, introducing administrative procedural principles which would define, in a Habermasian vision, the basis of a democratic system, and avoid parallel procedures. Nonetheless, if the procedure of NCP review is opened to NGO, why should it not also be for companies? A lawyer may have the idea to use the Guideline's violations by a competitor/contractor as an excuse for asking the NCP, in the name of a client, an out-of-court settlement. He may also use a tacit consensus with trade Unions and NGOs directly collaborating with the NCP to introduce a request through them before the NCP, and contest the behavior of a competitor/contractor on the OECD's Guidelines. It would contribute to a

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58 Same document, p.3.

59 <http://www.cedha.org.ar/es/iniciativas/celulosa/finland-ombudsman.pdf>

kind of "forum shopping" introducing a new way of conciliation between companies. Besides, a French public contractor could try to pass through the restriction of arbitration in a public contract[60] thanks to an OECD procedure opened directly to companies.

22. Nonetheless, "Les amis de la Terre" in Nam Theun 2 did not act differently, arguing before the French NCP that

> *the construction contracts for the $1.3 billion project will consist of five principal sub-contracts and one overriding Head Construction Contract (HCC). The HCC has been awarded to Electricité de France without International Competitive Bidding. The five principal sub-contracts are divided into two electromechanical packages (EM1 and EM2) and three civil works contracts (CW1, CW2 and CW3). CW1 includes the upstream works including the Nakai Dam, saddle dams, spillway, radial gates, road rehabilitation and new works, bridges, the operator's village and associated infrastructure. This is the major construction contract for the dam. The contract for CW1 has been given to Ital-Thai Development, again without International Competitive Bidding. The Environmental Assessment and Management Plan for Nam Theun 2 states that "EM1, EM2, CW2 and CW3 will be open to International Competitive Bidding". The BOOT concession is not subject to International Competitive Bidding and is therefore in breach of Chapter IX, para 2 of the OECD Guidelines for Multinational Enterprises. Not only have the two most important contracts been awarded without International Competitive Bidding, but they have been awarded to two of the consortium members, presenting a conflict of interest and therefore in breach of Chapter IX, para 1b) and Chapter IX, para 2 of the OECD Guidelines for Multinational Enterprises.*

23. The French NCP rejected these arguments and did not examine them. The NGO clearly adopted the behavior of a third party to a contract arguing the violation of the competition rules, as it could do before a judge or a competition authority. The purpose of the NCP is "*to provide a non-confrontational forum for the parties [and] [...] to contribute to the resolution of issues*[61]". It cannot really resolve pre-contractual conflicts with regard to competition law, and therefore does not assume the entire mission according to the OECD's Guidelines. The NCP, as an OECD's entity, would not have the instruments of an administrative authority or a judge to conduct its mission.

24. The NCP status lacks clarity. However, the NCP does maintain the appearance of a governmental body with special prerogatives. Involved in national projects, it also acts meanwhile as an independent OECD mediator in very sensitive affairs without any coercive powers. From this situation, one can infer a true collusion between the economic interests protected by the ministry and the role of arbitrator in such case. The NGOs invoke the argument of partiality. This is the reason why an independent administrative authority should

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[60] Except very specific situations, see **C. VINET**, "Impossibilité de recourir à l'arbitrage en dehors des dérogations prévues à l'article L. 311-6 du CJA", *AJDA*, 7 april 2008, pp.698-700; See also **S. LEMAIRE**, **C. JAROSSON**, **L. RICHER**, "Pour un projet viable de réforme de l'arbitrage en droit administratif ", *AJDA* 2008, p. 617.

[61] See <http://www.oecd.org/dataoecd/20/24/37205653.pdf>, a canadian NCP's case concerning Ascendant Copper Corporation in Ecuador.

bear more legitimacy. The same problems arise from several international organizations. Globalization of national administrative authorities, in charge of international missions, should encourage States and International Organizations to elaborate better models. One can indeed wonder why the NCP is not in France the competition authority. Even in environmental matters, it would make sense for an independent authority in charge of competition to ensure the OECD Guidelines' protection. One can also question why the OECD's system does not integrate the possibility, for NCP, to use administrative prerogatives in order to solve the case and in the same time, be subject to general administrative procedures[62]. The answer is quite obvious: it depends on political choices. I would like to assert that those choices have to be made in cooperation with one another (including the civil society) to democratize the process and avoid such situations. Although public governance appears fragmented, it could be rationalized around GAL's principles (independence, transparence, impartiality, reviewing) at each administrative level.

25. Finally, I would like to make a point about the functioning of the NCP's network. NCPs work together to resolve cases which are introduced before one or several of them. It means that two or several NCPs can be interested in the same case. What would happen in that situation? For instance, the Dutch NCP, on a matter dealing with the effects of fish farming in Chile on August 2002, noticed that the specific instance was treated by the Chilean NCP: "*The Dutch NCP acted merely as a mediator between the Dutch NGO and the Chilean NCP*[63]". The Dutch NCP's role was displaced relating to its principal mission. It did not conciliate directly the NGO and a company but act as a mediator with the Chilean NCP. Moreover, depending on the circumstances, a NCP can just be consulted by another NCP[64]. There seem to be various degrees of NCPs commitment, remaining in both administrative law and private international law. The consultation of a NCP is associated with an administrative cooperation. When giving an advice, it could be an advising procedure to another administrative entity. But when a NCP decides whether it is competent or not in a specific case, it does so with regard to the links of the case to its competences, which means that the NCP examines the relationship between the case and its own territory. For instance, in July 2002, labor unions requested the attention of the NCP on a closure of a French affiliate in the US:

> *the link that the labor unions made was the fact that another affiliate of this French company in the Netherlands could use the supply chain paragraph to address labor issues. The Dutch NCP concluded by deciding that the specific instance was not of concern of the Dutch NCP and did not merit further examination*[65].

Thus, the link between two affiliations of a French company in the Netherlands and the U.S. is not strong enough to examine the request of the Labor unions. Consequently, they need to ask for the same to the French NCP or US NCP in order to find a solution.

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62 According to Sebastian Godinot from "Les Amis de la Terre", The NGO did a press release relating that the NCP had accepted to examine the case Nam Theun 2. This press release was critized by the NCP in a letter addressed to "Les Amis de la Terre". It argued that this publication would harm EDF and the investors, and that it prefers to work without attracting publicity.

63 See <http://www.oecd.org/dataoecd/15/42/33915012.pdf>, p. 11.

64 For instance, US NCP consulted French NCP in july 2002 to find an issue dealt with employment and industrial relations, freedom of association and collective bargaining, <http://www.oecd.org/dataoecd/15/42/33915012.pdf>, p.17.

65 See <http://www.oecd.org/dataoecd/15/42/33915012.pdf>, p. 11

26. On the contrary, links to territory and interests may create conflicts between two NCPs if each wants to examine the case. Unfortunately, I did not find a specific case on the different websites. It may also create conflicts between the NCP and another authority out of the OECD's system. NCP needs to examine the case really carefully. In a case concerning business in a conflict zone and natural resource exploitation on August 2004, "*the US NCP concluded that United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo*[66] *had resolved all outstanding issues with respect to US companies involved*[67]". So it did not accept the request. Therefore, NCPs are not cut off from other institutions and should also work with them to resolve conflicts.

27. Such public network organized by the OECD represents a step toward unity. Behind fragmentation of authorities, the system rationalizes the way to implement the OECD's Guidelines. The unity of the system does not lie in its "uniqueness", but in its consistency. Thus, fragmentation should not be an obstacle to sectorial public governance. On the contrary, obvious interdependences should encourage States and international organizations to adopt a more coherent behavior regarding the protection of environment. The system should be rationalized for the parties of the network and the other international organizations.

28. What is more, private parties should participate in governance. Private actors can play a fundamental role. In the statement by the Belgian NCP on 8 November 2006, concerning operations made by the Forrest Group in the Democratic Republic of Congo, 'the NCP "*recommends that the Forrest Group assist the political authorities of DR Congo, as well as international institutions, in implementing appropriate economic and industrial mechanisms, having regard to the problems of populations living in the vicinity of industrial sites*"[68]. This recommendation encourages the company to participate in public governance alongside public authorities. As far as public and private governance are concerned, private networks also appear to be another good example of participation, and sometimes of undesirable collusion.

2) Private networks participating in a search of unity: the collusion between public and private governance (the ISO example)

29. Private governance may help to pursue the participation's goal to the public governance. Nonetheless, private and public networks in environmental matters do not act similarly. National public authorities enjoy, what one calls in French, the "privilège du préalable". Enlightened by the civil society (NGOs) and the issue of others coordinated agencies, those national authorities have their own instrument of enforcement, concerning their own decision as well as those of international organizations. In that particular scheme, a public authority is taking a classical decision having a legal enforcement *vis-à-vis* a private or another public actor. That is the case of an authorization for a forest's exploitation. The public authority can be helped to take a decision with regard to norms, other experiences, and its impact on environment. As Medinger argues, the private regulation of forests through certificates does not

66 See the report on <http://www.un.org/new/dh/latest/drcongo.htm>

67 See <http://www.oecd.org/dataoecd/15/42/33915012.pdf>, p. 18.

68 <http://www.oecd.org/dataoecd/26/24/35788434.pdf>, p.3.

present the same issue[69]. The network is composed most of the time of private companies, which respect some specific rules to be labeled in their activities. For instance, the wood certificate given by a directing board will be a commercial service and hence guarantees the consumers that rules about the forests' management were indeed respected during the process of exploitation. It would represent a self-regulation through a framework – the network – whose acceptance determines a way of acting. In my point of view, a network represents an international corporatism playing a very important role in case of lack of public regulation, i.e., when a public authority does not act on a territory although it is obliged to do so. At the same time, one could also consider it as a new kind of social contract. The acceptance of a private authority (a board) by private actors (the companies) to regulate a behavior (the forest's exploitation) for having an economic security (a label) is similar to Rousseau or Hobbes' myths. Citizens give up their weapons to the Leviathan in order to be protected and live in peace in return. Thus, private network, in that case, is more the expression of the protection of an economic market rather than of a real environmental interest.

30. However, "hybridity" could change that corporatist point of view. There are networks composed both of public and private entities, and more importantly, there is governance shared by public and private bodies, even when they are in troubled situations. The International Organization for Standardization (ISO) is neither qualified as a network, nor as a non-governmental organization but rather as a non governmental actor[70] connected with the OECD, UNEP or WTO, and private actors (associations, clubs, and companies). Composed of private entities and some public bodies, it may symbolize the phenomenon of "hybridity" in the GAL literature. ISO has a technical legitimacy through its large set of standards controlling consumers and citizens' lives[71]. Encouraged to adopt them[72], many companies did so. It is particularly relevant in environmental regulation[73].

> *The ISO 14000 family addresses various aspects of environmental management [...] ISO 14001:2004 provides the requirements for an Environmental management systems (EMS) and ISO 14004:2004 gives general EMS guidelines. The other standards and guidelines in the family address specific environmental aspects, including: labelling, performance evaluation, life cycle analysis, communication and auditing*[74].

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69 **E. MEIDINGER**, "The administrative Law of Global Private-Public Regulation: the Case of Forestry", *The European Journal of International Law*, Vol. 17 n°1, 2006, p.47-87.

70 **A**. **PRAKASH**, **M. POTOSKI**, "Racing to the Bottom ? Trade, Environmental Governance, and ISO 14001", *American Journal of Political Science*, Vol.50, N°2, Avril 2006, p. 351: "*While the ISO is not an "NGO" in the sense of being an activist group, it is a nongovernmental actor whose members are "private sector national bodies" (Mattli and Büthe 2003, 4) such as the American National Standards Institute, the British Standards Institution, and the Deutsche Institut für Normung*".

71 See **M. LANORD FARINELLI**, "La norme technique: une source du droit légitime ?", *RFDA*, 2005, p.738.

72 See **M. BAXTER**, "Taking the first steps in environmental management", *ISO Management Systems*, July-August 2004, p.13.

73 **A. PRAKASH**, **M. POTOSKI**, "Racing to the Bottom ? Trade, Environmental Governance, and ISO 14001", *American Journal of Political Science*, Vol.50, N°2, Avril 2006, p. 350: "*ISO 14001 is the most widely adopted voluntary environmental regulation which encourages firms to take environmental action beyond what domestic government regulation require*".

74 See <http://www.iso.org> , ISO 14000 essentials.

The point for ISO is to consider that a mere compliance with legislation is a cost of doing business. The Organization encourages the adoption of ISO 14000 in order to bring return on investment and avoid "*pollution that could cost the company a fine for infringing environmental legislation*"[75]. In other words: we sell you a service to have a better management of your company with regard to environmental law. However, the impact of ISO's standards, and in general certification of private bodies, does affect also public governance.

31. The European Union is very interested in environmental standardization to complete its environmental legislation[76]. It recognizes several European Standards Organizations, such as the European Committee for Standardization (ECS), the European Committee for Electrotechnical Standardization, and the European Telecommunication Standardization Institute[77], but it does not recognize directly ISO. ISO stays in liaison with them but is not part of the European dream team. It merely participates indirectly to the European standardization in environmental law. More than a simple attention[78] to ISO work, the ECS appointed by the European Commission has in fact an agreement for technical co-operation with the ISO in environmental matters. The ECS measures the existing needs and elaborates a European norm in three different ways. (1) It can elaborate a document, (2) use a document, (3) or collaborate with ISO[79]. ISO did a very impressive job concerning the standardization of a green management and report of emissions, which are the activities of ECS. It is particularly obvious considering the rules implementing the Kyoto Protocols[80], i.e. ISO 14064-1: 2006[81], ISO 14064-2:2006[82] and ISO 14064-3 2006[83]. Are they or should they be adopted as European norms through ECS? A simple integration of ISO norms in European law through these mechanisms (delegation to an entity which adopts international norms of another entity) would not be entirely satisfying[84] in terms of legitimacy. There is no clear technical delegation to ISO from a public authority. Plus, ISO norms could help actors to respect European law and

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75 See <'http://www.iso.org> , Business benefits of ISO 14000.

76 For example: Brussels, 25.02.2004, Communication COM(2004)130 final from the Commission to the Council, the European Parliament and the European Economic and Social Committee, on the Integration of Environmental Aspects into European Standardisation, available on:
<http://www.cen.eu/cenorm/homepage.htm>

77 Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations.

78 CEN Guide 4, Guide for the inclusion of environmental aspects in product standards, resolution BT C108/2004, edition 2, January 2005, p.15: "Attention is drawn to the ISO 14000 series, which provides information on environmental management *systems and Guidelines to the integration of environmental aspects into product standards*".

79 **H. KUNST**, intervention lors du séminaire international sur la mise en œuvre du développement durable par les entreprises: le rôle de la normalisation, des acteurs et des réseaux, St-Etienne, 28-29 septembre 2004, available on
<http://www.mediaterre.org/doc/2004/sidde-m-kunst.pdf>

80 Signed on december 11th, 1997, the Protocol had come into effect on February 16th, 2005. It was adopted by the European Council for the Community (Decision 2002/358/EC). The exchange of greenhouse gases' system in the European Union (Directive 2003/87/EC) works since the first December 2005.

81 Greenhouse gases –Part 1: Specification with guidance at the organization level for quantification and reporting greenhouse gas emissions and removals.

82 Greenhouse gases – Part 2: Specification with guidance at the project level for quantification, monitoring and reporting of greenhouse gas emission reductions or removal enhancements.

83 Greenhouse gases – Part 3: Specification with guidance for the validation and verification of greenhouse gas assertions.

84 For developments about delegation to private actors in environmental matters, See **J. F. GREEN**, "Delegation to Private Actors: A Case Study of the Clean Development Mechanism", *IILJ Emerging Scholars Paper* 5, 2007.

anticipate the next steps maximizing European principles. At the very least, compatibility with European law should be considered.

32. ISO acts also directly as a delegating public authority which elaborates implementing public rules without, however, real accreditation. For instance, ISO 14065:2007 defines "*requirements for greenhouse gas validation and verification bodies for use in accreditation or other forms of recognition*[85]". According to this statement, ISO edicts a set of rules to administrative authorities (both public and private enjoying a delegation of power) in charge of implementing the Kyoto Protocol, or participating in it[86]. This rule could be a national decree taken by a public authority to regulate activities. Considering the fact that such bodies could be both private and public, that ISO norms could be published in the Official Journal[87] and finally that the norm deals with requirements which must be respectful of environmental legislation, ISO does really act like a global authority whose aim is to enforce soft law.

33. This draws my attention to the fact that these management tools may theoretically conduct to a breach of environmental law. The example of ISO 14001 in the Netherlands is on this aspect very revealing.

> A *study, conducted on behalf of the Dutch Ministry of Justice, shows that 63 per cent of the companies with an ISO 14001 certified EMS [environment management systems] violate the rules of the Wet verontreiniging oppervlaktewateren (Pollution of Surface Waters Act), with only 24 per cent of the companies without an EMS do the same*[88].

According to that study, an ISO 14001's certified company has approximately three more chances to violate Dutch rules than any another Dutch company. The requirements for an environmental management system do not really fit accurately with either the public Netherlands regulation nor European law, as it increases the risk of violation by companies. In this specific case, two solutions could be adopted: (1) the percentage of ISO 14001's certified companies which are proved to have an illegal comportment should encourage ISO to change its standards in order to help companies showing more respect for environmental law. In fact, as I have already established, some ISO norms – like those relating to the Kyoto's Protocol – do look like executive decisions implementing a legislative norm, and companies therefore need to

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85 See <http://www.iso.org>.

86 It was the case, for instance, for registries. According to the Greenhouse gas emission allowance trading scheme, "*the Commission will adopt a regulation on the establishment of a system of registries in the form of an electronic database for monitoring the issue, holding, transfer and cancellation of allowances.These registries will also guarantee public access to information, confidentiality and conformity with the provisions of the Kyoto Protocol*". (<http://europea.eu/scadplus/leg/en/lvb/l28012.htm>); The french State gave power to the Caisse des Dépôts et Consignations to create such a database under Seringas' name, and to manage it. The Caisse des dépôts sold its technology to fourteen States (<http://www.caissedesdepots.fr/spip.php?article38>). Thus, la Caisse des Dépôts et Consignation, a "*public group engaged in public interest activities and the economic developement of the country*" (Art. L. 518-1 du code monétaire et financier), is in charge of managing the national register of monitoring greenhouse gases emission. In Canada, the Standards Council of Canada has granted accreditation to PricewaterhouseCoopers LLP as an Environmental Management System registration body on 2003.02.20., as KPMG a month before, to implement Kyoto's Protocol.

87 For instance, ISO 14065 was published by AFNOR (agence française de normalisation) in the French *Journal Officiel*, July 3rd, 2003.

88 **R. van GESTEL**, "Self-Regulation and environmental Law", *EJCL*, Vol. 9.1, January 2005, p.5.

be extremely vigilant not to violate the law. (2) The technical norms are directly adopted by European authorities. Standards can be adopted by a national public authority. Whenever the European Commission decides to integrate a norm ISO into a European directive, all the European states are supposed to transpose it in their national law. It was directly the case for the license plate[89], unit of measurement[90] and a lot of issues[91]. To my knowledge, this appears not to be the case yet in major environmental problems.

34. As a result, one can wonder whether the illegality of ISO 14001's certified companies in their environmental behaviors is an indicator for a need of major changes in European law. Even if ISO is indirectly involved in the production of environmental norms through European standards organizations, there could nonetheless be a gap between law influenced by ISO standards and ISO standards themselves. Theoretically, administrative public authorities are more concerned that private ones in environmental matters because they are of general interest. ISO is a paying commercial service which elaborates techniques standards adopted by public and private bodies. There could be also a gap between ISO standards and the way they are used by companies but they should respect them as much as possible. Most of the time, they directly adopt ISO norms because the norms are legitimate by both the technical approach and the public acceptance. It then questions the legitimacy of public and private entities in environmental matters. Reactions of private[92] or public actors to regulate environment in a context of conflicting interests depend entirely on their legitimacy, understood as not only their power to act but also their authorization to do so. The environment could be considered as public interest in the middle of the money jungle[93]. In addition, the process of elaboration of ISO 14000 has not been without competition between interests' parties and the lack of legitimacy has been strongly denounced[94]. However, ISO seems to benefit from a strong international support, especially from the UNDP.

35. Actually, ISO norms such as ISO 14000 are accepted as a reference by international organizations. Consequently, several international organizations encourage entities involved in environmental matters to accept ISO 14000. This is for instance the case of the UNDP:

> *International Suppliers who wish to be considered for UNDP procurement contracts are able to register with the United Nations Global Marketplace (UNGM). UNGM, formerly the United Nations Common Supply Database (UNCSD) is a registry of Suppliers available to all UN procurement personnel, and is the main supplier*

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89 Directive 78/507/CEE of the Commission introduced ISO 3780 and 3779, May 19th 1978.

90 Directive 80/181/CEE of the Council, December 20th 1979.

91 Like cereals: see **CFI**, November 15th 2007, *Hongry Republic v. Commission*, T-310/06, §5.

92 See **E. MEIDINGER**, "The administrative Law of Global Private-Public Regulation: the Case of Forestry", *The European Journal of International Law*, Vol. 17 n°1, 2006, p.47-87; **B. CASHORE**, "Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule Making Authority", 15 *Governance: An international Journal of policy, administration, and institutions* 503 (2002); **J. CLAPP**, "The Privatization of Global Environmental Governance: ISO 14000 and the Developing World", 4 *Global Governance* 295 (1998); **G. GEREFFI**, **R. GARCIA-JOHNSON**, **E. SASSER**, "The NGO-Industrial Complex", 125 *FOREIGN POL'Y* 56 (Jul/aug 2001); **K. RONIT**, **V. SCHNEIDER**, "Global Governance through private organizations", 12 *Governance* 243 (1999).

93 Duke Ellington, Money Jungle.

94 **N. MZOUGHI**, **G. GROLLEAU**,"La norme ISO 14001: un moyen de protection de l'environnement ou une arme concurrentielle ?", *Working Paper 2005/8*, UMR INRA- ENESAD CESAER Dijon.

database of various UN organizations, including UNDP. UNGM permits Business Units to take full advantage of improved search facilities, allowing for greater accuracy in identifying the appropriate Suppliers. Other features include, short-listing and data export facilities and a discussion forum[95].

The UNDP identifies key parameters for the evaluation of suppliers' capabilities: "technical capacity to deliver the goods, civil and/or services as per schedule", "financial strength", or "production capacity to provide after-sales-service for the goods or services provided". Environmental compliance (i.e. ISO 14000 Certification)[96]" is part of it. The UNDP considers ISO 14000's family as a point of reference that encourages suppliers to adopt it. According to the Dutch ministry report, most of the Dutch companies with an ISO 14001 certified EMS could theoretically act against European law and be considered in same time as capable suppliers according to UNDP's soft law. Thus, considering this specific issue, a company with an illegal behavior in the Netherlands under European law nevertheless could be considered as a supplier of an international organization. Moreover, a company wishing to become a supplier to an international organization, such as UNDP, could potentially break the law of its own country[97]. Such can be the discrepancies.

36. Plus, one usually finds ISO certified companies more trustworthy, whereas their environmental performances will not be necessarily of high standards[98]. ISO 14001 just helps companies to give an appearance of environmental politics protection; it does not replace environmental law. "*The five aspects of the process include: the implementation of environmental politics [decided by the company], planning problems, the implementation and functioning, correlative actions and board's control*[99]". As ISO norms are reformed as law, companies have to be certified

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95 On <http://content.undp.org/>, Programme and Operations Policies and Procedure, 4.1 Registration of Prospective Suppliers.

96 On <http://content.undp.org/>, Programme and Operations Policies and Procedure, 4.2 Appraising Suppliers.

97 For a similar idea: **D. KENNEDY**, "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream", 31 *N.Y.U. Rev. L. & Soc. Change* 641, 2007, p.2 electronic version: "*This road also leads us to normative pluralism. International law is applied differently in different places. It is more dense here than there. This is the world in which one's chance of getting nabbed for committing a "universal crime" varies with the inverse square of the distance from London or Brussels. Or in which the extraterritorial impact of California automobile emissions standards wildly outstrips the state's formal extraterritorial jurisdiction. Or in which ISO 14000 environmental standards are forced through the supply chain by private ordering, whether or not they correspond to national regulations*".

98 **J. FREEMAN**, "Private parties, Public Functions and the New Administrative Law", *Administrative Law Review*, Summer 2000, n°52, p. 813 (pp.8-9 electronic version): "*ISO 14000 certification requires firms to assess their environmental effects and establish a management system for achieving continuous improvement. Firms that adopt these standards become "ISO certified," a characterization that yields a number of important economic benefits, including lower insurance or loan rates, access to markets that demand ISO certification, potential market advantage among consumers, and potentially favorable treatment by domestic regulatory agencies. As with Responsible Care, adopting an Environmental Management System (EMS) to satisfy ISO 14000 is not a commitment to achieving specific performance standards. Certification guarantees only that a system is in place to meet a firm's goals, but it does not require firms to achieve a particular level of environmental performance. ISO certification is often proposed as an alternative to domestic regulatory standards, which impose substantive, technology-based emissions and effluent limits as well as process and design standards. While EPA has thus far refused to accept certification in lieu of compliance with domestic standards, it has signaled a willingness to exercise enforcement discretion favourably for companies that are ISO certified*".

99 **J. ARNAL**, "Les normes éthiques comme biens publics: La question du développement économique", *Cahiers de la MSE*, 2005.73, octobre 2005, pp.2-3: "*Cette norme internationale permet à une entreprise de formuler une politique et des objectifs prenant en compte les exigences législatives et les informations relatives aux impacts environnementaux. Elle s'applique donc aux aspects écologistes que l'entreprise peut maîtriser et sur lesquels elle est censée avoir une influence.*

according to the new version. As Juliette Arnal notices, "*at the end of 2003, a minimum of 66 070 certificates were delivered in 113 countries; this was evaluated just before the transition plan to adopt the new ISO norm 2004:14001*"[100]. It looks like an example of environmental regulation, but results in terms of local legality and the protection of environment could be discussed.

37. This example is to be put into perspective in the light of two arguments. Firstly, one can question the fact that ISO norms would be a cause of illegality for a company's comportment. Certainly, ISO norms are not illegal. However, their use may increase illegal behaviors, even if we cannot speak about ISO's responsibility. Secondly, national authorities can also use them to define call for tenders[101] or give an administrative authorization[102]. Christophe Bovis observes that

> *contracting authorities that wish to define environmental requirement for the technical specifications of a given contract may lay down the environmental characteristics, such as given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use appropriate specifications that are defined in ecolabels, such as the European Eco-label, (multi)national eco-labels or any other ecolabel provided the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organizations can participate, and provided the label is accessible and available to all interested parties*" [103].

Private companies can use the same instruments which participate, according to Vanderbergh, to the "new Wal-Mart effect": "'*the new Wal-Mart effect', reduces externalities by translating a*

Cette norme n'instaure pas d'elle-même des critères spécifiques de performance environnementale, mais elle donne un reflet de la politique de protection de l'environnement assumée par l'entreprise. Les cinq aspects développés dans le cadre d'un processus cyclique sont : l'application d'une politique environnementale, le souci de planification, la mise en œuvre et le fonctionnement, les actions correctives et le contrôle de la direction. Le but de cette norme est de respecter un "bon niveau de performance environnementale en maîtrisant l'impact de ses activités sur l'environnement" et ceci dans un souci d'amélioration continue du modèle".

100 **J. ARNAL**, *ibid*.

101 For instance, CAA de Lyon, 15/03/07, *Société Techno Logistique*, mentionné dans les tables du recueil Lebon: "*il résulte du règlement de consultation du marché susmentionné que les entreprises soumissionnaires devaient notamment fournir, lors de la remise de leur candidature, au titre des pièces exigées à l'article 50 du code des marchés publics précité, une certification ISO 9002 ou équivalent…*".

102 For instance, CE, 07/10/98, *Syndicat national des fabricants d'explosifs et de produits accessoires*, inédit au Recueil Lebon: "*Aux termes de l'article 1er de la loi susvisée du 5 février 1942, 'le transport (…) des matières dangereuses (…) figurant dans la nomenclature établie par le secrétaire d'Etat aux communications est soumis à des conditions de chargement, de déchargement, d'emballage, de garde et de manutention fixées, après consultation de la commission instituée par décret du 27 février 1941, par arrêté du secrétaire d'Etat aux communications'; Ces dispositions habilitaient le ministre chargé des transports à imposer aux transporteurs des marchandises qu'elles visent la détention d'un certificat attestant de leurs aptitudes à fournir un service répondant aux conditions imposées par la puissance publique, et contenues dans les normes "ISO 9001" et "ISO 9002", et notamment de la mise en œuvre par eux de procédures de surveillance et de contrôle internes; qu'en limitant la portée du certificat ainsi requis aux activités de transport de marchandises dangereuses, le ministre n'a ni excédé les limites de la compétence qui lui est attribuée par les dispositions législatives précitées, ni portée atteinte aux principes d'égalité et de libre exercice des activités commerciales*".

103 **C. BOVIS**, *Public Procurement in the European Union*, Palgrave Macmillan, 2005, p. 161.

complex mix of social, economic, and legal incentives for environmental protection into private contractual requirements[104]". Contracting companies introduce in their contracts environmental protection requirements, which can be similar to those used by public authorities, thanks to labels and technical norms.

38. Ecolabel and technical norms adopted by international organizations are not enforced unless States decide to adopt them in their legal order. The behavior of some companies and public authorities permit to give a real enforcement, through contract, to private standards adopted as international standards or at least recommended. Fragmentation between public and private governance could be reduced to some specific points, ending the divided scheme. For some, this leads also to the privatization of environmental law[105]. What is not so obvious in the European Community, (because under Article 6 of the Treaty, "*environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty*") takes another dimension in developing countries where companies can fill the gap left by public authorities. They give a hand to the protection of the global environment in local places, imposing international standards and principles.

39. The globalization of contracts, the way to manage rules and goals are integrally part of governance. Contract law is by definition the law of the parties which is globalized, even at a local level. The difference between public and private governance seems quite thin regarding technical norms introduced in public and private contracts. Step by step, transboundary contractualization of public and private actors may strengthen a common idea of good governance. The unity would come from the adaptation to local necessity, guiding by global organizations, which have often another approach of the issues.

40. The ISO issues show us that private governance could, not really provoke, but contribute to creating new antagonisms. This leads to a paradox situation, considering that ISO has the virtue of harmonizing a great part of legislation of many countries. Private governance is a chance for administrative authorities, but it can contribute to a situation of collusion between the legislations and technical norms, especially in glocal circumstances. A win/win strategy should encourage companies to stay vigilant regarding public governance and to participate actively in the conception of legislations. Conciliating for every decision a financial interest and environmental one may be quite hard. It is not possible to deny that a fight for power (commercial dominion as well as law's empire) affects a search of environmental efficiency. Companies are subject to administrative law, and ISO norms are more and more required in international administrative law - i.e. here, the UNDP calls for tenders – and in domestic administrative law. There is no real problem in case of correspondence between the national or

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104 **M. P. VANDENBERGH**, "The New Wal-Mart Effect: The role of private contracting in Global Governance", *UCLA Law review*, n°54, April 2007, p.913.

105 **A. MARTIN-SERF**, "La modélisation des instruments juridiques", in **E. LOQUIN**, **C. KESSEDJIAN** (dr.), *La mondialisation du droit*, Litec, 2000, p. 131-132: "*Le droit de l'environnement devient beaucoup plus contractuel qu'institutionnel dans de nombreux pays : on assiste à l'émergence d'un marché des droits à polluer, à une privatisation du droit de l'environnement qui se gère presque comme une entreprise, et à ces nouveaux contrats d'environnement qui réalisent une « capture » des pouvoirs publics par les entreprises qu'ils sont censés contrôler, d'autant plus que les experts publics sont dépendants des données que leur fournissent ces entreprises*".

the regional law integrated ISO norms and international requirements, but this could become a fundamental issue when ISO norms are adopted by companies regardless of public legislation which can make stronger provisions in environmental law. It is not just a question of which law, and/or norms should be applied, but what should be the rule more adapted to protect environment in this situation. Fragmentation of laws and governance are once again a chance to solve that problem. A strong participation of every interested actor (i.e. NGOs, companies, certification bodies, national, regional and international administrative authorities involved in a very specific issue) will surely help to solve this conflict. Nevertheless, some alternatives and practical solutions may be adopted, such as the contractual instruments to implement ISO norms or general principles.

41. Public and private governance are intrinsically linked, but they face the problem of coordination of regimes and authorities, which prevent them from offering effective protection to the environment. It reveals that the interests of administrative authorities (national, regional or international) can come cross those of private actors (NGOs, companies, lobbying), in a relatively large number of matters. From a classical point of view, this association should provide effective issues and resolve conflict of interests and even conflict of laws (environmental law vs. economic law, environmental law vs. human rights...). However, in Martti Koskenniemi's view, "*market law could be part of human rights law, the environment may be the distribution of resources, and sovereignty could be an intervention*"[106]. This classical division does not really make sense anymore and it brings us to rethink our models. Given this academic context, I would like to briefly study the need for a global environmental organization.

III A single global entity: an unification of governances and the search for an alternative consistency

1) The emergence of a single global environmental entity

42. In the unity/fragmentation debate about environmental governance, one must address the issue of the existence of a single authority in charge of environmental regulation. "*The criterion of administrative authority is not based on geographical connection, but on functional efficiency in view of the policy objectives pursued.*[107]" The point is that there are no global policy objectives pursued which would give functional efficiency to an environmental international organization. The WTO[108], as well as the UNEP, the OECD, the World Bank, or the European Commission are all confronted to environmental matters and each react differently. They do not have the same profile, nor the same goals.

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[106] **M. KOSKENNIEMI**, "Le Droit international et la Voie de l'Education Juridique: Entre 'Constitutionnalisme' et 'Gestionnariat'", *European Journal of Legal Studies*: Issue 1, April 2007: "*Et si le commerce est droits de l'homme ? Et si l'environnement est distribution de ressources ? Et si la souveraineté est intervention ? Et si ce qui est noir est blanc et la liberté possible uniquement à travers la contrainte ?*".

[107] NYU Seminar of **H. MUIR WATT** , titled "Global regulatory governance: an outsider's perspective, November 2007, p. 8.

[108] See for instance EU/WTO roles in environment with **J. SCOTT**, "International Trade and environmental governance: relating rules (and standards) in the EU and the WTO", 15 *European Journal of International Law* 307, April 2004.

43. The WTO used not to feel really concerned, but this situation has now changed: "*the urgent question is whether or not the WTO will assist in generating such a set of minimal [environmental] standards, or lose legal credibility*.[109]" Without any surprise, Director-General Pascal Lamy declared in December 2007 that the Doha negotiations on environmental goods and services could deliver "*a double-win for some of our members: a win for the environment and a win for trade*[110]". The global regulatory system WTO promoted in economy should integrate environmental interests to extend its influence on states[111], but this is without a doubt a minor interest. The precautionary principles, for instance, accepted in international environmental law, by several organizations and in many regimes – as the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa (1991)[112], the New York Convention on changing climate (1992)[113], the Cartagena Protocol on Biosafety (2000)[114], the Treaty on European Union[115], and some guidelines as the OECD Guidelines for Multinational Enterprises[116]– do not take place in WTO trade dispute[117]. The OECD takes into consideration

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109 **S. DILLON**, "Trade and the Environment: International Trade Rules and National Regulation of the Environment", in *International Trade and Economic Law and the European Union*, Hart Publishing, 2002, p.120.

110 <http://www.wto.org/index.htm> consulted on December, 15th .

111 **S. BATTINI**, "The Globalisation of Public Law", *REDP*, vol. 18, n°1, Spring 2006, p.42: "*As they govern the economy, those organisations have become the core of the global regulatory system. Assuming that all domestic public policies affect economic integration, the organisations pursuing this objective are motivated to extend their scope of action to the activities of national public authorities. That is why, for example, the WTO is concerned with local environmental and health protection rules, while the World Bank is interested in the principle of the separation of powers and the operation of the judicial system*".

112 Article 3§3 (f): "Each Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter-alla, preventing the release into the environment of substances which may cause harm to human or the environment without waiting for scientific proof regarding such harm. The Parties shall co-operate with each other un taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions".

113 Article 3§3: "The Parties should take precautionary measures to anticipate, prevent or minimize the cause of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainly should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost".

114 Article 1: "*In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specially focusing on transboundary movements*".

115 Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, Council of the European Union, Brussels, 15 april 2008, doc 6655/08, Article 191-2 (former Article 174 TCE): "*Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a proceudre of inspection by the Union*".

116 Chapter V, §5: "*Enterprises should maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities*".

117 European Communities - Measures Concerning Meat and Meat Products (Hormones) 13 February 1998, **WT/DS26/AB/R**, **WT/DS48/AB/R**, §§123-125. In the famous 1998 *Beef Hormones* case, the Appelate body of the WTO

environment in its recommendations. The United Nations Environment Programme is in charge of "*provid[ing] leadership and encourag[ing] partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations*"[118]. The multiplicity of public and private entities in charge of environmental governance encourages NGOs to call for a single specialized entity.

44. In fact, consensus has been reached on organizations which reveal a possibility of agreement on some common issues. That is the case, for instance, with the United Nations Economic Commission for Europe (UNECE) which brings together its 56 governments, members of the organization, "*to formulate environmental policy and support its implementation by organizing seminars, workshops and advisory missions and providing a forum for sharing experiences and good practices*"[119]. The UNECE has also negotiated environmental treaties that are now in force[120]. That is also the case with the United Nations Environment Programme[121] (UNEP). It appears as the center of a formal network. The UNEP alerts other international organizations when there is a danger concerning environment. The Programme actively participates in the emergence of protection for the ozone layer with the Vienna Convention (1987) and the Montreal Convention (1987). The UNEP helps States to elaborate environmental norms, while being a WTO's observor. Some NGOs and even States, call for its transformation in an unique global environment organization. The French State Secretary of Environment spoke about "*the project to create an environmental international organization within the U.N system's*" during the international meeting on the impact and the role played by emerging states in the global governance[122] of the July 6th 2007. She said that

> *ce projet soutenu par l'Union Européenne visant à créer une organisation globale d'environnement aux Nations Unies, qui serait construite sur les bases de l'actuel PNUE, a pour objet de renforcer les capacités de développement de ces pays et de contribuer à une plus grande mise en cohérence de l'action internationale environnementale*[123]".

This organization would coordinate the different international treaties to implement them at the local level thanks to the participation of all actors.

45. This would give the possibility to other international organizations and national entities to ask for advice and perhaps prejudicial questions. This would involve also creating committees in charge of controlling the respect of specific regimes in very large matters (sea, forest,...). Connections with all environmental public authorities and the majority of private actors seem

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considered the status of the so-called "precautionary principle" under the WTO covered treaties, especially the Agreement on Sanitary and Phytosanitary Substances (SPS Agreement). It concluded that whatever the status of the principle "under international environmental law", it had not become binding for the WTO.

118 <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43>

119 <http://www.unece.org/>

120 The Convention on Long-range Transboundary Air Pollution, the Convention on Environmental Impact Assessment in a Transboundary Context, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, the Convention on the Transboundary Effects of Industrial Accidents, and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

121 <http://www.unece.org/>

122 Conférence internationale sur l'impact et le rôle des pays émergents dans la gouvernance globale.

123 on the website in french: <http://www.developpement-durable.gouv.fr>

necessary, and the OECD's example showed us that it could be problematic. The principle of subsidiarity[124] would limit actor's competences, as it does in the European Union. In order to protect global public goods[125], we need[126] to create an aspect of unity toward the different regimes and rationalize judicial systems. So this organization should be an administration in charge of managing public goods[127], participating in the transformation of an international stratified law in a true environmental law[128]. This organization would reduce the tension between authorities[129]. In order for this to be achieved, and especially for "functional efficiency", political[130] and authoritative decisions[131] are needed.

46. The project should be very ambitious. It sounds today quite unreasonable, because as one said for international law, it is here also a question of sensibility[132]. We have to pass through many obstacles and at the same time respect alterity of decisions. Andreas Fischer-Lescano and Gunther Teubner were right to say that

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124 **J. ZILLER**, "Le principe de subsidiarité", in **J.-B. AUBY**, **J. DUTHEIL de LA ROCHERE** (ed.), *Droit administratif européen*, Bruylant, 2007, p.377.

125 See the very good article of **P. HUGON**, "L'économie éthique publique: Biens publics Mondiaux et Patrimoines Communs", *Economie éthique* n°3, SHS-2003/WS/23, published by the UNESCO.

126 **D. LEWIS**, "Law and Globalization: An Opportunity for Europe and its Partners and Their Legal Scholars", *European Public* Law, Volume 8 2002, p.220: "*The belief is emerging that rules and a sense of order are necessary for assuring 'public goods*".

127 **M. NETTESHEIM**, "Le droit international public vers un 'droit communautaire'", *in Europe et mondialisation*, Actes du Colloque de la Faculté de Droit et de Science Politique d'Aix-Marseille et de la Faculté de Droit de Tübingen (21-22 octobre 2004), Presses Universitaires d'Aix-Marseille, 2006, p. 269: "*Fréquemment, les éléments protégés du droit international de l'environnement (les mers internationales, l'atmosphère terrestre, l'Arctique, l'Antarctique, la couche d'ozone, etc.) sont désignés comme patrimoine commun mondial ("Global Commons") ou comme héritage commun de l'Humanité ("Common Heritage of Mankind"). Le respect de ces biens en tant que tâche attribuée à la communauté internationale toute entière s'est établi; on comprend la communauté internationale comme administratrice de certains biens publics pour les générations futures*"

128 **J. FROMOGEAU**, Introduction, in **M. CORNU**, **J. FROMOGEAU** (Pub.), *Genèse du droit de l'environnement*, Volume I, Fondements et enjeux internationaux, L'Harmattan 2001,p.19:"*La protection de l'environnement n'est plus un thème accessoire: elle mobilise les scientifiques, elle est au coeur du débat politique en France comme sur la scène internationale. C'est donc bien dans ce contexte de crise qu'émerge le droit de l'environnement qui n'est alors qu'un droit de regroupement stratifié, sans cohérence et sans spécificité*".

129 **H. MUIR WATT**, "Globalisation des marchés et économie politique du droit international privé", *Arch. Phil. Droit* 47 (2003), p.259: "*Dans un domaine comme la protection de l'environnement, où le problème des externalités transfrontières occupe une place centrale, il a été démontré que la compétition législative internationale est plutôt de nature à entraîner une course dégénérescente vers le bas, chaque législateur étant tenté d'"externaliser" le coût de ses propres activités sous la pression du marché, dans l'effort d'attirer des investisseurs. Au mieux, il faudrait donc conclure que les bienfaits de la compétition législative sont à mesurer au cas par cas et dépendraient de l'étendue du problème des coûts sociaux dans chaque domaine spécifique*".

130 **H. MUIR WATT**, NYU Seminar untitled "Global regulatory governance: an outsider's perspective", november 2007, p. 8: "*The criterion of administrative authority is not based on geographical connection, but on functional efficiency in view of the policy objectives pursued*".

131 **N. CRAIK**, "Deliberation and Legitimacy in Transnational Environmental Governance", *IILJ Working Paper* 2006/10, Global Administrative Law Series, p.23: "*To summarize, the fundamental difficulty that arises in transnational environmental governance structures is that environmental imperatives require that authoritative policy-decisions be made*".

132 **D. KENNEDY**, "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream", 31 *N.Y.U. Rev. L. & Soc. Change* 641, 2007, p.7 electronic version: "*As I see it, defining "international law" as, say, "the rules which bind sovereign states in their relations with one another" is not a description of the world. It is the symptom of a sensibility*".

> *in the zones of contact between the legal periphery and autonomous social sectors, an arena for a plurality of law-making mechanisms is established: standardized contracts, agreements of professional associations, routines of formal organizations, technical and scientific standardization, normalizations of behavior, and informal consensus between NGOs, the media and social public spheres*.[133]

It would be very hard to rationalize these phenomena through a single authority, and it is probably not really desirable. What remains of the idea of a global authority is that environmental governance should be linked to comportments of each actor who is a component of an efficient protection. Coherent and responsible behavior may change the face of the earth. This does not require unity of action, only a right attitude concerning the main issues.

2) Concrete alternatives in GAL's terms

47. As I have argued, the unity of a system does not lie in its "uniqueness", but in its consistency. I would like to add that this consistency is absolutely essential in order to create a legal system through a plurality of laws and regimes. It does not really need a single organization, nor new instruments. There are already enough organizations and tools[134]. We need to rethink the models in terms of implementation and coordination with democratic legitimacy. The plurality of interdependent organs involved in environmental issues preserves the multiplicity of voices. A derived multilevel system – with GAL schemes and principles – can work. "*Understood constitutionally, a multi-level system is based on the idea of an international community which formulates basic requirements for social interaction, and thus for internal law, by using international law*"[135]. The international community can formulate those requirements with the participation of the major actors (global and local, administrative and private) both for internal law and international law, which means also for international organizations. Harmonized positions on the main environmental issues – which are political decisions – a set of principles (not qualified as internal, international, European, or international environmental but just general principles)[136], and thus behaviors, would help to elaborate a real order through fragmentation. Plus, legal cultural diversity would encourage using different means to participate to the goals defined. That is of course, the case of international or regional treaties,

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133 **A. FISCHER-LESCANO**, **G. TEUBNER**, "Regime-Collisions: The Vain Search for Legal Unity in the fragmentation of Global Law", 25 *Michigan Journal of International Law* 999 (2004), p.7 electronic version.

134 For instance, the United Nations Conference of Stockholm in 1972 has affirmed fundamental principles as the principal of cooperation (principle 24:"*cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States*") or coordination ("*States shall insure that international organizations play a coordinated, efficient and dynamic role for the protection and improvement of the environment*"). Available on <http://www.unep.org/>.

135 **A. von BOGDANDY**, "The European Union as Situation, Executive and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship", *Jean Monnet Working Paper* 13/07.

136 **H. JAMES**, *The Roman Predicament – How the Rules of International Order create The Politics of Empire,* Princeton University Press, 2008, p. 1: " *The central problem is that we need rules for the functioning of complex societies, whether on a national (state) level or in international relations*". In our opinion, these rules – principles – can be both national and international.

and also of public and private contracts[137], principles, soft and hard law. Public and private governance need better coordination in order to protect this "*diversity governance*[138]" in all the specific regimes dealing with environment. It will give the environment a chance to find frameworks[139]and instruments adapted to the best environmental issues.

4 8 . To conclude, environmental governance is in this article a good example in order to speak about the debate on unity/fragmentation in GAL's terms and I will briefly answer directly some questions asked in Viterbo IV's call for papers. Fragmentation seems to be an opportunity for GAL to discuss the different ways to manage several governances and administrative organizations. With a codification of principles and the acknowledgement of public and private frameworks (through networks, hybrid entities and so on), GAL's scholars identified a way of unification in global law. Different systems can share a number of principles because of the links between States via several treaties, coherent guidelines, and national public and private enforcement, but it does not guarantee a harmonization of the comportments[140]. Plus, administrative authorities could be both national and international. According to those examples, I do not think that unity and fragmentation are destined to coexist in a binary system, instead they are most of the time mixed, depending on the situation. In GAL, the world map is made of links between entities and destructured territories reorganized in regional areas with part of states, international organizations and private actors. The links, such as networks, principles, specific regimes, give lines to the pieces of a puzzle. Consequently, fragmentation and unity look like the very basis of GAL because it is part of the methodology to understand those phenomena That is why, in my opinion, the system's consistency (both internal – within the system – and external – with the other systems –) is one of the keys to understand the GAL's prospection behind the actual debate.

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137 See for instance the article **I. CHAPERON**, "HSBC entend continuer à jouer les premiers de la classe", *Les Echos*, 27/03/08, p.10: "*Si l'évaluation fine des financements de grandes infrastructures restera une des composantes fortes de la politique de la banque, pronostique Francis Sullivan, l'attention se tourne désormais vers le grand public. Au Brésil, le groupe international a ainsi en test un produit d'assurance auto où les tarifs sont modulés selon les émissions de CO2 des véhicules. En Grande- Bretagne, il réfléchit à une carte de crédit qui permettrait de calculer l'empreinte CO2 du porteur et de le débiter afin de compenser ses émissions en finançant des projets « verts ». A Hong Kong, HSBC a déjà lancé une telle carte bancaire « verte », avec à la clef le financement de plantations sur les toits de la mégapole pour absorber leCO2. La banque planche également sur la création d'un crédit à taux bonifié permettant de financer les travaux d'amélioration énergétique de l'habitat*".

138 **A. von BOGDANDY**, The European Union as Situation, Executive and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship, *Jean Monnet Working Paper* 13/07.

139 According to **F. FUKUYAMA**, *State Building*, Profile Books, 2006, p. 58: "*there are no globally valid rules for organizational design means that the field of public administration is necessarily more an art than a science*".

140 For a national example, **C. HIMSWORTH**, Convergence and Divergence in Administrative law, *in* **P. BEAUMONT**, **C. LYONS**, **N. WALKER**, *Convergence & Divergence in European Public Law*, Hart Publishing, 2002, pp.104-105: "*In Scotland, however, there is a virtual monopoly of criminal prosecution by the Crown Office and procurator fiscal and it is almost certainly largely for this reason that, whereas the Environment Agency in England prosecutes extensively in respect of environmental offenses, the Scottish Environment Protection Agency initiates many fewer prosecutions. The environmental legislation itself may be virtually identical but prosecution practice (and, it should be added, sentencing practice in the courts) is very different*".