Chapter III

# Contemporary Issues of Public Administration

## PUBLIC ADMINISTRATIVE LAW OF DIFFERENT MULTILEVEL SYSTEMS OF COOPERATION



**Erzsébet CSATLÓS, PHD**
Public Law Institute
University of Szeged, Faculty of Law and Political Sciences,
csatlos.e@juris.u-szeged.hu
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**READING MATERIAL FOR CHAPTER Nº 3**

# PUBLIC ADMINISTRATIVE LAW OF DIFFERENT MULTILEVEL SYSTEM OF COOPERATION

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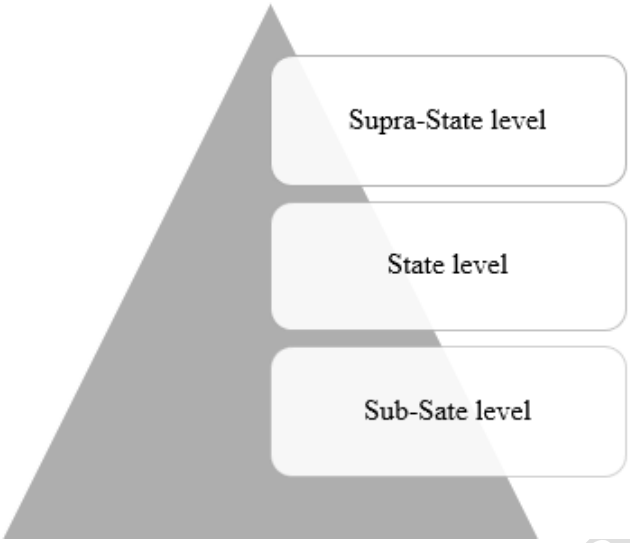
## 1. Multi-level governance and its main types

Interdependence and different kinds of international cooperation in all sort of issues create a *multi-level governance* phenomenon.
*Multi-level governance (*MLG) is defined as the vertical (multiple levels) and horizontal (multiple actors) dispersion of central government functions and refers to both, political structures and decision-making processes because of the growing interdependence between governments and non-governmental actors at various territorial levels. Both supra-national and sub-national levels became more relevant. This is due to the (1) *decentralization within states* (see the autonomy of local self-governments for example) and (2) *increasing transnational cooperation* between them. Such impact tends to press apart from the State's public law framework.

*Within MLG, State governance is heavily influenced by supra-State and sub-State actors and certain State functions may be enrolled at different levels. It does not deny the importance of nation-States but also focuses attention and counts on the impact of actors other than the State.*




*1. General layers of multi-level governance (author)*



### *1.1. The administrative law of the Westphalian model of international cooperation*

According to the Westphalian concept, no superior authority is recognized above State and the elements of public power, legislation, execution and judiciary, belong exclusively to the State. State, which is built up and functions in conformity with the *rule of law*, enters international negotiations and assumes obligations in conformity with internal rules that determines its activity.

*International organizations and their Member States constitute multilevel systems and a compound with a multilevel administration. In constitutional theory, it presupposes structures in which law is produced autonomously at each level and public authority is exercised through shared responsibility and the connection between the different levels are ensured by cooperation. Thus, international organisation constitutes different layers of authority combined with the international legal obligation of Member States to cooperate, however, there is no common legal background for that. The constitutional rules of each Member States determine the State actors' activity, but domestic law does not expand on the sphere of the act committed at a higher level, so an institutional administration is required which honours the rule of law and principles derived from it. Law done at the highest level of the system is considered as international law and as such, it is supposed to be superior to domestic law but in fact, the legitimizing legal order is always at the national level. As regards judicial power, even if an international organisation disposes of judicial organ, its jurisdiction is usually strictly limited to develop and interpret common principles deriving from the common aims.*

Public administration is the performance of the State in action; in the international sphere, it is completed by governmental functions. Therefore, the bridge between national and supranational area is also built on the requirements of rule of law by the acts of government in conformity with rule of law. The legitimacy behind the activity and the way the results of negotiations are implemented to practice is thus ensured. By domestic legal norms which regulate the activity, it is guaranteed that the

(a) common, supranational decision-making processes are normatively correct (*empowered organs act within the limits of their power and according to the rules of procedure prescribed while they make a decision)*;

(b) and the results of negotiations respond to public interests and values of the *rule of law (the commonly accepted achievement is legitimate in the view of democratic state requirements).*

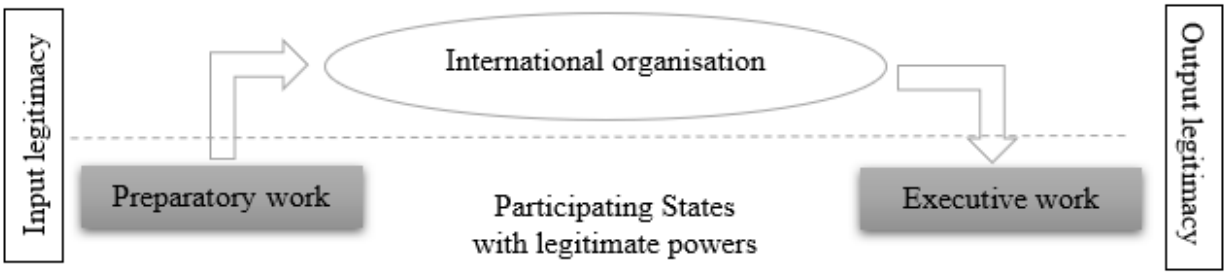
The consistency of rule of law principles and State activity in the international sphere then lies in the accountability of its representatives.

The economic and political interdependence of States has reshaped this mechanism while the values of the Westphalian regime remain. Legitimacy and rule of law are often seen as the guarantee in the democratic functioning of public administration which regulates the State in action.

*Legitimacy* has two aspects that stand in complex reciprocal relations.

- *Input legitimacy* refers to the importance of representation of all relevant interests and points of view when making authoritative decisions if these decisions are to be regarded as legitimate.
- *Output legitimacy* points to the quality of the decisions produced and to their effectiveness in solving the problems that they supposedly address.

At the State level, sub-national actors are often involved in decision -making to share experience accordingly to public law that settles their status in the procedure and without the intention to take the place of the decision-maker. Therefore, benefits of sub-level involvement are used but input and output legitimacy remain in harmony and can stay in close interaction with each other.




*2. Legitimacy flow in international organisations (author)*

### *1.2. Globalised international cooperation and its relationship with administrative law*

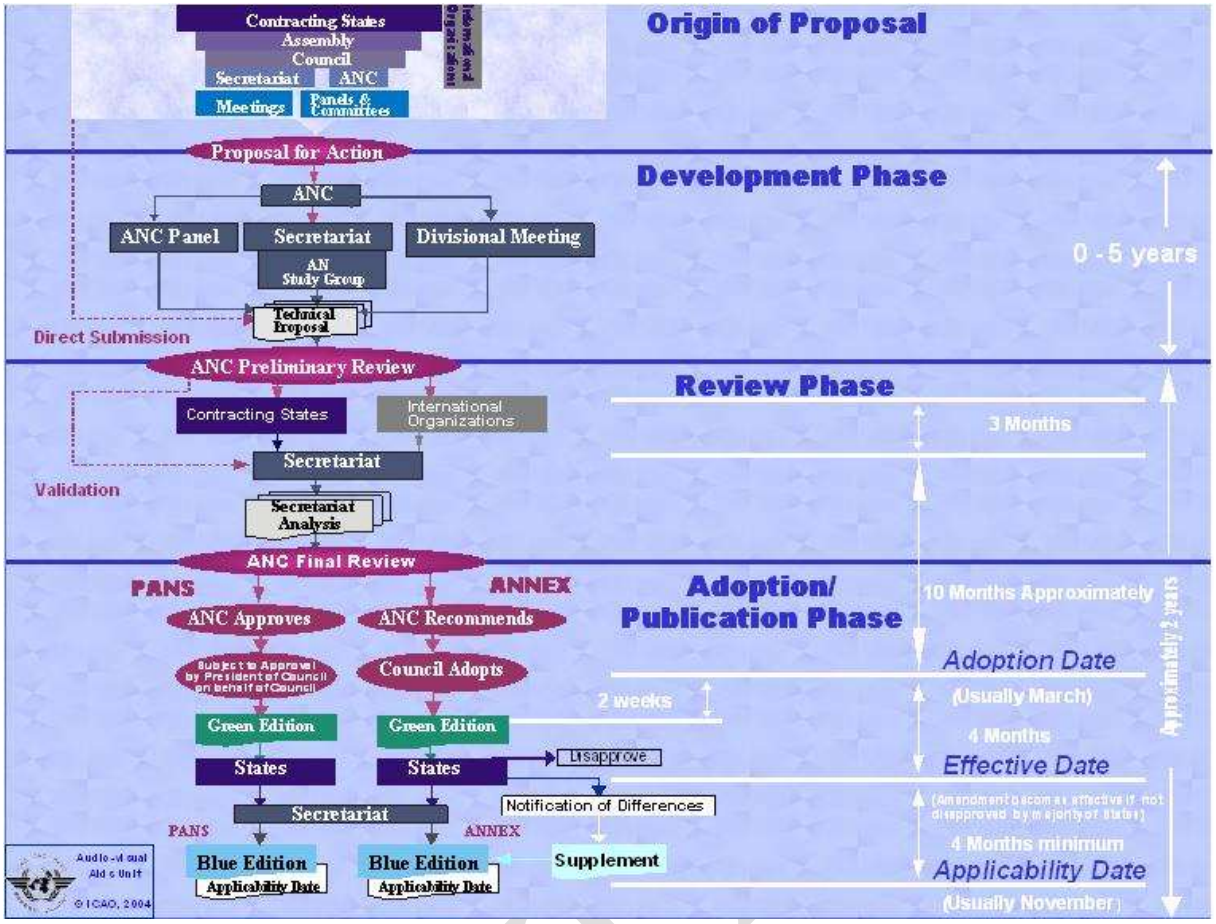
At supra-national sphere, different type of actors appears in various form of cooperation. Typically, international organisations are based on the inter-governmental regime. They have in common that they tend to practice a sort of legislative function, which is legitimate if the international organisation is vested with such power (supranational organisation). Otherwise, the defined norm is *soft law*.

States ensure their implementation in domestic legal order. In these cases, legitimacy of this sort of decision-making is ensured by the State that acts within its powers; follows the proper procedural law to that end, and provides equality of access to courts and other machinery for adjudication as a guarantee.

*There are many useful achievements of different type of specialised international organisations that are used as orientation point or source of idea for domestic legislation or just practice. The World Health Organisation (WHO) guidelines are such instruments: health-related challenges do not respect State borders; therefore, they are supposed to be responded to globally, however, the opportunities and resources are not equally present for that purpose.*

*They articulate and support the role of health authorities in sanitation policy and programming to help ensure that health risks are identified and managed effectively. The audience for the guidelines is national and local authorities responsible for the safety of sanitation systems and services, including policymakers, planners, implementers within and outside the health sector and those responsible for the development, implementation and monitoring of sanitation standards and regulations. The Governing Council is composed of one representative of each Participating State and is responsible for the organisation maintenance. The Governing Council, after considering the recommendations of the Scientific Council (a) adopt the programme of permanent activities; (b) approve any special project, and (c) decide upon any supplementary programme. The professionalism is ensured by the Scientific Council, which is composed of highly qualified scientists, selected based on their technical competence in cancer research and allied fields. Engagement is a key aspect of WHO's role in global health governance and non-State actors play a critical role in supporting WHO's work to fulfil its constitutional mandate. Partnerships include various organizational structures, relationships and arrangements within and external to WHO to enhance collaboration to achieve better health outcomes. It means collaboration with, inter alia, institutions such as research institutes, parts of universities or academies, which are designated by the Director-General to carry out activities in support of the WHO's programmes; individuals experts from whom the WHO may obtain technical guidance and support and UN Volunteers who make important contributions to UN action in the pursuit of sustainable development. See more by clicking here.*

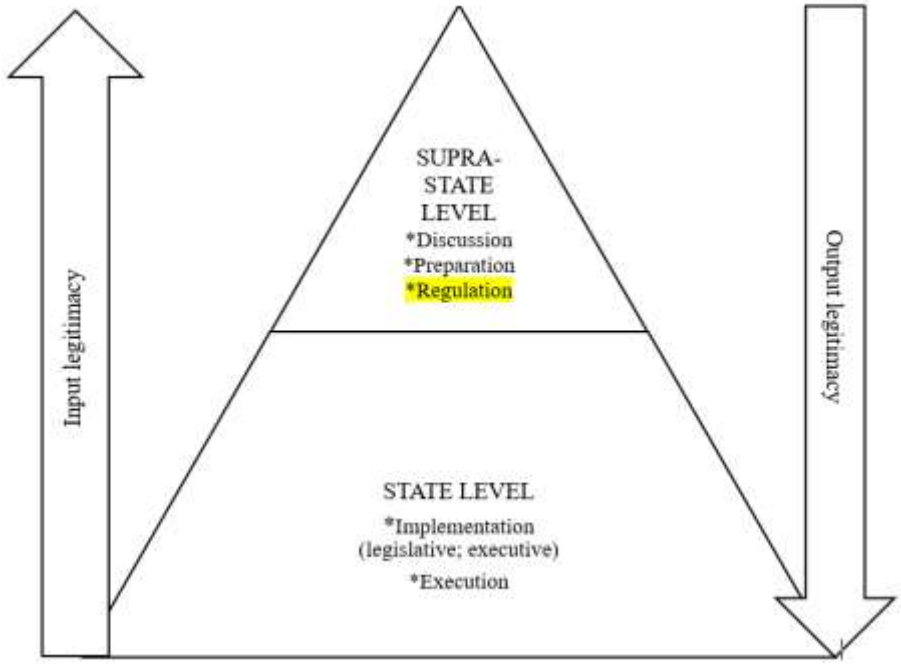
*A similar example is seen in the case of the International Civil Aviation Organization (ICAO) which is also a specialized agency of the United Nations. It codifies the principles and techniques of international air navigation and fosters the planning and development of international air transport to ensure safe and orderly growth. The ICAO Council (the governing body which is elected by the Assembly for a three-year term, is composed of 36 States) adopts standards and recommended practices concerning air navigation, its infrastructure, flight inspection, prevention of unlawful interference, and facilitation of border-crossing procedures for international civil aviation. ICAO defines the protocols for air accident investigation that are followed by transport safety authorities in countries signatory to the Chicago Convention on International Civil Aviation. As the governing body, the Council gives continuing direction to the work of ICAO. It is in the Council that Standards and Recommended Practices are adopted and incorporated as Annexes to the Convention on International Civil Aviation. The Council is assisted by the Air Navigation Commission (technical matters), the Air Transport Committee (economic matters), the Committee on Joint Support of Air Navigation Services and the Finance Committee. At the international level, the International Civil Aviation Organization is responsible for setting minimum aviation safety standards (International Standards and Recommended Practices - SARPs), but these are not binding and so compliance is mainly dependent on the States parties' goodwill. As aviation is challenged by many circumstances, the ICAO works in close cooperation with other members of the United Nations family such as the World Meteorological Organization (WMO), the International Telecommunication Union (ITU), the Universal Postal Union (UPU), the World Health Organization (WHO), the World Tourism Organization (UNWTO) and the International Maritime Organization (IMO). Non-governmental organizations which also participate in ICAO's work include the Airports Council International (ACI), the Civil Air Navigation Services Organisation (CANSO), the International Air Transport Association (IATA), the International Business Aviation Council (IBAC), International Coordinating Council of Aerospace Industries Associations (ICCAIA), the International Council of Aircraft Owner and Pilot Associations (IAOPA), the International Federation of Air Line Pilots' Associations (IFALPA) and the International Federation of Air Traffic Controllers' Associations (IFATCA).*




*3. Making ICAO SARP. Source: https://www.icao.int/safety/airnavigation/PublishingImages/overview.jpg*

When the international soft law is created, there are often concerns about input and/or output legitimacy. In most cases, either one or both sides are missing.

The standard-setting activity as a new form of cooperation resulted in soft law thus often fails to meet the rule of law requirements, however, as useful and effective tools, they often diffuse into legal practice and cause rule of law challenges. These standards are resulted by *"international institutions and transnational networks involving both governmental and non-governmental actors as well as administrative bodies that operate within international regimes or cause transboundary effects*" and without governmental powers and *de sure* empowerment, they contribute to the creation of *de facto* obligations.




*4. Legitimacy issues of multi-level structures (author)*

### *1.3. Supranationalism: the question of public power practice at international sphere*

There are supranational organisations, which are vested with certain State functions by the transfer of sovereignty, and there are those which assemble State and non-State actors, or simply, they function as a common forum of non-State actors. The most advanced forms include the shifting of power, mainly the legislative and/or judicial and ***rarely the executive***, in certain issues to an international level which might lead to the dispersion of authoritative decision-making across multiple territorial levels.

#### *1.3.1. Supranational decision-making*

Creating legislative bodies is usually the classical way of thinking about supranational regimes: a **common decision-making body** is vested with the power to adopt legislation (often with unanimity to ensure the unconditional acceptance of this kind of regime) and oblige the Member States directly, without their domestic interpretative acts.

> *The European Union is the most well-known example of supranational decision-making. By the power transfer from the Member States, the legislative institutions are entitled to adopt binding sources of law that are to be applied directly by the Member States.*

#### *1.3.2. Supranational judiciary*

States may make subordination and accept the **superiority of an international judicial body** to judge cases in which the State (or to be corrected, its organ) fails to interpret the assumed international obligation.

> *The International Court of Justice (ICJ)is the principal judicial organ of the United Nations (UN); it is seated in the Hague. It is a general, permanent body of respected judges who may proceed to decide upon the breaches of international law and the judgments are accepted as final and binding. Its role is to settle, under international law, legal disputes submitted to it by*

*States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.*

*1.3.3. Supranational executive: supranational public authority*

States rarely create **supranational administrative bodies** which ensure enforcement and daily execution of the adopted normative, legislative texts. Simply, because it is not realistic that a supranational organ may be capable to deal with everyday cases at the lowest level of administration i.e. in the case of individuals applying the created norm in individual cases and establishing such a system would not be cost-efficient. The question of a supranational public authority which issues binding decisions in individual cases is therefore very rare.

*The European Union regulates competition on the internal market. Sometimes violations of competition rules happen within just one country, so a national competition authority would often handle the case. However, when the effects of illegal behaviour, like running a cartel, are often felt in many countries across the EU and beyond and in such cases, the Commission is often well placed to pursue these trans-EU cases and proceeds them and issues a decision with binding effect. In this case, the Commission is entitled to adopt individual acts of individual enterprises. The Commission has the power not only to investigate but also to take binding decisions and impose substantial fines. The Commission enforces the EU competition rules together with the national competition authorities of the EU countries. These authorities and the European Commission exchange information on implementing EU competition rules. See more: click here!*

To sum up, the executive power collaborates to achieve solutions to solve global problems, therefore form a global administrative space.

By shifting certain powers to create authoritative acts to the international area, the importance of legitimacy and having a public law framework is revealed. Normative background of the international authority, its supervision and jurisdictional questions arise.

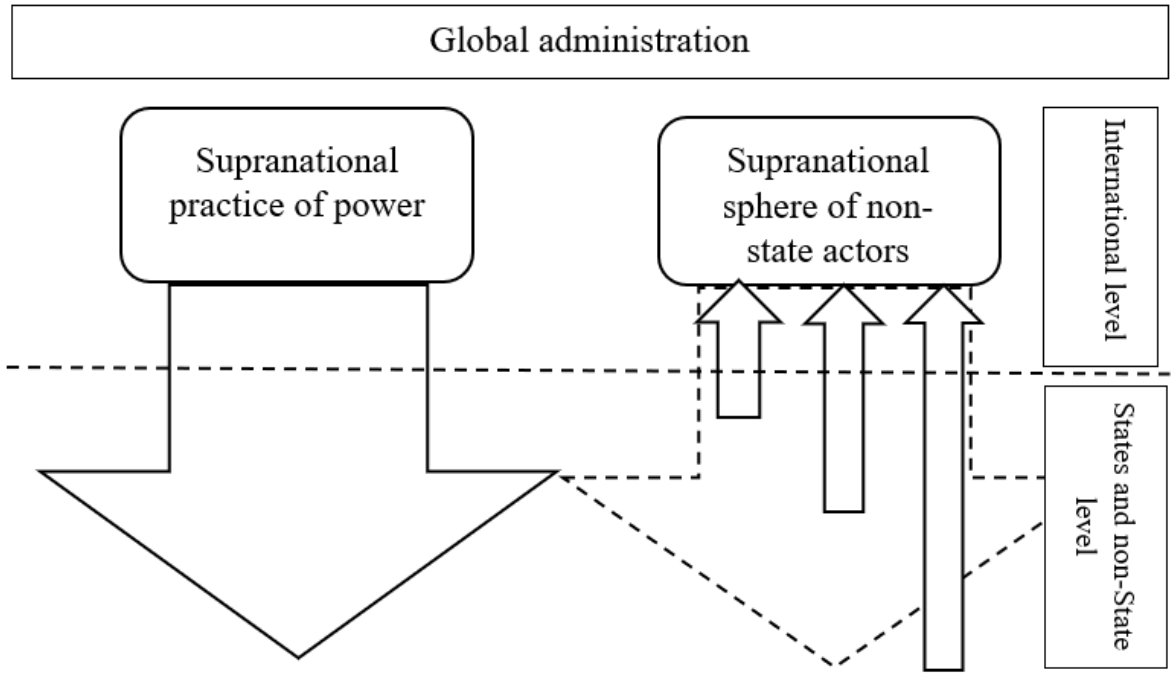
*1.3.4. Supranational power practice without empowered actors*

Recently it is often seen as competent national authorities cooperate to discuss challenges of law application. It seems that they take over the role of decision-maker as the result of their common think-thanking is manifested in commonly accepted guidance and other collection of best practices. Such exercise of public power often occurs through non-binding standards which are produced by a decision -making procedure that has nothing to do with the constitutional principles of legislation and the balance of interest made them worth following instead of legal commitments. Legal literature calls the phenomenon the exercise of international public power which reveals the question, in a wider scope, whether a global administrative space exists or there is a place for parallelly existing administrative spaces which overlap each other from time to time.

*Trade, finance, the environment, fishing, exploitation of marine resources, air and maritime navigation, agriculture, food, postal services, telecommunications, intellectual property, the use of space, nuclear energy and energy sources are all subjects of global regulation which involves many other sectors as well, as the production of sugar, pepper, tea and olive oil. There is no human activity wholly untouched by supra-state or global rules. [Cassese p. 671.]*

Within a State, they cannot be such quasi legislators, as it would be a clear abuse of power and the spill-over of their competencies unless they are vested to act as such.

*The French Conseil d'État is not only the highest level of public administration but its decisions are considered as case law by the norms regulating its activity.*




*5. Actors of global administration (author)*

Besides governmental functions and the contribution to legislative work, in States, a significant area of public administration deals with direct execution of the law; public authorities interfere into social relationships to evaluate the public's interests and values over private purposes in individual cases by individual authority acts. Individual acts of public administration are strictly regulated by *public administrative law* which means *control* over *public power*, to keep the powers within their legal bounds and to protect the citizen against their abuse and put under judicial control. As *von Bogdandy* describes, public law has a constitutive and limiting function to legitimise public authority. When formal and informal networks appear to exchange ideas, settle common standards for common problems, and competent authorities collaborate to that end, the success of their mission depends on the evaluation of the soft law they establish as a solution to problems. Although within their States, they might be vested with authority power to enforce legal norms by individual acts in individual cases, they shall not apply the standard they created together until it is correctly implemented by the domestic legislator; no matter how competent the actor in a certain issue, being non-governmental actor, it cannot assume obligation on behalf of its State. This is a catch-22 even without complicating the issue with two *sui generis* organisations among the interacting actors at the supranational level.

International relations has grown to a ***global administrative space***: a space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms. In practice, the increasing exercise of public power in these structures has given rise to serious concerns about legitimacy and accountability, prompting patterns of responses to those concerns in many areas of global governance. (Krisch - Kingsbury, 2006, p. 1.)

However, there are examples when the collaboration of States contributes to a supranational system that is settled above them and contains elements of all three parts of power: legislation-

execution-judiciary. See the case of tuna fish case among three States and analyse how global administration works in such case.


*6. Parties to the tuna fish case (author)*

*According to the United Nation's Convention on the Law of the Sea (UNCLOS), "[t]he coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations to ensure conservation and promote the objective of optimum utilization of such species (...)" Therefore, in 1993, Australia, Japan and New Zealand signed the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) and in 1994, they established the Commission for the Conservation of Southern Bluefin Tuna Nature. It is a supranational authority that has a legal personality, a budget and rules governing accounting and employment relations, a Secretariat with its staff, and headquarters in Canberra. Within it, separate bodies carry out oversight and consultation tasks. In 2001, the Commission established an Extended Commission, made up not only of the Commission's the Member States, but also of other "entities or fishing entities" whose flagships fish tuna. Its main purpose was to adopt binding decisions establishing quotas of tuna that may be fished annually by each treaty adherent and if necessary, to adopt additional measures and to control illegal fishing.*

*Meanwhile, Japan exceeded the quota, thus Australia and New Zealand opened an arbitration procedure before an arbitral tribunal (under UNCLOS) and required interim measure from ITLOS.*

*In 1999, the ITLOS declared that the 3 countries were not allowed to exceed the fishing limits decided upon by common agreement and in 2000, the arbitral tribunal stated about its legitimacy that without Japan's consent to refer the controversy to the arbitral tribunal, that "this Tribunal lacks jurisdiction to entertain the merits of the dispute brought by Australia and New Zealand against Japan it thus revoked the provisional measures ordered by the ITLOS, but added: "[h]owever, revocation of the Order prescribing provisional measures does not mean that the parties may disregard the effects of that order or their own decisions made in conformity with it".*

*To sum up the supra-State, a supra-national organisation with supranational authority and judiciary, see the chart:*


*7. Branches of power at a supra-state level in the tuna fish case (author)*

To sum up, the *case of tuna fishing* shows ***the major features*** of ***global administration***:

- ✓ **lack of exclusivity** among international relations;
- ✓ a high degree of **self-regulation** as regulators and the regulated ones may be the same;
- ✓ **material law** may be of different sources;
- ✓ decisions are made by independent committees based on scientific criteria and negotiations concluded by agreements (**professionalism**)
- ✓ the line between public and private is hardly clear at the global level;
- ✓ there is **no** definitive **constitutional background,** so the legal framework and the supervision of the decision depends on further negotiations.



## LITERATURE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## SIGNIFICANT CASE-LAW

- Southern Bluefin Tuna Cases (New Zealand v. Japan and Australia v. Japan)

- Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures

**SIGNIFICANT DEFINITIONS**

| | |
|---|---|
| Global administrative space | space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms |
| Input legitimacy | refers to the importance of representation of all relevant interests and points of view when making authoritative decisions |
| Inter-governmental relations | interactions between governmental units i.e. responsible public organs at the highest level of State administration and policy that can act on behalf of the State they represent and can assume the obligation |
| Legitimacy | a value whereby the practice of power is recognized and accepted as right and proper |
| Multi-level governance (MLG) | is defined as the vertical (multiple levels) and horizontal (multiple actors) dispersion of central government functions and refers to both, political structures and decision-making processes because of the growing interdependence between governments and non-governmental actors at various territorial levels |
| Output legitimacy | expresses the quality of the decisions produced and their effectiveness in solving the problems that they supposedly address |
| Public authority | the power to govern and regulate a part or aspect of public life with binding effect and with judicial enforceability; |
| Self-regulation | the power to determine the rules for own functioning |

**EXERCISES TO PRACTICE**

1. Select the characteristics for the right category!

| Westphalian model of international cooperation | Globalised model of international cooperation |
|---|---|
| | |

a) the actors are States
b) the actors are only States
c) the actors are often non-state players
d) intergovernmental
e) multiple actors from various levels in a multilevel governance system
f) multilevel governance
g) international law determines the relationship of the actors
h) administrative law has a determinant role in the functioning of the system
i) shifting of power
j) decision-making is based on governmental bodies and interpreted according to the constitutional framework of the participating States
k) solution finding for global problems
l) soft law is created
m) aimed to establish a convention to be signed by the participating States
n) supranational decision-making body
o) legitimacy behind the acts carried out at the supranational level has a domestic constitutional background
p) there is no constitutional background for the system
q) input legitimacy often lacks
r) professionalism dominates over the political point of view

## TEST OF MULTIPLE CHOICES/QUIZ

**1. Speaking of the Westphalian model of international cooperation, it means**

a) that the cooperation is based on the interaction of state and non-state actors.

b) that the cooperation supposes the dominance of State actors although non-State actors may also have equal right in the procedure of adopting international obligations.

c) that the cooperation is based on State actors.

**2. The Westphalian type of international cooperation**

a) is the synonym of supranationalism.

b) is the synonym of inter-governmentalism.

c) is the synonym of globalism.

**3. Multi-level governance**

a) supposes the horizontal collaboration of actors.

b) supposes the horizontal and vertical collaboration of actors.

c) supposes the vertical collaboration of actors.

**4. The reason for multi-level governance**

a) is the interdependence of actors at different levels in the State.

b) is the rising of decentralisation of State functions.

c) is only a feature of federal States.

**5. Input legitimacy**

a) ensures that the actors which contribute to international cooperation are doing this according to the rule of law.

b) ensures that the results of supranational decision-making conform with the requirements of rule of law.

c) is to be ensured by the supranational bodies created by international cooperation.

**6. Legitimacy**

a) is a requirement to be ensured when the results of the international cooperation are interpreted.

b) is required to ensure at all phases of international cooperation.

c) is required to be ensured only at the domestic level of activities as in an international context it cannot be ensured.

**7. Soft law**

a) is not obligatory as it cannot produce legal effects as it cannot be enforced.

b) is not obligatory, although it may produce legal effects, it cannot be legally enforced.

c) is obligatory as it may produce legal effects and can be enforced.

**8. Global administrative space**

a) is the area of administration of supranational international organisations.

b) is the area of interplay between States and international organisations to perform executive power.

c) is the area where administrative functions are performed in often complex interplays between officials and institutions on different levels.

**9. The role of public law in global administration**

a) has a declarative and limiting function to legitimise the public authority

b) has a constitutive and limiting function to legitimise the public authority

c) has a constitutive and empowering function to avoid the practice of public authority.

**10. If a supranational public authority is established**

a) it is based on the establishing States agreement.

b) it is depending on the competency rules it establishes for itself, that it what self-regulation means.

c) it means that NGOs are empowered to practice authority power.