GLOBAL AND EU ADMINISTRATIVE LAW AND JUSTICE
CONTEMPORARY TRENDS AND LESSONS TO BE LEARNED

1. ADMINISTRATIVE LAW AND INTERNATIONAL ORGANISATIONS

To a considerable extend, the prevailing doctrine on administrative law was evolved through the historical experiences of countries in Central Europe. For most of the countries of the Old World, administrative law emerged during the 19th century, in a constitutional framework that placed special emphasis on the separation of state functions doctrine. For instance, the emergence of a particular public law system in France was initially related to historic experience, as proclaimed at art. 13 of celebrated Law 16-24 of August 1790 that excluded the competence of civil courts on administrative matters[1]. In this way, a powerful, autonomous and systematic body of public law sprung out of the jurisprudence of the French *Conseil d' Etat*. In contrast, in England, the impact of the dominant liberal ideology and the institutional might of courts in the aftermath of the 1688 Revolution led to a unified jurisdiction. Notwithstanding their different ideological and historical origins briefly, and perhaps simplistically, exposed above, one cannot ignore that both theoretical approaches and models of public law, the Continental one, primarily represented by French law, and the Anglo-Saxon one, are clearly visible in the different national administrative systems[2], irrespective of which one of the two appears to dominate in each system. In addition, other theories, of a different origin, also have a notable bearing on the evolution of modern (and by now, even post-modern) administrative systems. Scandinavian societies, for example, have developed a system of administrative law that is only secondarily

[1] J-L Mestre *Introduction historique au droit administrative* (Libr. Générale de Droit et Jurisprudence, 1985). A de Laubadère, *Manuel de droit administrative* (Libr. Générale de Droit et Jurisprudence, 1967).
[2] M Hauriou, *Précis du droit administrative et du droit public* (Sirey, 11th ed, 1927).

based on judicial tradition, relying heavily on the institution of the Ombudsman[3].

For the Continental European legal theory and tradition, administrative law is founded on two principles, emanating from the era of the French Revolution: on the one hand on the principle of autonomy and self-reliance, meaning that public administration has its own, distinctive legal system; on the other hand, administrative law in Continental Europe is based on the principle of the rule of law, whereby also the public sector, the State have to comply to the provisions of law.

While administrative law initially emerged and developed as a particular, a special branch within the wider theoretical and disciplinary area of public law, the transformation of structures and forms of governance, as well as of exercise of public power, have led to a system characterised by a mixture of public-private law principles, with the introduction of provisions emanating from private law (and the imbuing of principles of private law) to various functions of the public sector. It goes without saying, of course, that this influence is reciprocal, so that the principles and provisions of private law that have crept into the modus operandi of the public sector are particular ones, modified through their fusion with relevant public law principles.

International (or global, to use the popular, American-inspired, terminology[4]) regulatory systems are by now considerably widespread. Over the past few decades, they have exhibited an incredible development, multiplying in numbers and extending the breadth and depth of their competences. Human rights, commerce, the economy, the environment, fishing, the management of water resources, sea and air transports, agriculture, telecommunications, intellectual property,

[3] J A Jensen "Judicial Review of Legislative Acts" 3 European Public Law 1997, H H Vogel "Swedish Administrative Law in a State of Change" 3 European Public Law 1997.
[4] *Global regulatory systems* instead of *International*, just as *Global Administrative Law* instead of *International Administrative Law*.

the space, energy resources, nuclear energy etc are but an indicative citation of some of the policy areas heavily, if not almost entirely, regulated by international conventions and international organizations. In fact, it is already credibly affirmed that there is no area of human activity that remains completely and entirely unaffected by the operation of some international regulatory system[5]. States are no longer able alone to observe fishing of migratory species, nor are they able to effectively regulate –with fragmented, and of local/regional/country-wide range interventions- the thresholds of omissions recognized as contributing facts of the green house effect. These gaps, that are created by the incapability of contemporary state structures and functions to produce a complete and effective system of controls and regulations[6], have to be filled by international/global regulatory bodies, namely by international and supranational organizations. The prevalence of global regulatory organizations, and through them, of an apparent de facto global governance, is founded on a new concept of sovereignty: Not the right and capability of self-determination, but the right, the opportunity and possibility of participation in global and inter-governmental formations, networks and institutions, that are essential for the perseverance of states, as they set the platform for resolving, through co-operation, problems and reaching policy goals that states alone, with competences and regulatory authority that is constrained within their defined territorial boundaries, are incapable of[7].

Research surveys and statistics exemplify the rapid expansion and increase in numbers of such organizations. Depending on the criteria adopted by each survey, the number of international organizations stretches from 245 (with the most stringent and restrictive criteria) to

[5] For an overall evaluation of the scope of international/global administrative law, R Wölfrum & V Roben (eds) *Developments of International Law in Treaty Making* (2005).
[6] F G Cerny "Globalisation and the Changing Logic of Collective Action" 49 International Organisation 595 (1995).
[7] A Chayes & A H Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995), A-M Slaughter "Sovereignty and Power in a Networked World Order" 40 Stanford Journal of International Law 283 (2004).

7306 (with the most flexible ones) [8]. To make the point of the plethora of international organizations a bit more vivid, if there is such a need, one has to take into consideration that they are much more – calculated under any criteria- than the number of recognized, sovereign and independent states[9].

While contemporary structures for the exercise of public power solidify evermore the presence of international organizations, the determination of whether these organizations comply to administrative law requirements, and if so, of which nature, requires further analysis.

In assessing and analysing the administrative law of international organizations, certain basic principles should first be highlighted.

First, it has to be clarified that there is no homogeneity or uniformity between international organizations. Each of them is governed by their own statute, agreed and ratified by its member-states, with its own particular characteristics. Even the nature itself of international organizations differs. One could identify international organizations of a political nature, authorized to –and charged with- resolving crises in a diplomatic/political way, by intervening between states and mediating; or organizations of a politico-military nature, serving as forums for strategic co-operation; or organisations of a clearly scientific or economic nature.

Secondly, the partition of law into public and private has no immediate and direct effect on international organizations, as they are institutions exercising power beyond, and quite often above, states; they are not affected by the legal framework for the exercise of public

[8] Union of International Associations, *Yearbook of International Organisations: Guide to Global and Civil Society Networks 2004-2005*. N Blokker & H Schermers (eds) *Proliferation of International Organisations: Legal Issues* (2001). C Shanks, H K Jacobson & J H Kaplan "Inertia and Change in the Constellation of International Governmental Organisations" 1981-1991 50 International Organisation 593 (1996).

[9] According to official data of the UN, they are 191. Growth in United Nations Membership, 1945-2005, www.un.org/Overview/unmember.html.

power by states, or for the relations of states and citizens, or even the relations among citizens of a polity governed by the rule of law.

Administrative law, it is submitted, has advanced beyond state formations. Yet, it operates in the international level at a legal and institutional vacuum; the constitutional framework, in which the national/domestic administrative law operates, is missing. It appears, however, that international law is elaborating mechanisms and procedures for its 'constitutionalisation', mainly through rules of a constitutional content and nature. Notwithstanding recent trends towards 'constitutionalising' public law beyond states, the lack of a clear constitutional framework for the operation of global administrative law has provoked debates on the scrutiny and control, the accountability and legitimacy of international organizations. It should be noted, however, that these debates are predominantly limited to the lack of democratic control, which is undoubtedly missing, without going into a deeper analysis of the possibility and sufficiency, appropriateness and adequacy of applying democratic criteria in organizations of such nature. It is, in any case, beyond any doubt, that if globalisation is to be founded on –and to promote, as its supporters assert- principles of democratic organization of power and society, every institution exercising public power, whether state, supra-state or international, should enjoy satisfactory levels of democratic legitimacy. New forms of control and accountability should be examined, and if need be, designed; forms that would correspond to the particular characteristics of these organisations[10].

A set of general principles of administrative law seems to have already prevailed globally. The principle of legality, the right to participate in the decision-making process, the right to prior hearing of the interested and affected parties, the right to consultation, the right to access documents, the obligation on the part of the administration to justify administrative acts and decisions, the principle of founding

[10] J Cohen & C F Sabel "Global Democracy?" 37 (4) International Law and Politics 763 (2005).

decision on scientifically sound and provable grounds, the principle of proportionality, the principle of transparency, to mention bit a few.

A critical issue raised by the existence of a plethora of international regulatory organizations has to do with system of judicial review and protection. It appears that there is no uniform answer to the question who is competent to review compliance of the decisions of international organizations to generally recognized principles of law, the national courts or the tribunals and the judicial formations that exist in the internal structure of specific international organization. There are cases, where national courts have the competence to review decisions of the international regulatory organizations[11]. More interesting, however, is the ever-increasing number and scope of competences of administrative tribunals that form part of the overall architecture of an international organization.

So far, the administrative law of international organizations is identified as the one developed and formulated by the jurisprudence of their administrative tribunals. For the Anglo-Saxon legal tradition, this corresponds to some form of labour/employment law, while for the continental legal tradition, it constitutes classic administrative law. For some time, public law scholars were hesitant in recognizing this area of administrative law as a legal system. Only recently, and after the publication of some seminal works on what has been commonly termed Global Administrative Law, the systematisation of this area of law has begun to look likely. The discourse on European administrative law, contrarily, is far more advanced.

There are four (4) basic differences between domestic and European administrative law[12]:

a) Domestic administrative law is founded on one, and single authority, the Government. European administrative law, on

[11] A Reinisch, *International Organisations Before National Courts* (2000).
[12] H Kassim "The European Administration. Between Europeanisation and Domestication" in J Hayward & A Menon (eds) *Governing Europe* (OUP, 2003).

the other hand, recognizes two authorities, the Council and the Commission, which preside over the public administration at the EU level; it has to be born in mind also that the composition of the EU is complex, as it combines both European and national/domestic (i.e. of member-states) administrative bodies[13].

b) Domestic administrative law is characterized by a bi-polar relationship between the citizen and the Administration. The European administrative law is characterized by a tri-polar relationship, between citizens, the Commission and the national governments[14].

c) Domestic administrative law forms a special branch of law, and public administration may impose it directly, while the enforcement of European administrative law is guaranteed either through the jurisprudence of the ECJ or with the assistance of member-states' public administration.

d) Domestic administrative law is based on the national/domestic Constitution, and the legal order that it [the Constitution] describes. The European administrative law, due to the lack of a Constitution, draws its constitutional foundations from the Treaties, the general principles of law and the common legal traditions of member-states in the area of administrative law.

Apart from the differences and particularities that global administrative law presents vis-à-vis traditional domestic administrative law, it also demonstrates important similarities; it regulates the relations of an organization with regulatory competences and powers, that issues decisions and acts (or omissions) directed both to its members but also to third parties, while there is also a – more or less developed- system of judicial review and protection for

[13] Art. 202, 211, 5(2), 10 TEC, and Statement no 43 inserted in the Amsterdam Treaty.
[14] Art. 85 and 88(1), (2) TEC.

resolving or mediating disputes arising from the operation of the organization.

Be that as it may, global administrative law distinguishes itself from domestic on yet another crucial point, the lack of exclusive jurisdiction.

Provisions, for example, regulating tuna fishing can be sought both in a special treaty, the treaty for the protection of tuna, and in the general stipulations of the Law of the Sea. The Committee for the protection of bluefin tuna applies not only the provisions of the specific treaty, under which it is established, but also the decisions adopted by FAO. Hence, three distinct international legal frameworks are involved in the regulation of tuna fishing[15].

The environment is regulated by the World Meteorological Organisation (WMO)[16], the UN Framework Convention on Climate Change-Clean Development Mechanism (UNFCCC-CDM)[17], and the Global Environmental Facility (GEF)[18] -each of them possessing their own executive bodies- the Programme for the Environment of the UN, the UN and World Bank Development Programme[19].

In the economic area, there is also a plethora of regulatory authorities: IMF, World Bank, Basel Committee on Banking Supervision, Financial Stability Forum (FSF), Financial Stability Institute (FSI), Committee on Payment and Settlement Systems, Egmont Group, Financial Action Task Force on Money Laundering (FATF), International Organisation of Securities Commissioners (IOSCO), International Association of Insurance Supervisors (IAIS), International Accounting Standards Board (IASB) etc. The increase in numbers of international economic/financial organizations, and the need to somehow

[15] *Southern Bluefin Tuna* Case (Australia & N. Zealand v Japan), ICSID (WB) 91, www.worldbank.org/icsid/bluefin tuna/award080400.pdf, S Cassese "Administrative Law without the State? The Challenge of Global Regulation" 37(4) JILP 2005, p. 669.
[16] www.wmo.ch/web-en/about.html.
[17] UNFCCC, *The Mechanisms under the Kyoto Protocol: Joint Implementation, the Clean Development Mechanism and Emissions Trading*, unfccc.int/Kyoto_mechanisms/items/1673.php.
[18] www.gefweb.org.
[19] www.unep.org, www.undp.org, www.worldbank.org.

coordinate their actions and operations has, in fact, led to the establishment of yet more and new bodies, to which several of the abovementioned organizations participate, like the Joint Forum, created in 1966 by the IOSCO and the IAIS under the auspices of the Basel Committee[20].

International organizations are most commonly established by inter-state agreements, as in the case of the UN. At the same time, sub-state institutions may agree to establish international organizations. For instance, national institutions regulating the stock markets cooperate in the frame of the IOSCO, national institutions dealing with social security matters participate in the IAIS, authorities for the protection of fair competition are members of the International Competition Network (ICN), while the Financial Stability Forum (FSF) is promoted by the Finance Ministries and the Central Banks of the G7.

Another distinctive group of international organizations are the ones that are established not by states, but by other international organizations. For example, the International Centre for Settlement of Investment Disputes (ICSID) [21], was created by the World Bank.

Further to the synergies identified above, elements of organizational and functional cooperation are also recognizable. Examples of organizational interrelations are the participation of the General Director of the WTO to the Executive Council of the UN, the participation of the President of the World Bank in the presidium of the board of directors of ICSID, the appointment of the Secretary of UNFCCC-CDM by the Secretary General of the UN; in addition, there are several examples of one organization 'lending' its institutions to another organization, like in the case of ICSID that was created to resolve disputes arising from the investment activities of the World Bank, but is also dealing with disputes in the frame of NAFTA, the

[20] www.iaisweb.org/134_1343_ENU_HTML.asp.
[21] www.worldbank.org/icsid/about/about.htm.

Energy Charter Treaty, the Cartagena Free Trade Agreement (CFTA) and the Colonia Investment Protocol of Mercosur etc.

Examples of functional relations between international organizations can be identified, e.g. in the set of agreements between the World Intellectual Property Organisation (WIPO) and the WTO[22].

Although the plethora of international organisations, as already stated earlier, is not characterised by homogeneity, or by some identifiable and commonly followed forms of organisation, one could distinguish some general, and repeated functions. The most common and important ones are the coordination, the promotion of cooperation, the harmonisation of different institutional frameworks and the establishment, or imposition, of standards, what is in other words known as 'standardisation'.

States have a stable distinction and division of competences and powers among their organs; international organisations have, at most, distinctions of the functions performed by each of their bodies. The organisational structure of international organisations is commonly distinguished into four basic bodies: a collective body, of a collegiate nature, usually referred to as the Assembly, composed of the members of the organisation; a more restricted collective body, in most cases called the Council, the members of which are usually elected by the Assembly; an executive body, usually referred to as the Secretariat; and a variety of committees composed of officials from national administrations.

International Administrative Tribunals have been, by now, established in all, or at least in most, international organisations, with the aim of adjudicating on disputes between the organisations and their personnel/staff. Their establishment aimed at filling the jurisdictional gap that existed, as international organisations fall under no national jurisdiction. The absence of a system of adjudicating on disputes of

[22] C Tietje, *Global Governance and Inter-Agency Co-operation in International Economic Law*, 36 Journal of World Trade 501 (2002).

such a nature could have risked them having to fall under a national jurisdiction; and such a prospect would have been most unwelcome by international organisations, as it would have restricted their independence from nation-states and states' judicial systems.

The Society of Nations established its administrative tribunal in 1927; its structure was informed the creation of the tribunal of the ILO in 1946, while in 1949 the UN also established its own administrative tribunal[23]. The World Bank created its tribunal in 1980, and the IMF in 1994.

To the question "what is an international administrative tribunal?", Professor Robert Gorman, having served many terms at the World Bank administrative tribunal and at the tribunal of the Asia Development Bank, replies that the most common and simple reply would be to say that it is an international civil service arbitration tribunals, to which employees of an international organisation resort for a final –and binding for the organisation- resolution of the disputes arising within the frame of their employment[24].

Access to the protection afforded by international administrative tribunals is conditioned on a set of procedural requirements, relating to time-frames, the right of locus standi etc. Issues relating to the legality of procedures have been recognised by international administrative tribunals as substantial. Compliance to procedural rules is of equal importance as compliance to substantive rules[25].

2. THE CIVIL SERVICE TRIBUNAL OF THE EU

There is, hence, over the past decades, a rapid growth of the phenomenon of setting up administrative tribunals within

[23] C F Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals vol I* (2nd ed, 1994).
[24] R A Gorman "The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank" 18 ERPL 2005, no 1.
[25] Decision 1213, *Wyss* (2004) UN International Administrative Tribunal.

international organisations, whose exclusive competence is to resolve employment disputes[26].

The EU Civil Service Tribunal (henceforth: CST) is such a judicial body. The comparison between long established judicial formations of international organisations and the recently established CST brings to the fore similarities and differences, as well as basic, common principles of organisation and operation. It contributes, at the same time, to the understanding of certain choices on the structure, the organisational architecture, the functions and the competences of the recently created CST.

The comparison and juxtaposition of these judicial bodies, and the search for common principles, operating methods and structures is especially interesting also from a more practical point of view: there are innumerable examples of employees shifting from the EU to an international organisation and vice versa. The UN has special rules and laws for the status of employees transferring from one organisation following its system of salaries and allowances to another (especially concerning financial matters, like allowances, pension schemes, loans etc[27]); it would be interesting to assess the effects on the status of an employee –if there are any- that decides to transfer from the EU to an international organisation and/or vice versa.

Furthermore, the interaction between international administrative tribunals are not limited to issues of organization, internal structure, function, responsibilities, process, etc. but has extended to issues of jurisprudence. Indeed, the International Tribunal of the World Bank, in its very first decision, with which it announced its presence in the area of international jurisdiction, did not fail to mention that, given

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[26] *International Organisations Immunities Act* (IOIA, 22 U.S.C.§288a(b), 2000): "*international organizations, wherever located, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments*". By decision of the US Congress and the President, this wide immunity status has been also granted to the World Bank. The Bank may have lifted immunity status for disputes arising with suppliers and other third parties, but not for disputes between the organisation and its employees.

[27] *"Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances".*

the particular history, function and mission of the Bank, the Court will shape its jurisprudence by sometimes resorting to the jurisprudence of other similar international administrative tribunals, without, however recognising them the binding power of precedent[28].

It has already been stated that the international administrative tribunals are mainly judicial formations to whom the task of resolving employment disputes has been assigned; most frequent and common among the cases brought before them have to do with alleged breaches of employment contracts and of the conditions for recruitment of staff from an international organization. It should be noted that these employment contracts and the conditions they entail are not the result of collective bargaining and negotiations, as is commonly the case in European countries – for both the public and the private sector-, between statutory bodies representing employers and employees' and workers' unions. There may be unions and associations of employees in several international organizations, which in many cases even have a consultative role in the determination of employment relations, but this does not mean that they are recognized as statutory bodies representing employees of the organisation, authorized to conduct collective bargaining and negotiations on working conditions with the employers –the organisation's administration- on behalf of their members.

2.1 The Establishment of the CST

The Nice Treaty of 2009[29] provided for the establishment of judicial formations for special matters. More specifically, art. 220 TEC was revise by the Nice Treaty, and in its second paragraph stipulates that

[28] World Bank Administrative Tribunal, Decision 1 (1981) *de Merode*.
[29] In force since the 1st f February 2003.

«*In addition, judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty*».

Furthermore, art. 225[A], that was attached to the TEC by the Nice Treaty, sets the ground principles for the manner of establishing new judicial panels on specific issues, as well as rules on their composition and judicial competence:

«*The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission, may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas.*

The decision establishing a judicial panel shall lay down the rules on the organisation of the panel and the extent of the jurisdiction conferred upon it.

Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance.

The members of the judicial panels shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The judicial panels shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council, acting by a qualified majority.

Unless the decision establishing the judicial panel provides otherwise, the provisions of this Treaty relating to the Court of

Justice and the provisions of the Statute of the Court of Justice shall apply to the judicial panels».

The Nice Treaty, in fact, provided for the establishment, as soon as possible, of a judicial body for the resolution of disputes between the Community and its staff. According to Statement no 16 in relation to added art. 225[A] TEC, the Intergovernmental Conference called the ECJ and the Commission to draft urgently a decision for the creation of a judicial panel with the competence of adjudicating on first instance on disputes between the Communities and their staff. The CST is the first from what can be assumed to be a line of specialised bodies with judicial competence in the EU (another example is the European Community Patent Court[30]).

The creation of the CST, apart from the undoubted decongestion of the existing judicial system of the EU, was also attributed to the enhanced role and elevated status of the Court of First Instance (CFI) that, until the Nice Treaty was the competent body to rule on employment disputes, and since then is exclusively competent to adjudicate on first instance on important cases.

Statistically, as early as 1985, hence even before the establishment of the CFI, the employment cases brought before the ECJ were 433, while in 1970 they were just 79. Already since 1978, the Commission had proposed, following a relevant opinion expressed by the Council, the creation of an administrative tribunal for employment disputes[31]. Given, now, that the CFI was also considered a court specialising in employment cases, as the majority of cases brought before it involved employment relations, it could be claimed that a court, or rather a tribunal, specialising in resolving civil service disputes in the EU

[30] The proposal was submitted by the Commission in November 2003. COM (2003) 705 final. See also N Lavranos "The new specialized courts within the European judicial system" 30 ELRev 2005, p. 261 ff.
[31] OJ C 222, p. 6.

existed ever since 1988 (the creation of CFI), and that in 2005 it was re-created under a new title and with exclusive competences[32].

On the 2nd November 2004, the Council adopted decision 752/2004/EC, EAEC for the establishment of the Civil Service Tribunal of the EU. The intention of the Council was for it [the tribunal] to commence its business within 2005, so as to contribute to lifting part of the workload of the CFI, and to offer more specialised judicial review of employment affairs.

According to Council Decision 752/2004, the Civil Service Tribunal of the European Union (EU CST) is attached to the CFI as a judicial panel competent to adjudicate on disputes involving the European public administration. The CST is based in the CFI. PLR EU established the Court. The Council decision also amended the Statute of the Court. A new title, title IVa was added, on judicial panels, providing that the clauses on the jurisdiction, composition, organization and rules of procedure of these panels, established as stated above under Article 225a TEC and 140B EAEC, are appended to the modified Statute of the court

The Lisbon Treaty (formerly also known as the Constitutional Treaty, the European Constitution, or the Reform Treaty) provides for the creation of a Court of the EU, that will contain the ECJ and the CFI (and will be called the "ordinary" court), and special courts. The Lisbon Treaty also provides for easier resort of citizens and business to the judicial protection afforded by the EU system against regulations of the Union, even in cases where they [the plaintiffs] are not immediately and individually damaged by them.

For the CST, the new Treaty provides that it will no longer be called tribunal, but will be renamed (and upgraded) to court.

[32] Π. Σκουρή, *Το Ευρωπαϊκό Υπαλληλικό Δίκαιο και το Δικαστήριο Δημόσιας Διοίκησης της Ευρωπαϊκής Ένωσης* (Σάκκουλας 2006). P Skouris, *European Employment Law and the Civil Service Tribunal of the EU* (Sakkoulas 2006).

2.2. THE COMPOSITION

Although the Court consists of seven (7) judges, their numbers may increase by a Council decision adopted by qualified majority at the request of the Tribunal itself[33]. The term of members of the Tribunal is for six (6) years, renewable. Judges are appointed by the Council, by a decision taken under Article 225a para. 4 TEC and 140B para. 4 EAEC, after consulting the Committee provided for by this article. The selection criteria of the Council refer to a balanced composition and the representation of widest possible geographical basis among nationals of Member States, and legal systems[34].

Further, the Council adopted a decision in relation to the qualifications and prerequisites of candidates for the position of judge at the CST[35]. Summarily, every citizen of the EU that fulfils the conditions set out in arts 225A para. 4 TEC and 140B para. 4 EAEC may submit his/her candidature.

Candidate judges must:

— Satisfy all guarantees for independence,
— Have the necessary competences for the exercise of their judicial duties,
— Have EU citizenship[36].

The Council, deciding by qualified majority, upon the recommendation of the Tribunal, determines the procedures for submitting and assessing the candidatures[37]. The committee that aids the Council in its decision is composed of seven (7) members, which are personalities of known stature and legal experience, former judges of the ECJ and

[33] Art. 2 CST Statute.
[34] Art. 3§1 CST Statute.
[35] Council Decision of 18th January 2005 concerning the conditions and the other details for the submission and evaluation of candidatures for the appointment of judges at the CST of the EU (2005/150/EC, EAEC), EE L 50/7, 23.2.2005.
[36] Apart from these minimum requirements, the consultative committee set up by the Council also takes into consideration, among other things, the capability of candidates to work in the frame of a collective structure in an international and multilingual environment, as well as the nature, depth and breadth and extend of their experience, that is considered appropriate for the exercise of their duties.
[37] Art. 3§2 CST Statute.

the CFI and legal scholars of considerable reputation. The Council, again, decides for the appointment of the committee, as well as for its modus operandi, by qualified majority, upon the recommendation of the President of the Tribunal[38]. The committee opines on the adequacy and competences of candidates in relation to the demands of the position of judge at the CST. The committee's opinion is accompanied by a list of candidates that satisfy the criteria and requirements and possess the most appropriate –high level- experience. This list should include at least twice as many candidates as the judges that will actually be appointed to court.[39]. The President of the CST is elected among its members and his/her term is renewable.

In January 2005, the Council adopted a decision in relation to the rules of procedure of the committee of art 3§3 of appendix I of the Protocol on the Statute of the Court, that refers to the Tribunal[40]. In accordance with the abovementioned rules of procedure, the term of the members of the committee is four (4) years, renewable. The chairman of the committee is selected by the Council among its members. The quorum is set at five (5) members present. The General Secretariat of the Council offers its assistance in the form of secretarial support. In a latter decision, in January 2005[41], the Council determined the following composition for the committee:

Mr. Leif SEVÓN, President,
Sir Christopher BELLAMY,
Mr. Yves GALMOT,
Mr. Peter GRILC,
Ms Gabriele KUCSKO-STADLMAYER,
Mr. Giuseppe TESAURO,
Mr. Miroslaw WYRZYKOWSKI.

[38] Art. 3§3 CST Statute.
[39] Art. 3§4 CST Statute.
[40] Council Decision of 18th January 2005 on the rules of procedure of the committee of art. 3§3 of appendix I of the protocol on the Statute of the Court (2005/49/EC, EAEC), EE L 21/13, 25.01.2005.
[41] Council Decision of 18th January 2005 on the appointment of members of the committee of art. 3§3 of appendix I of the protocol on the Statute of the Court (2005/151/EC, EAEC), EE L 50/9, 23.2.2005.

The committee decides by simple majority. In case of a tied vote, the vote of the chairman prevails.

In July of the same year, the Council issued a decision on the composition of the CST[42]. So, the first judges to serve at the newly, back then, judicial panel, are:

— Irena BORUTA,
— Stéphane GERVASONI,
— Heikki KANNINEN,
— Horstpeter KREPPEL,
— Paul J. MAHONEY,
— Χαρίσιος ΤΑΓΑΡΑΣ, (Charisios Tagaras)
— SeanVAN RAEPENBUSCH.

Paul J. Mahoney was elected among his peers to preside over the meetings of the Tribunal.

The term in office of the President is three (3) years, renewable. This applies for the usual procedure of appointment of judges, and not if the Council decides to apply the procedure of art. 4§1 of added appendix I of the Statute of the Court[43].

Immediately after the giving of oath by the members of the Tribunal, the President of the Council selects by lot three (3) judges, whose term will end –in contrast to art. 2§2 first phase of appendix I of the Statute of the Court- after the first three (3) years of their term in service[44]. The three members that were selected by lot to serve for a reduced term of three (3) years were:

- Irena BORUTA,
- Horstpeter KREPPEL,
- SeanVAN RAEPENBUSCH.

The Tribunal convenes in panels of three (3) members. The rules of procedure determine the competences and the quorum of the plenary, as well as the composition of the panels, and the assignments to them.

[42] Council Decision of 22nd July 2005 on the appointment of judges at the Civil Service Tribunal of the European union (2005/577/EC, EAEC), EE L 197/29, 28.7.2005.
[43] Art. 3§1 Council Decision 752/2004/EC, EAEC.
[44] Art. 3§2 Council Decision 752/2004/EC, EAEC.

The CST relies on the services of the ECJ and the CFI. The President of the ECJ and/or the President of the CFI determine, jointly with the President of the CST the terms and conditions under which the staff of the ECJ and/or the CFI offer their services to the CST. The CST appoints its own secretary and determines his/her employment status.

The Secretary is responsible for the keeping of the protocol and the files of the pending cases, for receiving, transmitting, serving and keeping of documents, for correspondence with the litigants and the third parties and the safekeeping of the CFI seal. S/he caters for collecting the levies to the secretariat and the amounts owed to the CFI repository. S/he is also in charge of the publications of the CFI.

In applying –and complying with- the principle of access to documents, the litigants may consult, at the offices of the secretariat the original file of the case, including all sorts of files of administrative nature that have been deposited to the CST, to request copies or excerpts of documents of the procedure and of the protocol. Representative of intervening third parties have the same rights, and so do litigants in cases tried jointly, with the reservation of para. 4 of art. 1 of regulation no 1 of the Council in relation to the confidential character of some data or documents of the case file.

2.3 COMPETENCES

According to art. 1 of its Statute, the CST

> "*shall exercise at first instance jurisdiction in disputes between the Communities and their servants referred to in Article 236 of the EC Treaty and Article 152 of the EAEC Treaty, including disputes between all bodies or agencies and their servants in respect of which jurisdiction is conferred on the Court of Justice.*"

Apart from the annulment of certain decisions of the EU Administration, the CST may consider requests for compensation. Indeed, according to its rather limited so far jurisprudence, the Tribunal may make an assessment and may rule on claims for compensation, even if the compensation amount requested is not specifically mentioned by the plaintiff, as long as it can be accurately calculated by the Tribunal itself[45].

The Tribunal may issue decisions on interim relief (injunctions). The President of the Tribunal considers requests for interim measures, relying mainly on the practice and the jurisprudence of the CFI. Thus, in accordance with art. 104 (2) of the CFI Statute, requests for interim relief measures must state the circumstances that indicate the urgency of the case, for which temporary protection is sought, and also the legal and substantial reasons and claims that warrant the injunction prima facie. Both these factors must be present for the request for interim protection measures to be granted[46].

The CST rules on the costs. Subject to specific provisions of the Rules of Procedure, the defeated party is called to pay the costs, if such a request was submitted by the winning party[47].

Decisions of the CST may be annulled by the CFI. Requests for annulment are grounded on legal issues. Possible grounds for annulment may be the incompetence of the Tribunal, a breach of the rules of procedure affecting the rights of the interesting party, and the breach of Community law by the Tribunal. No request for annulment may be solely grounded on the attribution and/or the calculation of the amount of the costs of the judicial proceedings.

The annulment is permissible in the following cases:

- Final decisions of the Tribunal, as well as

[45] F-126/05, ibid, para. 72.
[46] Order of the President of the CFI in case T-120/01 *De Nikola v EIB*, para.12.
[47] Art. 7 CST Statute.

- decisions that partly resolve the difference in substance, or decisions disposing of a procedural issue concerning a plea of lack of competence or inadmissibility,
- The parties may request an annulment before the CFI of a decision of the CST issued under Articles 242 or 243 or Article 256 para. 4 TEC or under Articles 157 or 158 or Article 164 para. 3 of EAEC.

The request for annulment must be submitted within two (2) months from the notification of the contested decision[48]. The request may be submitted by the party that was defeated fully of partly. The intervening parties, with the exception of member-states and the EC bodies, may not request an annulment, unless the CST decision directly affects them. Intervening parties have the right to request an annulment of a CST decision only if their request for intervention in the first instance proceedings before the CST was rejected, and only within two (2) weeks from the notification of the rejection[49]. Subject to arts 242 and 243 TEC and arts 157 and 158 EAEC, filing a request for annulment of a CST rule does not suspend the execution of the decision[50].

The procedure before the CFI in cases brought before it for the annulment of a CST decision consists of two stages: the written and the oral one. The Court, however, under the conditions specified in its rules of procedure, and after hearing the parties, may dispense with the oral procedure.

If the request for annulment is upheld, the Court sets aside the decision of the Tribunal, and rules on the dispute. It may also return the case to the CST, if it considers that the dispute is not ripe enough

[48] Art. 9 para. 2 CST Statute.
[49] Art. 9 para. 2 & 10§1 CST Statute.
[50] Art. 12§1 CST Statute.

for a ruling[51]. In such cases, the CST is bound by any decision the CFI may have taken on legal[52].

3. Concluding Remarks

Globalisation, and the subsequent "opening up" of national legal systems, is largely based on the law. The law is the mechanism that would allow globalisation to develop appropriate, harmonized with each other, regulatory frameworks for the functioning of the economy and the organization of society.

Moreover, and concurrently with the process of harmonising nation-states' regulatory frameworks, the creation of other ones, supra-state, international regulatory frameworks is fiercely promoted; such frameworks operate beyond and above nation-state ones, without automatically and directly causing their harmonisation, degrading and also downgrading their importance and relevance. These international regulatory frameworks take the organizational structure of international organizations, with their own system of legal protection for their affairs with their staff.

In recent years, the firm harmonization of national systems has reached even the nucleus of the nation state, public law. In the EU, which also is a model of "globalisation", at a local-European level, the recognition of a quasi-constitutional framework, as expressed so far by the Treaties and the jurisprudence of the ECJ in recent decades, has brought about and promoted discussions on a European Administrative Law. In fact, discussions have now advanced to forming a Constitutional Treaty, the Lisbon Treaty, which, although it will not fundamentally change the – already of a constitutional nature-

[51] Art. 13§1 CST Statute.
[52] Art. 13§2 CST Statute.

context and nature of the Union, however, has undoubtedly great symbolic value.

The CST is the expression, at the EU level, of a trend observed in international organizations, that of autonomous settlement of administrative disputes by judicial formations that operate in within the organization itself. In European law, the establishment of the Tribunal introduced some innovations. For the first time, for example, and following the model of administrative tribunals of other international organizations, judges of such judicial formations are selected and appointed not by the usual procedure applied for the composition of the ECJ and/or the CFI (i.e., the proposal by member-states, and therefore their representation in the panels), but by an open call for expression of interest, with opinion expressed by an expert panel and a final ratification procedure by the Council. It should be noted that the procedure followed for the composition of the Tribunal, a procedure that will in the near future be applied for every special judicial formations that may be created, and by the courts, was foreseen already by the Constitutional Treaty, long before it was ratified and put in force. Yet, it was already applied for the establishment and composition of the Tribunal!

It is still too early to draw reliable conclusions as to the benefits of the functioning of the Tribunal, and the problems that may arise. It is perhaps even more early and risky to comment on the case law, as the jurisprudence of the Tribunal is now taking shape. It will require some time to assess whether the Tribunal has decided to follow the jurisprudential path waved by its predecessor in cases of employment disputes, the CFI, or it will break from the past, and develop its own, autonomous jurisprudence. It will also be interesting to assess to what extend the Tribunal will attempt to apply principles, practices and rules recognised by other administrative tribunals of international organisations, or if it will stay away from such judicial interactivity and remain largely within the confines of hardcore EU judicial

paradigms. One thing seems, however, to be certain: the justice system of the EU, its judicial system, is going through a period of significant change, which can give new impetus to the European integration project, especially through the “constitutionalisation” of the nature of the EU and the strengthening of its “state-like” existence.