CHAPTER III

A GLOBAL DUE PROCESS OF LAW?

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I. THE IMMATURITY OF INTERNATIONAL LAW?

ADMINISTRATION is becoming increasingly international. Regulatory regimes are being shifted from domestic authorities to global agencies. International organizations now enjoy regulatory, adjudicatory and dispute resolution powers. Their number is increasing (there were 123 international governmental organizations in 1951; 154 in 1960; 242 in 1971; 1039 in 1981; there are approximately 2000 now[1]). Their staff is growing (from 65,000 in the year 1970 to 100 – 120,000 in 1981 to 250.000 now[2]). Their influence is on the rise.

If a global administration is now well-established, is it also now subject to those special rules – the right to a hearing, the duty to give reasons, judicial review - that we call administrative law? Or, at this early stage, is the global administration still ruled by secrecy, informality and arbitrariness?

Hans Kelsen, writing in 1934, argued that "international law is a 'primitive' system, in that it lacks organs for creating and applying legal norms, and so has to rely on the members of the international

[1] S. Cassese, *Relations between International Organizations and National Administrations*, in International Institute of Administrative Sciences, XIXth International Congress of Administrative Sciences, *Proceeding*, Deventer, Kluwer, 1985, p. 165; Union of International Associations, *Yearbook of International Organizations*, Muenchen, Saur, 2005.

[2] S. Cassese, *Relations* cit., p.165; data for 2006 are author's estimate.

legal community to create norms and on individual states to enforce them"[3].

Kelsen's diagnosis has been echoed by three recent authors. The first has remarked upon the "continuing immaturity of international law in the failure of international organizations to provide the controls of the rule of law which are the mark of a mature legal order"[4]. The second has observed that an international organization "[….] operates [….] in something of a legal vacuum, within what is

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[3] H. Kelsen, *Introduction to the Problems of Legal Theory*, Oxford, Clarendon, 1992, chapter IX (translation of the *Reine Rechtslehre*, 1934), as summarised by D. Dyzenhaus, *Emerging from self-incurred immaturity*, paper presented at the NYU Law School, Globalization and its Discontents Colloquium, Spring, 2004 (*http://www.ilj.org*). Kelsen wrote: "*International law is still a primitive legal system, however, just at the beginning of a development that the state legal system has already completed. It is still marked by wide-ranging decentralization – at least in the field of general international law, and thus as it affects the entire international legal community. There are still no organs, whose respective functions reflect a division of labour, for creating and applying legal norms. The formation of general norms proceeds by way of custom or treaty, which is to say, by way of the members of the legal community themselves, and not by way of a special legislative organ. And the application of general norms to the concrete case proceeds in the same way. The state that considers its interests violated is to decide for itself whether there exists the material fact or an other state denies the claimed unlawful act, then, for want of an objective authority to settle the dispute in a legally regulated authorized to respond to the violator with a coercive act of general international law, that is, with reprisal or war. This self-help technique, which also served as the point of departure for the development of the state legal system, emphasizes the principles of collective and absolute liability over the principles of individual liability and liability for fault. The consequence of an unlawful act is not directed against the human being who, functioning as an organ of the individual state, intentionally or negligently brought about the material fact of the unlawful act. Rather, the consequence is directed against others, who took no part in the unlawful act and were unable to prevent it. Reprisals and war do not strike the state organs whose acts or forbearences, imputed to the state, count as violations of international law; reprisals and war strike either the mass of human beings making up "the people", or they strike a particular state organ, the army – in so far as it is possible, in modern warfare, to separate the army from the people at all.*", in H. Kelsen, *Introduction to the problems of legal theory*, A Translation of the First Edition of the *Reine Rechtslehre* or Pure Theory of Law, Clarendon Press, Oxford, 1992, p. 108 ff. See also H. Kelsen, *The Essence of International Law*, in K. W. Deutsch and S. Hoffmann (eds.), *The Relevance of International Law*, Cambridge, Mass., Schenkman, 1968, p. 87 ("International Law as a Primitive Legal Order")

[4] D. Dyzenhaus, cit. p. 2.

literally a lawless environment"[5]. The third has noted that globalization is the most dramatic assertion of the superiority of technocratic government, in contrast with the American, "enormous new apparatus of administrative law designed to maximize both the participation of interest groups in the bureaucratic policy-making process and the obligation of bureaucracies to make public every bit of their fact gathering, analysis, and public choice processes and to prove publicly their every claim of expertise". "Transnational or global governance [….] raises [….] serious problems for administrative law. Under this form of governance, decision-making processes are relatively new and tend to be elitist and opaque, with few participants and no agreed upon protocol. [….] Lack of defined participatory mechanisms lead to street demonstrations that demand additional places at the table, but there are as yet few seating plans or even table manners"[6].

An opposite point of view is that the regulatory dimension of international law has produced the emergence of global governance and that, among the hallmarks of the global governance, there is "international proceduralization and international insistence on domestic proceduralization"[7].

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[5] R. A. Gorman, *The Development of International Employment Law: my Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank*, in *Comp. Labor Law and Pol'y Journal*, 25, 2004, p. 633, p. 638.

[6] The two quotations are from two articles by M. Shapiro, *The Globalization of Law*, in *Global Legal Studies Journal*, I, 1993, pp. 45-47 and *Administrative Law Unbounded*, in *8 Indiana Journal of Global Legal Studies 369*, *2001*, pp. 374-375. See also D. Dyzenhaus, *The Rule of (Administrative) Law in International Law*, in *Law and Contemporary Problems*, Vol. 68, Summer-Autumn 2005, n. 3-4, p.127 ff.

[7] J. H. H. Weiler and I. Motoc, *Taking Democracy Seriously: The Normative Challenges to the International Legal System*, in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns-New Challenges for the International Legal Order*, Wien, Springer, 2003, pp. 68-69.

In this paper I shall not examine the entire problem of the development of the rule of law at the global level[8]. Instead, I shall focus only on one aspect of this problem: are mechanisms of procedural participation, that are taken for granted in domestic administrations, lacking in the global legal order? Are "notice and comment" rights in rule-making procedures and the "right to a hearing" in adjudicatory proceedings granted in the global arena?

The reason for this choice is that "[….] fair decision-making procedures have been very successful in gaining deference to decisions and to rules, authorities and institutions more generally"[9]. A fair procedure plays an important role in building social consensus. Process control or voice encourage people's cooperation with authorities and lead to legitimacy. Recognizing participatory rights in the global legal order may, therefore, increase international organizations' legitimacy.

This analysis will be divided into two parts. In Part I, I shall present a taxonomy of participatory rights and procedural rules. In Part II, I shall measure the maturity of participation rights in

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[8] See E. Denninger, *Lo Stato di diritto o "rule of law": che cosa è oggi?*, in A. Jellamo and F. Riccobono, *In ricordo di Vittorio Frosini*, Milano, Giuffrè, 2004, p. 74, where he raises the question of whether the rule of law ends with the end of the sovereignty of the nation State.

[9] T. R. Tyler, *Social Justice: Outcome and Procedure*, in *International Journal of Psychology*, 2000, 35, (2), p. 124. See also K. Murphy, *Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-*compliance, in *Journal of Law and Society*, Vol. 32, n. 4, December 2005, p. 562 ff. and N. Luhmann, *Legitimation durch Verfahren*, Frankfurt, Suhrkamp, 1983, II ed. (Italian translation *Procedimenti giuridici e legittimazione sociale*, Milano, Giuffrè, 1995): according to Luhmann, procedure is a means for neutralizing disappointment. An opposite point of view is that of L. H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, in *Yale Law Journal*, 1980, 89, p. 1063: "[….] *the constitutional theme of perfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete*".

the global administrative arena and compare global to domestic proceduralism.

II. THE MAZE OF GLOBAL PARTICIPATORY RIGHTS

"In domestic settings, the right of affected individuals to have their views and relevant information considered before a decision is taken is one of the classical elements of administrative law. Versions of such a principle are increasingly applied in global administrative governance [….][10]"

In domestic legal orders, participatory rights have a simple structure. For example, if an authority has to take decisions that affect large populations, the law may require that the interested parties be consulted and due consideration be given to their opinions. Or, if an authority has to apply sanctions to private individuals, the law may provide that the affected party be heard and due consideration be given to the hearing in deciding (and possibly that reasons be given with the decision).

In the global legal order, things are more complex. In the global regulatory process, participation can be granted to national authorities or to private individuals. Domestic authorities may make comments in global procedures or in the domestic procedures of another State. Private individuals may be heard both by their domestic authorities and by foreign national authorities. The right to a hearing may be granted both vertically (for example to a national government in conflict with an international organization) and

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[10] B. Kingsbury, N. Krisch, R. Stewart, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1 New York University School of Law, p. 24 (*http://www.iilj.org*, now in *Law and contemporary Problems*, 68, 2005, n. 3-4, p. 15 ff.)

horizontally (for example, to a domestic authority in conflict with a domestic authority of another State). National governments appear before and within international organizations both as a unit and as a disaggregated set of bodies. Relations are usually triadic (between the private party, the national government, the global institution), rather than dyadic. We are thus witnessing the growing complexity of participation in the global arena.

I will now examine the five main categories of participatory rights. In the first global rules impose participation on domestic administrations, for the benefit of private actors. These rules reinforce the participation otherwise provided by domestic rules, but also broaden its range, extending the right to be heard to foreign actors as well.

Second, global rules impose participatory rights upon global institutions, for the benefit of domestic administrations. In these cases, global organizations subject themselves to the rule of law. This works to the benefit national administrations, which come to play a more active role than their usual one, as a passive recipient of private parties' comments.

Third, global rules impose participatory rights upon domestic administrations, for the benefit of other domestic administrations. This obligation affects actors that formally stand on an equal footing.

Fourth, global rules grant participatory rights to global organizations vis-à-vis other global organizations.

Fifth, global rules grant participatory rights directly to private actors vis-à-vis global institutions.

1. Participation granted to private parties vis-à-vis domestic authorities.

First, global rules may provide for the participation of private parties in national decision-making.

For example, the Rio Declaration on environment and development (3 – 4 June 1992) has established, as Principle 10, that "*[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities* [….] *and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available*".

Subsequently, the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters[11] establishes the principle of "public participation" (Article 1.1). Furthering this principle, Article 6 provides that "*the public concerned shall be informed*" of an environmental decision-making procedure. The procedure must provide "*opportunities for the public to participate*", a public hearing with comments or questions, sufficient time for informing the public, early public participation, when all options are open and effective public participation can take place. In the decision due account is taken of the outcome of the public participation. The public authority has to "*make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based*".

Article 7 recognizes the right for the public to participate during the preparation of plans and programmes and of policies relating to the environment, while Article 8 establishes the right to "*effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding*

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[11] G. Handl, *International "Lawmaking" by Conferences of the Parties and Other Politically Mandated Bodies*, in R. Wolfrum-V. Röben (eds.), *Developments of International Law in Treaty Making*, Springer, Berlin, 2005, p. 135 ff. See, in general, K. Raustiala, *The "Participatory Revolution" in International Environmental Law*, in *Harvard Environmental Law Review*, Vol. 21, 1997, p. 537 ff.

rules that may have a significant effect on the environment". To this end, "*draft rules should be published or otherwise made publicly available and the public should be given the opportunity to comment, directly or through representative consultative bodies. The result of the public participation shall be taken into account as far as possible*".

A second example is the Code of Conduct for Responsible Fisheries, a voluntary agreement that serves as an "*instrument of reference to help States to establish or improve legal and institutional framework required for the exercise of responsible fisheries*" (Article 2). Article 6.13 provides that States, "*in accordance with appropriate procedures, should facilitate consultation and the effective participation of industry, fishworkers, environmental and other interested organizations in decision making with respect to the development of laws and policies related to fisheries management, development, international lending and aid*". According to Article 6. 6, States "*should ensure that fishers and fishfarmers are involved in the policy formulation and implementation process*". Article 7.1.2 provides that "*within areas under national jurisdiction, States should seek to identify relevant domestic parties having a legitimate interest in the use and management of fisheries resources and establish arrangements for consulting them to gain their collaboration in achieving responsible fisheries*". According to Article 7.1.6, "*[r]epresentatives from relevant organizations, both governmental and non-governmental, concerned with fisheries should be afforded the opportunity to take part in meetings of subregional and regional fisheries management organizations and arrangements* [….]. *Such representatives should be given timely access to the records and reports of such meetings, subject to the procedural rules on access to them*". Finally, Article 11.3.2 provides that "*States, in accordance with their national laws, should facilitate appropriate consultation with and participation of industry as well as environmental and consumer groups in the development and implementation of laws and regulations related to trade in fish and fishery products*"[12].

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[12] The Code has been followed by the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), another voluntary instrument. This provides that States encourage "*full participation of stakeholders in combating IUU fishing, including industry, fishing communities, and non-governmental organizations*" (Article 9. 1; see also Articles 25 and 83).

A third example is the Cartagena protocol on biosafety to the 2000 Montreal Convention on biological diversity[13]. Article 23, on public awareness and participation, provides that "*[t]he Parties shall: (a) Promote and facilitate public awareness, education and participation* […] and "*in accordance with their respective laws and regulations, consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public*".

A fourth example is that of World Trade Organization (WTO) Guidelines for arrangements on relations with non-governmental organizations (decision adopted by the General Council on 18 July 1996)[14]. This points to "*the special character of the WTO*". As it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings, "*[c]loser consultation and cooperation with NGOs can* [….] *be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making*".

A fifth example is the 1994 Agreement on implementation of article VI of the General Agreement on Tariffs and Trade (GATT). Article 6.1 provides that "*[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question*". Article 6.1.1 provides that "*evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation*". Article 6.1.3 states: "*[a]s soon as an investigation has been initiated, the authorities shall provide the full text of the written application received* […] *to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved*". Article 6.2 continues by saying: "*[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests*"[15].

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[13] M. Böckenförde, *Grüne Gentechnik und Welthandel*, Springer, Berlin, 2004.

[14] E. Benvenisti, *Public Choice and Global Administrative Law: Who's Afraid of Executive Discretion?*, Draft February 11, 2004, Paper presented at the NYU Law School Globalization and its Discontents Colloquium, Spring 2004 (*http://www.iilj.org*.).

[15] It continues, specifying that "t*o this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that*

A sixth example is provided by the World Bank Guidelines for joint staff assessment of a poverty reduction strategy, which require that the program called Heavily Indebted Poor Countries Initiative (HIPC), started in 1996, be based on participation. Civil society groups, women's groups, ethnic minorities, policy research institutes and academics, private sector trade unions, representatives of different regions of the country must be involved in the design of the strategy at the national level, in order to obtain concessional lending and debt relief[16].

Finally, the North American Agreement for Labor Cooperation (NAALC), which entered into force in 1994, established the Commission for Labor Cooperation. The Agreement provides (Article 5, para. 1) that "[*e*]*ach Party shall ensure that its administrative* [….] *proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each party shall*

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opposing views may be presented and rebuttal arguments offered [….]. *Interested parties shall also have the right, on justification, to present other information orally*". Article 6.3 states that "*[o]ral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2*" and Article 6.4 specifies that "*[t]he authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases* [….]". The following provisions regulate control of the accuracy of the information supplied by the interested parties and investigations carried out in order to verify the information provided or to obtain further details. Finally, according to Article 6.9, "*[t]he authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests*".
Article 6.11 of the Agreement states that "*[f]or the purposes of this Agreement, "interested parties" shall include: (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; (ii) the government of the exporting Member; and (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member. This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties*".

[16] See B. Dalle, *The Global Aspirations of the Aarhus Convention and the Case of the World Bank*, paper presented to the Second Global Administrative Law seminaer, Viterbo, 9-10 June 2006.

provide that: 1. such proceedings comply with due process of law; 2. any hearings in such proceedings are open to the public [….]*; 3. the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and 4. such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays*"[17]. This rule continues by requiring that national governments provide reasoned decisions (based on information or evidence in respect of which the parties were offered the opportunity to be heard) and judicial review by independent and impartial tribunals.

Though global norms do not determine the structure of the procedure, they might establish a global supervisory board to check national authorities' compliance with the global rules and to interpret their scope and application on a case by case basis. Even where the applicable global norms address only substantive areas and not procedure, supervisory bodies have created procedural rights to ensure the vindication of substantive rights. In these cases, global rules guarantee participation in national decision-making processes, under the control of global regulators. This is a variant of the first type, as global rules require States to guarantee participation, but also require international institutions to supervise and control the participation granted at the national level.

The WTO Agreement on Safeguards, Article 3, provides that "*a member may apply a safeguard measure only following an investigation by the competent authorities of that member pursuant to procedures previously established and made public in consonance with article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of*

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[17] The Agreement has established "*a process whereby citizens, groups, or governments can raise questions of labor law enforcement in all three member countries. The Commission, through a network of National Administrative Offices in each country, coordinates the submission process, which can, in some cases, directly result in initiation of the government-to-government dispute settlement mechanism*" (U.S. General Accounting Office, *NAFTA – U.S. Experience With Environment, Labor, and Investment Dispute Settlement Cases*, GAO-01-933, July 2001, p. 4

other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law".

Article 13 of the Agreement on Safeguards establishes a Committee on Safeguards for the oversight of the agreement's implementation. This Committee has "*to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods*". According to Article 12 of this Agreement, a Member must notify the Committee upon initiating an investigation, before taking a provisional safeguard measure and upon taking a decision, and provide the Committee with all pertinent information.

In this case, participation is granted by global rules to private parties before national authorities. Private parties may be nationals of the State in which participation takes place, or nationals of another State. Participation has the task of providing the parties with the possibility of defending their interests.

There are however cases in which the principle of fairness is not imposed on national governments by global rules, but is instead determined by a global court.

Article 73. 2 of the United Nations Convention on the Law of the Sea provides that "*arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security*". The International Tribunal of the Law of the Sea, in the "Juno trader" case of December 18, 2004[18], decided that "*[t]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other*

[18] *http://www.itlos.org/case_documents/2004/document_en_249.pdf.*

financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision"[19]. In a separate opinion, Judge Treves wrote: [….] *the essential fact seems to me to be that between the time of arrest of the ship and the time of the application to the Tribunal* [….] *all domestic procedures held in the case [….] inaudita altera parte* [….]". In fact, "*confiscation [had been] obtained in violation of due process*" and "*fines [had been] imposed without procedural guarantees*".

Finally, global procedural norms have been extended to non-governmental bodies.

A first example is provided by the Programme for the Endorsement of Forest Certification (PEFC) Rules for Standard Setting. Article 3.5 regulates the participatory process for the standard setting process for forest certification in the following manner: "*3.5.1 [t]he process of development of certification criteria shall be initiated by national forest owners' organisations or national forestry sector organisations having the support of the major forest owners' organisations in that country. All relevant interested parties will be invited to participate in this process. Their views will be documented and considered in an open and transparent way. A Forum (e.g., committee, council, working group) shall be created to which interested parties are invited to participate in the process* [….][20]*.3.5.2 The start of the standard setting process shall be communicated to the public. Information on the development process shall be distributed and discussed and final draft standards shall be available to all interested parties, e.g. by posting it on the Internet. 3.5.3 The final draft standards are sent out for formal national consultation process. Consulta-*

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[19] Paragraph 77.

[20] Article 3.5.1 continues by saying: "*[t]he invited parties should represent the different aspects of sustainable forest management and include, e.g. forest owners, forest industry, environmental and social non-governmental organisations, trade unions, retailers and other relevant organisations at national or sub-national level. Participation in the Forum shall be organised according to its respective consensus–building procedures which should provide for balanced representation of interest categories such as producers, buyers, consumers, etc. The interested parties' participation and views will be documented and considered in an open and transparent way. Formal approval of standards shall be based on evidence of consensus. The Forum shall define its own written procedures based on the consensus principle which governs the methods used for standards development. Copies of the procedures shall be made available to interested parties upon request. Such written procedures shall contain an appeal mechanism for the impartial handling of any substantive and procedural complaints*".

tion shall ensure that the views of interested parties are discussed. The Forum shall give general information on the changes made as the result of a consultation process. [….]"[21].

A second example is that of the International Organization of Securities Commission's (IOSCO) Objectives and Principles of Securities Regulation[22]. Article 6.5, on *Clear and consistent regulatory processes* provides that "*in exercising its powers and discharging its functions, the regulator should adopt processes which are: [….] transparent to the public; fair and equitable. In the formulation of policy, the regulator should: have a process for consultation with the public including those who may be affected by the policy; publicly disclose its policies in important operational areas; observe standards of procedural fairness;[….]. Many regulators have authority to publish reports on the outcome of investigations or inquiries, particularly where publication would provide useful guidance to market participants and their advisers. Any publication of a report must be consistent with the rights of an individual to a fair hearing [….]*".

A third example is that of the World Anti-Doping Agency (WADA) Code (World Anti-Doping Code). This sets forth rules and principles that are to be followed by all anti-doping organizations, understood as all organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority (the International Olympic Committee, the International Para-olympic Committee, international federations, major event organizations, and national anti-doping organizations)[23].

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[21] A similar rule is established by Article 4. 3, which sets standards for chain of custody certification. See E. Meidinger, *The Administrative Law of Private/Public Global Forestry Regulation*, Paper presented at the NYU Law School Conference on Global Administrative Law (2005), now in *European Journal of International Law*, 2006, Vol. 17, n. 1, p. 47 ff., pp. 82-83. See also C. Segall, *The Forestry Crisis as a Crisis of the Rule of Law*, in *Stanford Law Review*, Vol. 58, March 2006, p. 1539 ff. and M. Howlett and J. Rayner, *Globalization and Governance Capacity: Explaining Divergence in National Forest Programs as Instances of "Next-Generation" Regulation in Canada and Europe*, in *Governance*, Vol. 19, n. 2, April 2006. p. 251 ff.

[22] D. Zaring, *Informal Procedure, Hard and Soft, in International Administration*, IILJ Working Paper 2004/6, Global Administrative Law Series, NYU, pp. 14, 19-20 and 24-27 (*http://www.iilj.org*).

[23] Notice that, in this case, global procedural norms also include international bodies.

Article 8, on the "right to a fair hearing", provides that "*each anti-doping organization with responsibility for results management shall provide a hearing process for any person who is asserted to have committed an anti-doping rule violation. Such hearing process shall address whether an anti-doping violation was committed and, if so, the appropriate consequences. The hearing process shall respect the following principles: a timely hearing; fair and impartial hearing body; the right to be represented by counsel at the person's own expense; the right to be fairly and timely informed of the asserted anti-doping rule violation; the right to respond to the asserted anti-doping rule violation and resulting consequences; the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body's discretion to accept testimony by telephone or written submission); the person's right to an interpreter at the hearing, with the hearing body to determine the identity, and responsibility for the cost, of the interpreter; and a timely, written, reasoned decision*". The violation leads to disqualification and the decision is subject to appeal (Articles 9 and 13)[24].

As mentioned above, these global rules are enacted by private global organizations, like the PEFC, or by semi-public global organizations, like the IOSCO and WADA (which bring together domestic public authorities). These rules are imposed from above upon the national authorities or organizations identified by the global rule; they operate vertically or diagonally, granting the right to be heard to nationals and to foreigners. The right to participate has the purpose of ensuring consultation or guaranteeing the right to a fair hearing[25].

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[24] M. S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, in 106 *Dickinson Law Review*, 523, spec. p. 544 on the clash between US and civil law notion of due process and pp. 557-558 on procedural rules; A. Van Vaerenbergh, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-Doping Regime*, IILJ Working Papers 2005/11, New York University Law School, spec. pp. 15, 30 and 38 (*http://www.iilj.org*).

[25] One type of participatory right is granted to private parties before national agencies which act in the global arena. This type has two peculiarities: participatory rights are not provided for by global rules, but by national law; private parties participate in national proceedings, but these proceedings serve global decision-making processes.

Let us analyze and compare the above examples.

The participatory rights of private parties before domestic authorities vary noticeably . These rights are provided by global law, and may be exercised in many different *fora*: in informal procedures aimed at ensuring civic participation in policy formation (exemplified by the WTO Guidelines on the relations with non-governmental organizations and the World Bank Guidelines for the assessments of poverty reduction strategies); in rule-making procedures (exemplified by the Code of Conduct for Responsible Fisheries or securities regulation); in procedures leading to administrative measures, like

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The United States Code, Chapter 13, Subchapter II, Paragraph 2578, Notice of United States participation in international standard-setting activities, provides that "*(a) [t]he President shall designate an agency to be responsible for informing the public of the sanitary and phytosanitary standard-setting activities of each international standard-setting organization. (b) Not later than June 1 of each year, the agency designated under subsection (a) of this section with respect to each international standard-setting organization shall publish notice in the Federal Register of the information specified in subsection (c) of this section with respect to that organization. [….] (c) The information to be provided in the notice under subsection (b) of this section is (1) the sanitary or phytosanitary standards under consideration or planned for consideration by that organization; (2) for each sanitary or phytosanitary standard specified in paragraph (1) a description of the consideration or planned consideration of the standard; whether the United States is participating or plans to participate in the consideration of the standard; the agenda for the United States participation, if any; and the agency responsible for representing the United States with respect to the standards. (d) The agency specified in subsection (c) (2) (d) of this section shall provide an opportunity for public comment with respect to the standards for which the agency is responsible and shall take the comments into account in participating in the consideration of the standards and in proposing matters to be considered by the organization*".

Paragraph 2578a provides that "*[i]f the Commissioner proposes to issue a determination of the equivalency of a sanitary or phytosanitary measure of a foreign country to a sanitary of phytosanitary measure of a foreign country to a sanitary or phytosanitary measure of the Food and Drug Administration that is not required to be promulgated as a rule under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] or other statute administered by the Food and Drug Administration, the Commissioner shall publish a notice in the Federal Register that identifies the basis for the determination that the measure provides at least the same level of sanitary or phytosanitary protection as the comparable Federal sanitary of phytosanitary measure. The Commissioner shall provide opportunity for interested persons to comment on the notice. The Commissioner shall not issue a final determination on the issue of equivalency without taking into account the comments received*".

environmental impact assessment, the transfer, handling or use of living modified organisms, trade safeguard measures, forest certification, disqualification for doping and labour law enforcement in North America; and in dispute settlement proceedings (for example, the anti-dumping investigation).

In each of these cases, participation rights are mandated by global rules only some of which are binding. These rules are imposed upon national legal orders from above, and thus create a vertical opening, in the sense that they oblige domestic authorities to hear private parties. They reinforce the national rules providing for participation in the domestic realm. But they also go beyond domestic rules, which generally grant participatory rights only to nationals. The global rules, by contrast, require domestic authorities to hear foreign parties as well.

The participatory rights examined here also manifest an incredible diversity of structures.

The right to participation in proceedings before public authorities, or semi-public bodies, and even private bodies may be granted. Examples of this can be seen in the areas of forest certification, securities regulation and anti-doping measures. Only in the last case is a hearing before an impartial hearing body required.

The procedure for such participation is not fully determined by the global rules. This is because these global rules guarantee participation in proceedings before national authorities, and global actors do not want or need to unduly interfere with domestic authorities' jurisdiction; the same can be said for the specification of the private parties entitled to participate, the provisions on access to records, the kind of participation envisaged (to make comments or attend meetings) and the obligation to take the comments made by the parties into due consideration.

The right to participation is granted to affected parties, concerned citizens or interested organizations. In some areas, like fisheries, parties are more specifically defined as parties having a legitimate interest in the use and management of fisheries resources. In other areas, notably the WTO anti-dumping and safeguard measures, foreign parties can participate and parties can respond to other parties' statements.

To make participation possible, some global rules guarantee access to the information, or the right to be informed, or they require authorities to give notice or disclose policies. Such guarantees can be seen in the areas of environmental assessment, fisheries regulation, WTO anti-dumping and safeguard measures, forest certification, securities regulation, and the anti-doping disqualification.

Global rules do however address the time and form of participation. Environmental proceedings must assure early public participation and anti-doping hearings are required to be timely. Participation may be oral or written. Participation rights may be exercised in hearings or meetings. Parties may appear with or without counsel (see the cases of fisheries regulation, WTO anti-dumping and safeguard measures, forest certification, securities regulation, and anti-doping measures).

The authorities' obligation to take the points of view expressed in consultation proceedings into account is specified only in the areas of the environment, NGO consultation and in the proceedings for labour law enforcement in the North American system. A reasoned decision is required only in the cases of the environment, WTO safeguard measures, anti-doping disqualification and North American labour law enforcement procedures. The duty to publicize decisions is established only in the cases of the environment, living modified organisms procedures and North American labour law enforcement.

Moving from the structure of participation to its function, one can observe four main goals of participation. Participation may have the purpose of involving civil society in the (public or private) decision-making process (for example, in environmental matters and in securities regulation proceedings); or it may aim at encouraging private cooperation with governmental and intergovernmental action (like in the case of responsible fisheries); participation may have the job of promoting civic trust (like in the case of living modified organisms); it may play the same role as the right of defence in a judicial process (this is illustrated by the WTO anti-dumping and safeguard measures, the anti-doping disqualification, and North American labour law enforcement).

Why do global organizations take measures to provide for participation in domestic matters, before national agencies? One can distinguish three main reasons.

One reason is a need to harmonize not only goods, services and tariffs, but also procedures. This leads the rules and practices followed in many countries to be codified at the global level. The scope of these rules thus becomes wider, because they are imposed upon multiple national governments. This is the case of participation in environmental matters, in the proceedings for forest certification, in securities regulatory processes and in the anti-doping procedures.

The obligation of national governments to hear private parties is established at the global level, in another set of cases, in order to promote the collaboration of domestic private parties in implementing global policies, because national agencies act in accordance with such policies. This is the case of the Code of Conduct for Responsible Fisheries, of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, of the WTO Guidelines for

arrangements in relations with non-governmental organizations, of the HIPC Programme of the World Bank[26].

Thirdly, participation is provided at the global level because it involves foreign actors, who would not otherwise have a right to a hearing under domestic law. In the cases of anti-dumping investigation, of measures of safeguards, of the UNCLOS, as interpreted in the Juno Trader decision of the International Tribunal of the Law of the Sea, global law was needed to impose on States the obligation to provide a hearing to somebody who did not enjoy the right to a hearing under domestic law.

In these cases, national rules either grant participation to nationals, but not to foreigners (and therefore global norms widen their scope), or they fail to ensure participation at all (and global norms make it available to everybody, but foreign actors have a special interest in making use of it).

2. Participation granted to national governments vis-à-vis global organizations

A second type of participation is that granted to national governments in global decision-making processes. Like the previous type of participation discussed above, this too is vertically oriented.

The first example is that of the International Convention for the Regulation of Whaling[27]. This Convention includes a Schedule, which is an integral part of the Convention. The Schedule can be amended. Article V.3 provides that amendments shall be notified by the Commission to each of the

[26] Notice that, according to the WTO document already quoted, the WTO is both a treaty establishing rights and obligations and a forum for negotiations.

[27] G. Handl, cit., p. 133 ff.

Contracting Governments. If any Government presents to the Commission objection to any amendment, the amendment shall not become effective with respect to any of the Governments and any other Government may present objection to the amendment. The amendment shall become effective with respect to all Governments which have not presented objection [28].

A second example is that of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer as adjusted and amended by the second Meeting of the Parties (1997)[29]. Article 2. 9 provides that proposals for adjustments and reductions of production or consumption of the controlled substances "*shall be communicated to the Parties by the Secretariat at least six months before the meeting of the Parties at which they are proposed for adoption*"[30].

A third example is that of the Procedures for the Elaboration of Codex Alimentarius Standards and Related Texts. Part I on the "Uniform procedure for the elaboration of codex standards and related texts" provides two consultations with Members of the Commission (i.e. Member Nations and Associate Members of the Food and Agriculture Organization (FAO) and World

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[28] Article V. 3 provides that "*[e]ach of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, which ever date shall be later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals*"..

[29] G. Ulfstein, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements*, in R. Wolfrum-V. Röben, cit., p. 147 ff.

[30] It continues by saying: "[i]*n taking such decisions, the Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement reached, such decisions shall, as a last resort, be adopted by a two-thirds majority vote of the Parties present and voting representing at least fifty per cent of the total consumption of the controlled substances of the Parties*".

Health Organization (WHO))[31]. The first has to do with the proposed draft standard. This is "*sent to Members of the Commission and interested international organizations for comment* [….].*(4) The comments received are sent by the Secretariat to the subsidiary body or other body concerned which has the power to consider such comments and to amend the proposed draft standard. (5) The proposed draft standard is submitted through the Secretariat to the Commission or to the Executive Committee with a view to its adoption as a draft standard. In taking any decision at this step, the Commission or the Executive Committee will give due consideration to any comments that may be submitted by any of its Members regarding the implications which the proposed draft standard or any provisions thereof may have for their economic interests.*[….] *(6) The draft standard is sent by the Secretariat to all Members and interested international organizations for comment on all aspects, including possible implications of the draft standard for their economic interests. (7) The comments received are sent by the Secretariat to the subsidiary body or other body concerned, which has the power to consider such comments and amend the draft standard. (8) The draft standard is submitted through the Secretariat to the Commission together with any written proposals received from Members and interested international organizations for amendments at Step 8 with a view to its adoption as a Codex standard.*[….]". A similar two-step consultation procedure is followed, according to Part II, for the "uniform accelerated procedure for the elaboration of codex standards and related texts".

A fourth example is that of the Operational Guidelines for the Implementation of the World Heritage Convention established by the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage[32]. These Guidelines provide for the participation of the State Parties in the process for the inscription of properties on the world heritage list. For this purpose, Articles 149 and 150 provide that "*[t]*he Advisory Bodies are requested to forward to States Parties [….] any final question or request for information that they may have after the examination of their evaluation. The concerned States Parties are invited to send [….] a letter to

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[31] S. Suppan, *Consumers International's Decision-Making in the Global Market Codex Briefing Paper*, August 2004, p. 11ff. (*http://www.tradeobservatory.org/library.cfm?RefID=36988*); M. Savino, *The Role of Transnational Committees in the European and Global Order*, paper presented at the University of Viterbo, Global Administrative Law Seminar, June 10-11, 2005.

[32] L. Boisson de Chazournes, *Treaty Law-Making and Non-Treaty Law-Making : The Evolving Structure of the International Legal Order*, in R. Wolfrum-V. Röben, cit., p. 473 ff.

the Chairperson, with copies to the Advisory Bodies, detailing the factual errors they might have identified in the evaluation of their nomination made by the Advisory Bodies [….]". The dialogue between global institutions and States continues in the following way, regulated by Articles 159 and 169: "[n]ominations which the Committee decides *to refer* back to the State Party for additional information may be resubmitted to the following Committee session for examination. The additional information shall be submitted to the Secretariat [….]. The Secretariat will immediately transmit it to the relevant Advisory Bodies for evaluation.[….] The Committee may decide *to defer* a nomination for more in-depth assessment or study, or a substantial revision by the State Party.[….] These nominations will then be revaluated by the relevant Advisory Bodies [….]". Articles 183, 184 and 196 provide that corrective measures and the deletion of properties shall be made in consultation with the State Party.

A fifth example is that of the International Labour Organization (ILO). Article 26 of the ILO Constitution provides that "*[a]ny of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles. 2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry,[….] communicate with the government in question[….]. 3. If the Gover ning Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon*"[33].

The Members are required to place at the disposal of the Commission of Inquiry all the information in their possession which bears upon the subject-matter of the complaint (Article 27). According to Article 28, "*[w]hen the Commission of Inquiry has fully considered the complaint it shall prepare a report*

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[33] Article 26 continues by saying: "*4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference. 5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question*".

embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken".

Finally, Article 29 provides that "*[t]he Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published. 2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice*". The International Court of Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry[34].

A sixth example is the Financial Action Task Force on money laundering (FATF). Paragraph 11 ("Review process") of the "Annual Review of Non-Cooperative Countries or Territories", 20 June 2003 states that "*[t]he jurisdictions to be reviewed were informed of the work to be carried out by the FATF. The reviews involved gathering the relevant information, including laws and regulations, as well as any mutual evaluation reports, related progress reports and self-assessment surveys, where these were available. This information was then analysed against the twenty-five criteria and a draft report was prepared and sent to the jurisdictions for comment. In some cases, the reviewed jurisdictions were asked to answer specific questions designed to seek additional information and clarification. Each reviewed jurisdiction provided their comments on their respective draft reports. These comments and the draft reports themselves were discussed between the FATF and the jurisdictions concerned during a series of face-to-face meetings. Subsequently, the draft reports were discussed and adopted by the FATF Plenaries*"[35].

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[34] See A. C. L. Davies, *Global Administrative Law at the International Labour Organization: the Problem of Softer Standards*, Paper presented at the NYU Law School Colloquium on Global Administrative Law, April 2005, p. 3 ff. (*http://www.iilj.org*), also on the recourse to soft law as a means of withholding participation rights.

[35] Additional information on the procedure were provided by the previous "Report on Non-Cooperative Countries and Territories", 14 February 2000: "*[t]he FATF and its members can implement focussed efforts, country by country, to convince non-cooperative jurisdictions to improve legislation and domestic practices and to participate actively in international co-operation. These efforts could take the form of a dialogue, in conjunction with the relevant*

A seventh example is the North American Agreement for Labor Cooperation (NAALC). Articles 23-27 of this Treaty provide that, if a dispute between national governments is not resolved through "cooperative consultations", an "Evaluations Committee of Experts" may be established. This Committee "*may invite written submissions from the Parties and the public*". It "*may consider, in preparing its report, any information provided by* [....] *the National Administrative Authority of each Party, organizations institutions and persons with relevant expertise, and the public*". Finally, "[e]*ach Party shall have a reasonable opportunity to review and comment on information that the Evaluation Committee of Experts receives and to make written submissions to the Evaluation Committee*" (Article 24, paras. 4 – 6).

Let us now compare these examples with the examples of participatory rights in the relations between private parties and national authorities, examined above.

Here the participating party is not a private individual or organization, but the State (though the NAALC also allows for submissions from the public).

Participation is granted in treaty-making and in rule-making procedures (as in the case of amendments to the International Convention for the Regulation of Whaling Schedule and in the case of the adjustment and reduction of production of substances that deplete the ozone), in standard setting proceedings (like in those of

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FATF-style regional body or appropriate international organisation/body, with the identified jurisdictions in order to check that their situation has been estimated correctly and to establish whether improvements are already being undertaken. The dialogue could be pursued by a letter from the FATF President to the concerned government explaining the purpose of the FATF's work in this area once the consolidated list of non-cooperative jurisdictions has been established. This dialogue should prompt them to amend their laws and change their practices. To do so, they could be helped through advice and technical co-operation by FATF, its members, a FATF-style regional body, or an appropriate international organisation/body to implement the necessary changes. Specific actions could also be taken by other multi-lateral fora (e.g., the G-7, the OECD, the Basle Committee, IOSCO and the International Financial Institutions) to seek the issuance of public statements or other appropriate action [....]".

the Codex Alimentarius Commission), in policy-making procedures (like in those of the North American Agreement for Labor Cooperation-NAALC), in adjudication proceedings (as in the process for the inscription on the world heritage list or in the review processes of the Financial Action Task Force) and in dispute settlement procedures (as for the evaluation of complaints before the ILO).

These proceedings are more loosely structured here than in the previous case. This may be due to the fact that national governments are parties to the global institutions and can therefore influence them from within.

There are three features common to both cases. The participation of national governments in global institutions is established by global rules, imposed from above (though in the FATF case there are no rules, just a practice). There is a provision for notification or communication. Objections or comments by the States are envisaged (in the case of the North American Agreement for Labor Cooperation, there can be a cross-examination, as parties can review and comment on the information received by the Committee. Only in the cases of food standards and labour complaints do global norms require that objections or comments be taken into due consideration).

Some of these procedures are complex. Participation is serial, as in the case of the objections to amendments to the International Convention for the Regulation of Whaling Schedule and also for the nominations for the inscription of properties in the world heritage list. Participation is doubled in a two-step consultation procedure, as in the case of the Codex Alimentarius Commission Standards.

Decision-making falls under the jurisdiction of the executive body of the global organization, or it may be conferred upon a separate body (like in the case of the Commission of Inquiry

which reports to the Governing Body of the ILO on complaints by Members).

Global rules' imposition of a right to participate upon domestic agencies is much less important than requiring global institutions to let the national governments participate in the global decision-making process. The first type is well known in domestic legal orders, while the second has a precedent in the federal and regional States and in supra-national governments (like the European Union), where there are participation procedures for including States in federal or supra-national decision-making.

I shall finally address the same question raised at the end of the previous paragraph: why is participation provided by global rules? For this second type of participation, one can consider three kinds of reasons.

Participation is required by global law because it is a part of the negotiation process that characterizes the international arena. Participation is another way to ensure cooperation among States in establishing rules or amending treaties. This is the case of the regulation of whaling and regulation of the substances that deplete the ozone layer. States have participatory rights because they are political principals in international decision-making and they are parties to a treaty that is implemented by an international organization. This kind of participation does not really fall into the field that I am examining, because participation is here a treaty amending power. States establish participatory rights in order to mutually guarantee the power to amend agreements. This kind of participation is no different from the participation of lower levels of government (municipal or regional) in the decisions of the higher levels of government (regional or central) in national administrations.

Secondly, the participation of national authorities at the global level is necessary for integrating domestic authorities into the global decision-making process and promoting the collaboration of national agencies in global decision-making (as in the case of the process for the inscription of properties on the world heritage list). This is not a separate level of government, but is made up of a global and a multinational component (as in the case of the Codex Alimentarius Commission standard setting process).

Finally, participation is granted at the global level in order to provide the right to a hearing to a government which has been the subject of a complaint filed by another government for not having observed a Convention (as in the case of the ILO) or a "review" of a global organization (as in the case of non-cooperative countries for money laundering).

3. Participation granted to national governments (and to interested parties) vis-à-vis other national governments

In the global legal order participatory rights do not operate only vertically (private parties are heard by the State; States are heard by global organizations), but also horizontally (national governments are heard by other national governments; global institutions participate in the decision-making process of other global institutions). I shall now discuss the first of these two types of participatory rights.

The first example is the General Agreement on Trade in Services (GATS). Article VI. 4 provides that "*[w]ith a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may estab-*

lish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia: (a)based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service".

As an example of the implementation of such rule, one can consider the WTO "Disciplines on domestic regulation for the accountancy sector". These have a chapter on transparency that provides: "*[m]embers shall make publicly available, including through the enquiry and contact points[….], the names and addresses of competent authorities (i.e. governmental or non-governmental entities responsible for the licensing of professionals or firms, or accounting regulations). Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points: (a) where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards; (b) requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance; (c) information on technical standards; (d) and, upon request, confirmation that a particular professional or firm is licensed to practise within their jurisdiction. Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives as referred to in paragraph 2. When introducing measures which significantly affect trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption. […]*".

A second example is that of the Agreement on the application of sanitary and phytosanitary measures. Article 7, on transparency, establishes that "*[m]embers shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B*". Annex B, on "Transparency of sanitary and phytosanitary regulations" regulates the notification procedures in the following manner: "*[w]henever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall: (a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation; (b) notify other Members, through the Secretariat, of the*

products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account; (c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations; (d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account [….]"[36].

A third example is provided by the Agreement on Technical Barriers to Trade (TBT). Article 2.9 provides a regulation similar to that of Annex B, on the "Transparency of sanitary and phytosanitary regulations"[37].

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[36] Annex B continues by stating: "*9. The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them. 10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex*". The WTO document on "How to apply the transparency provisions of the SPS agreement", n. 72 – 74, explains how to deal with comments from others: "*[a] prime purpose of notifying proposed regulations is to allow countries that might be affected by them to be consulted during the drafting process. Government authorities that have notified proposed regulations might receive comments on such regulations. Comments will either go to the notification authority or any other address specified in the final box of the notification form. [….] The notification authority should establish good working relationships with relevant agencies, and documented administrative procedures to ensure this happens. When other countries make comments on a notified SPS measure, the country notifying has certain obligations to meet. The country receiving comments should, without further request: (i) acknowledge the receipt of such comments; (ii) explain within a reasonable period of time, and at the earliest possible date before the adoption of the measure, to any Member from which it has received comments, how it will take these comments into account and, where appropriate, provide additional relevant information on the proposed sanitary or phytosanitary regulations concerned; (iii) provide to any Member from which it has received comments, a copy of the corresponding sanitary or phytosanitary regulations as adopted or information that no corresponding sanitary or phytosanitary regulations will be adopted for the time being; (iv) where possible make available to other countries comments and questions it has received and answers it has provided, preferably through electronic facilities*".

[37] Article 2.9 provides that "*[w]henever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall: 2.9.1 publish a notice in a publication at an early appropri-*

A fourth example is that of the "Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal" (adopted by the Conference of the Plenipotentiaries on 22 March 1989)[38]. Article 6, on the transboundary movement between Parties, provides: "1. *[t]he State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes.[….] 2. The State of import shall respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. A copy of the final response of the State of import shall be sent to the competent authorities of the States concerned which are Parties. 3. The State of export shall not allow the generator or exporter to commence the transboundary movement until it has received written confirmation that: (a) The notifier has received the written consent of the State of import; and (b) the notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question. 4. Each State of transit which is a Party shall promptly acknowledge to the notifier receipt of the notification. It may subsequently respond to the notifier in writing, within 60 days, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information"*[39].

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ate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation; 2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account; 2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards; 2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account".

[38] G. Handl, cit., p. 131 ff.

[39] Article 6 continues by stating: "[*t]he State of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit. However, if at any time a Party decides not to require prior written consent, either generally or under specific conditions, for transit transboundary movements of hazardous wastes or other wastes, or modifies its requirements in this respect, it shall forthwith inform the other Parties of its decision pursuant to Article 13. In this latter case, if no response is received by the State of export within 60 days of*

A fifth example is that of the Principles for Food Import and Export Inspection and Certification System of the Codex Alimentarius Commission. Articles 14, 15, 16 and 17 on transparency provide: "14. *[….][t]he principles and operations of food inspection and certification systems should be open to scrutiny by consumers and their representative organizations, and other interested parties. 15. Importing countries should provide information on existing requirements and proposed changes to requirements should be published and[….] an adequate time period permitted for comment. The views of exporting countries [….] should be taken into account in taking a final decision. A reasonable period should be allowed before a new requirement takes effect in order to permit exporting countries, and in particular developing countries, to make necessary changes to methods of production and control measures. 16. Importing countries should make available to the exporting countries, upon request, timely advice as to the basis of the decision they have taken regarding the compliance of foods with their relevant requirements. 17. Upon request by the competent authorities of the importing countries, the exporting countries should provide access to view and assess the actual working of their relevant inspection and certification systems*".

Another example is that of the Code of Conduct for Responsible Fisheries. Article 11. 3. 4 provides that "*[w]hen a State introduces changes to its legal requirements affecting trade in fish and fishery products with other States, sufficient information and time should be given to allow the States and producers affected to introduce, as appropriate, the changes needed in their processes and procedures. In this connection, consultation with affected States on the time frame for implementation of the changes would be desirable. Due consideration should be given to requests from developing countries for temporary derogations from obligations*".

A seventh example is provided by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994. Article 5. 5 provides: "[….] *after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned*". The above-mentioned Article 6.1.3 states that, after an investigation has been initiated, the authorities shall provide the full text of the written application to the known exporters and to

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the receipt of a given notification by the State of transit, the State of export may allow the export to proceed through the State of transit. [….]"

the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved[40].

The eighth example is from the WTO Agreement on Safeguards. Article 12. 3 provides: "*[a] Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8*".

The last example is from the General Agreement on Tariffs and Trade (GATT) 1994 itself[41]. Article XIX of such agreement regulates emergency action on imports of particular products. Paragraph 2 provides that "*[b]efore any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the contracting parties as far in advance as may practicable and shall afford the contracting parties and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action*". The treaty provides for an agreement. If the agreement is not reached, the affected parties can suspend equivalent concessions[42].

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[40] Article 6.11 states: "*[f]or the purposes of this Agreement, "interested parties" shall include: (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; (ii) the government of the exporting Member; and (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member. This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties*".

[41] Article X. 3 a. of the 1994 GATT provides that "*[e]ach Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations and decisions and rulings [….]*" and requires that Members maintain or institute judicial, arbitral or administrative tribunals or procedures to ensure prompt review and correction of administrative action.

[42] On the basis of this provision the Appellate Body of the WTO has decided that the certifications envisaged by Section 609 of the United States Public Law 101-162: […] *consist principally of administrative ex parte inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the*

Horizontal linkages among States, established by global rules, are as dense as the vertical linkages between States and global organizations. Global governance is not made up only of global institutions. It is also made up of multinational and transnational

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certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance ore rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)[…]. *The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, vis-à-vis those Members which are granted certification. The provisions of Article X:3 of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the "laws, regulations, judicial decisions and administrative rulings of general application" described in Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension pro hac vice of the treaty rights of other Members. It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons of the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994*", WTO Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products (AB-1998-4) (WT/DS58/AB/R) 12 October 1998, nn. 180-183. See also WTO Appellate Body, United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (AB-1996-3) (WT/DS24/AB/R) 10 February 1997, para. IV; WTO Appellate Body, Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (AB-2000-12) (WT/DS122/AB/R) 12 March 2001, paras. 98-112; WTO Appellate Body, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India Recourse to Article 21.5 of the DSU by India (AB-2003-1) (WT/DS141/AB/RW) 8 April 2003, paras. 101-146. G. della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, in *European Public Law*, Vol. 9, Issue 4, December 2003, p. 574.

processes. They open national governments up to each other and increase the dialogue between nations.

But horizontally-operating participatory rights also have an additional vertical effect. National governments' compliance with participatory requirements is often monitored by global authorities (like the Council for Trade in Services or the WTO Secretariat). Therefore, the structure is not purely horizontal, as it involves both vertical and horizontal elements.

This kind of participation occurs in rule-making (like in the GATS, SPS and TBT and responsible fisheries cases), adjudicating (as in the trans-boundary movements of hazardous wastes, food inspections, WTO safeguard measures and GATT emergency actions) and quasi-judicial (as in the case regulated by the Agreement on implementation of Article VI of the GATT 1994) procedures.

The duty to grant participation rights falls upon national governments, and the parties that participate are also national governments. Only in some cases, such as the TBT Agreement, the Codex Alimentarius Commission Export Inspection and Certification System, and the Agreement on the Implementation of Article VI of the GATT 1994 can private parties also participate. Participation rights are extended to private economic actors in a similar way as in the first set of cases examined, where global norms oblige national governments to hear private parties. In these cases, domestic governments play a double role: they are participants, but they also protect the interests of private actors.

Global norms require national governments to provide information, or publish notices, or notify parties and some of them also introduce timeliness requirements, such as that information must be given at an early stage or that governments must give sufficient

or adequate time (exemplified by the SPS and TBT Agreements, food inspection and fisheries regulation).

Information is required in order to allow for comments (and the SPS and TBT Agreements require that comments be made in writing) from the States (or other interested parties).

Finally, four norms (GATS, SPS, TBT, and Codex) require the addressee government to give consideration to the comments received or take them into account.

When participation provided by global norms is put under global control, the relations established are not purely horizontal, but triangular, involving both horizontal (national government-to-national government) and vertical (national governments-global institution) links.

Why does global law oblige national governments to hear other national governments? First of all, in order to ensure an exchange of information and the reciprocal adaptation of national rules and conducts, as in the case of the Code of Conduct for Responsible Fisheries.

A second reason is in order to establish not only an exchange of information, but also a process of self-harmonization among States, as in the cases of the GATS, the SPS Agreement, the TBT Agreement, and the Food Import and Export Inspection and Certification System.

The third reason is to promote multinational cooperation, as in the case of transboundary movements of hazardous wastes, antidumping procedures and safeguards measures.

4. Participation granted to global institutions before another global institution

A second type of horizontal participatory rights are those rights granted to global institutions vis-à-vis another global institution.

The first example is the United Nations Environment Programme (UNEP). Rule 10 of the Rules of Procedure of the UNEP Governing Council regulates agenda setting: "*[a]fter the Governing Council has considered the provisional agenda for the following session, the provisional agenda, incorporating any amendments made by the Governing Council, shall be communicated by the Executive Director to all States Members of the United Nations or members of the specialized agencies and of the International Atomic Energy Agency, the Chairmen of subsidiary organs of the Governing Council as appropriate, the President of the General Assembly when the Assembly is in session, the President of the Economic and Social Council, the appropriate United Nations bodies, the specialized agencies, the International Atomic Energy, the intergovernmental organizations referred to in rule 68 below and the international non-governmental organizations referred to in rule 69 below*".

A second example is that of the already mentioned Codex Alimentarius Commission's standard-setting procedure. The "Uniform procedure for the elaboration of Codex standards and related texts" (Part 1 of the "Procedures for the Elaboration of Codex Standards and Related Texts") provides that both the "proposed draft standard" and the "draft standards" are sent not only to members of the Commission, but also to "interested international organizations". These organizations may make comments on all aspects and the "subsidiary body" of the Commission (see Rule IX of the "Rules of procedure of the Codex Alimentarius Commission"), usually a Committee, "*has the power to consider such comments*".

In the cases discussed above, participation is granted in agenda-setting and standard-setting proceedings. Other interested global institutions are entitled to participate. The usual procedure of communication-comments-consideration applies.

Why do global rules require participation in these cases? Global law is made up of sectoral regimes. But these regimes are interconnected. A global institution may be member of the governing board of another global institution, or it may – as we are concerned with here – enjoy the right to participate in certain decision-making processes of another global body. Global rules granting participatory rights to a global organization vis-à-vis another global organization establish a line of communication between global regulatory regimes.

This function does not differ from the function of inter-agency consultation and participation procedures in place in national governments. It creates relationships between different authorities and promotes their cooperation.

5. Participation granted to private parties before global institutions

I now turn to the most important part of the picture, participatory rights that private parties may exercise directly before global organizations.

Participation of private parties in domestic procedures (1) is well known, as the relevant rights are usually established by domestic legislation. Participation of national governments in global institutions (2) is also a widespread phenomenon. Participation of national governments in foreign governments' decision-making (3) is also common, as bilateral or multilateral agreements open up national legal systems vis-à-vis foreign ones. The peculiarity of the first, in this case, lies in the fact that it is provided by global rules. Therefore, the duty to hear is imposed on the State. The peculiarity of the second and third cases is that here State participation in the global organization does not occur at a "constitutional" level, but at

an "administrative" level. It is not participation in the "legislative" process, but participation in the "administrative" process.

What is entirely new is the participation of national civil society in the global decision-making process. This undermines the traditional view of the State as the only global actor: participation in global decision-making is no longer only for the province of national governments.

The participation of national civil society in global institutions is the result of the increasing global regulation of private actors: the more that international organizations establish standards for private actors, the more that these actors seek to participate to global standard setting processes[43].

The first example is informal consultation with the financial industry by the Basel Committee on Banking Supervision (BCBS), established by the central-bank Governors of the Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, United Kingdom and United States) at the end of 1974[44]. The "Introduction" to the document on the "Application of Basel II to Trading Activities and the Treatment of Double Default Effects"(July 2005) states: "*[i]n releasing the Revised Framework [….], the BCBS re-iterated its intention to maintain its active dialogue with the industry to ensure that the new framework keeps pace with, and can be applied to, ongoing developments in the financial services sector* [….]. *Given the interest of both banks and securities firms in the potential solutions to these particular issues, the BCBS has worked jointly with the International Organization of Securities Commissions (IOSCO) to consult with industry representatives and other supervisors on these matters.* [….] *The BCBS released a first version of this proposal[….] for consultation purposes. Thirty-seven comments have been provided by banks, investment firms, industry associations, supervisory authorities, and other interested institutions. [….] The BCBS and IOSCO worked*

[43] See S. Cassese, *Global Standards for National Administrative Procedure*, in *Law and Contemporary Problems*, Vol. 68, Summer/Autumn 2005, no. 3 & 4, p. 109

[44] D. Zaring, cit., p. 7-8.

diligently, in close cooperation with representatives of the industry, to reflect their comments in the present paper"[45].

A second example is the World Trade Organization's (WTO) 23 July 1996 "Guidelines for arrangements on relations with non-governmental organizations", which states: "*1.Under Article V:2 of the Marrakesh Agreement establishing the WTO "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO". 2.In deciding on these guidelines for arrangements on relations with non-governmental organizations, Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs. 3.To contribute to achieve greater transparency Members will ensure more information about WTO activities in particular by making available documents[….]. To enhance this process the Secretariat will make available on on-line computer network the material which is accessible to the public, including derestricted documents. 4.The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO*".

A third example is the Commission for Environmental Cooperation (CEC), established by the North American Agreement on Environmental Cooperation (1993)[46]. The Commission is comprised of a council, a Secre-

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[45] See also M.S. Barr and G.P. Miller, *Global Administrative Law: the View from Basel*, in *European Journal of International Law*, 17, 2006, n. 1, pp. 17, 24 ss., 45.

[46] On this treaty, D. L. Markell, *The North American Commission for Environmental Cooperation after Ten Years: Lessons about Institutional Structure and Public Participation in Governance*; J. H. Knox, *Separated at Birth: The North American Agreement on Labor and the Environment*; K.Raustiala, *Police Patrols and Fire Alarms in the NAAEC*; C. Wold, L. Ritchie, D. Scott, and M. Clark, *The Inadequacy of the Citizen Submission Process of Articles !4 and 15 of the North American Agreement on Environmental Cooperation*, in *Loyola of Los Angeles International and Comparative Law Review*, Vol. 26, 2004, pp. 341 ff., 359 ff., 389 ff., 415 ff.; T. Yang, *The Effectiveness of the Nafta Environmental Side Agreement's Citizen Submission Process:*

tariat and a "Joint Public Advisory Committee (JPAC)" (Article 8. 2). This Committee has adopted "Public Consultation Guidelines", where one can read: "*[….] JPAC has been charged by the Council to reach out to the public that is interested in and affected by the work of the Commission*[47]*. Invitations to the public to participate in a consultation have a stated purpose, such as to: establish a policy or directive; assist in the preparation of the program of the CEC; obtain views in the context of a specific project; and address a specific issue or set of issues. Information, consultation and participation are different activities engaged by JPAC. The majority of events may be in the nature of a consultation or in gathering information, or both. A consultation is the preferred means of contributing to the decision-making progress on the subject at hand. In addition, JPAC from time to time may consult or seek information or the participation of experts, specific groups and individuals on any relevant issues or projects, and may assist the Secretariat to organize the public input for diverse activities*"[48].

The principles for consultation embodied in the Guidelines are: "*[….] consultation meetings will generally provide: information to participants on the purpose and objectives of the meeting; opportunity for participants to express individual views without interruption or contradiction; opportunity to build on views expressed and, whenever possible, to discuss and reach conclusions, consensus or recommendations; and opportunity for the participants to engage in open-ended discussion (generally at the conclusion of the meeting). To achieve these objectives, the Commit-*

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a Case Study of Metales y Derivados, in *University of Colorado Law Review*, Vol. 76, 2005, p. 443 ff.; D. L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submission Process*, in *North Carolina Journal of International Law and Commercial Regulation*, Vol. 30, 2005, p. 759 ff.

[47] The Guidelines continue by stating: "*1. The purpose of the public consultations is to comply with the provision of the North American Agreement on Environmental Cooperation (NAAEC) which charges JPAC to "[...] provide advice to the Council on any matter within the scope of this Agreement, including on any documents provided to it under paragraph 6, and on the implementation and further elaboration of this Agreement." In addition, "JPAC may provide relevant technical, scientific or other information to the Secretariat.""*

[48] Goals are established by the "Public Consultation Guidelines" in the following manner: "*[a]s to consultations, this event should have as an outcome to provide to the Commission: sense of the concerns, priorities and aspirations of the participants; information to shape the policies and programs of the CEC; and whenever possible, specific recommendations and proposals; and to provide to the participants: a forum to interact constructively and make progress towards solutions and actions; and feedback on the results of the consultation and how advice received was taken into account*".

tee should be guided by the following principles: a) Recognize the difference between information, participation and consultation activities. b) Provide a clearly-stated purpose and outcome. c) Any event that is a consultation should include opportunity for: every participant to express his/her views clearly and succinctly, orally and/or in writing, on the issue at hand; exchange between participants and JPAC and between participants themselves; and feedback from JPAC on information received and steps to follow".

As for the structure of consultation, the Guidelines provide that consultation meetings will be structured along the following lines: "*advance notification; introduction and information; early break-up into work groups or roundtables; at the beginning of each of the smaller group meetings, opportunity for each participant to make a presentation; and a closing plenary session to provide opportunity for workshop reports and recommendations, for short, open discussion between participants and JPAC members*".

A fourth example is again the North American Agreement on Environmental Cooperation, which provides that "[t]*he Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law*" (Article 14. 1). The submission must be written, provide sufficient information and be aimed at promoting enforcement. The Secretariat may forward the submission to the domestic authorities, decide that the submission warrants developing a factual record and submit the factual record to the Council. Any Party may provide comments on the accuracy of the draft factual record. The Council may make the final factual record available (Articles 14 and 15)[49].

A fifth example is the above-mentioned North American Agreement for Labor Cooperation (NAALC), which provides for public submissions to the Evaluation Committees of Experts and empowers these Committees to consider such submissions (Article 24, paras. 4 and 5).

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[49] "[T]*he agreement provides citizens and nongovernmental organizations an opportunity to raise questions about and shed light on a Party government's effective enforcement of its environmental laws through the submission process*": U.S. General Accounting Office, *U. S. Experience*, cit., p. 9

A sixth example is the "Code of Conduct for Responsible Fisheries". As already noted, this provides for consultation and effective participation by States. But it also requires consultation and participation by global institutions. Article 1. 2 states that "*[t]he Code is global in scope, and is directed toward members and non-members of FAO, fishing entities, subregional, regional and global organizations, whether governmental or non-governmental, and all persons concerned with the conservation of fishery resources and management and development of fisheries, such as fishers, those engaged in processing and marketing of fish and fishery products and other users of the aquatic environment in relation to fisheries*".

A seventh example is provided by the Constitution of a global private organization, the International Accounting Standards Committee Foundation (IASCF). Article 31 establishes that the IASB (International Accounting Standards Board), in order to prepare and issue standards, shall "*(b) publish an Exposure Draft on all projects and normally publish a discussion document for public comment on major projects;[….] (d) (i) establish procedures for reviewing comments made within a reasonable period on documents published for comment;[….] (e) consider holding public hearings to discuss proposed standards, although there is no requirement to hold public hearings for every project;[….] (g) give reasons if it does not follow any of the non-mandatory procedures set out in (b), (d)(ii), d(iv), (e) and (f)*". According to these provisions, accounting standards are developed through an "international due process" that involves financial analysts, users of financial statements, the business community, domestic regulatory agencies and academics[50].

An eighth example is provided by Article 34 of the 1970 Patent Cooperation Treaty. This regulates the Procedure before the International Preliminary Examining Authority: " *….](2) (a) The applicant shall have a right to communicate orally and in writing with the International Preliminary Examining*

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[50] See IASCF, *Review of the Constitution – Proposals for Change*, November 2004, p. 34, n. 107 on the "significance of appropriate due process and consultative arrangements" and p. 35, n. 112 on the "comply or explain requirement". Annex to Appendix C explains the steps of due process at p. 72, no. 7. See W.Mattli and T.Buethe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, in *Law and Contemporary Problems*, 68, 2005, Summer-Autumn, n. 3-4, p. 242 and D. Livshiz, *Holding Professionals Accountable: The Challenge of Privatized International Standard Setting in Accounting and Architecture Service Sectors*, paper presented to the Second Global Administrative Law Seminar, Viterbo, 9-10 June 2006.

Authority. [….] (c) The applicant shall receive at least one written opinion from the International Preliminary Examining Authority [….]. (d) The applicant may respond to the written opinion [….]". Article 34 goes on to specify rules for the restriction of the claims.

A ninth example can be found in the International Labour Organization (ILO) Constitution, Article 24. This provides that "*[i]n the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit*". Article 25 then states: "*[i]f no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it*".

A tenth example is that of the Internet Corporation for Assigned Names and Numbers (ICANN) Bylaws[51]. Article III, section 6 of these Bylaws provides for a notice and comment procedure on policy actions. With respect to any policies that substantially affect third parties, ICANN shall "*provide public notice*" and "*a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments*". Where the policy action affects public policy concerns, the opinion of the Governmental Advisory Committee must be requested. Subsequently, ICANN shall provide "reconsideration" by a "Reconsideration Committee" and "independent review" by an "Independent Review Panel".

Finally, the above-mentioned World Anti-Doping Code has established the right to a fair hearing before each anti-doping organization. As a consequence, this right is guaranteed to the affected parties not only before national anti-doping organizations, but also before the International Olympic Committee, the International Para-olympic Committee and the International Federations (see Introduction to the Code and Article 8).

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[51] As amended, effective 28 February 2006 (*http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm*)

It is important to mention that private parties' participation in global decision-making procedures may also be the result of State action. The Convention on access to information, public participation in decision-making and access to justice in environmental matters (25 June 1998), Article 3. 7, provides that "*[e]ach Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment*".

The United States Code, title 19, Chapter 22, Subchapter I, Paragraph 3536: Increased transparency states: "*[t]he Trade Representative shall seek the adoption by the Ministerial Conference and General Council of procedures that will ensure broader application of the principle of transparency and clarification of the costs and benefits of trade policy actions, through the observance of open and equitable procedures in trade matters by the Ministerial Conference and the General Council, and by the dispute settlement panels and the Appellate Body under the Dispute Settlement Understanding*".

The examination of these cases shows that private participation in global decision-making is both *de facto* (as in the case of the Basel Committee) and *de jure* (in the remaining cases)[52].

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[52] A different set of cases involves the participation of global organizations' employees in global decision-making (it is mostly devoted to this subject C. de Cooker (ed.), *Accountability, Investigation and Due Process in International Organizations*, Leiden, Martinus Nijhoff, 2005). Here we see the participation of private parties, which do not represent civil society.
Let us take the example of Conditions of service applicable to the staff of the WTO Secretariat (decision adopted by the General Council on 16 October 1998). Regulation 12. 2 provides that "*[i]n disputes relating to their conditions of service, staff members have the right to due process, as set out in the Staff Rules*". Rule 105. 2 of the Staff Rules provides that the staff member and the supervisor shall conduct an annual review of the staff member's performance and accomplishments and that the staff member "*may provide written comments on the assessment*". Rule 113.2, on the disciplinary procedure, provides that the Director-General shall notify the staff member and a "joint advisory body" in writing of the proposal to apply a disciplinary measure and of the grounds for such action. "*The staff member may provide the body with written observations on the proposal* [….]; *the body shall hear the staff member* [….] *and shall call such other witnesses as it or the parties may wish to hear, and report to the Director-general with written observations on the report* [….]. *The decision of the Director-general on the proposed disciplinary measure shall be notified to the staff member* […..].

Participation in global decision-making processes granted by global rules is – as noted – the most important step towards introducing direct links between civil society and global institutions. This may explain why this type of participation is regulated in a somewhat vague and ambiguous manner.

This type of participation has the following peculiarities. It may be exercised in policy formulation proceedings (as in the cases of NGO participation before the WTO, ICANN, or the NAALC), in regulatory procedures (as in the BCBS and the fisheries cases), in standard setting proceedings (as is the case for accounting standards), in procedures aimed at enforcing global standards in domestic jurisdictions (like in the context of the North American environmental standards), in adjudication proceedings (as in the cases of

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What if the global rules fail to guarantee the right to a hearing? This is illustrated by the Skandera case, decided by the World Bank Administrative Tribunal on June 5, 1981 (No. 2). The World Bank Administrative Tribunal held (at paragraphs 28 and 29) that "[….] *[n]otice of termination should communicate to the affected staff member the true reasons for the Bank's decision. It is in the interest of the Bank that the employment of qualified employees not be terminated on the basis of inadequate facts or ill-founded justifications, and one way to assure this is to furnish the staff member at the time of termination with a specific and true assessment which will provide a fair opportunity to the individual to dispute, and possibly to seek rectification of the decision of the Bank. The prompt communication of reasons for termination will also facilitate the preparation and presentation of appeals and other remedies provided in the Bank's dispute-resolution procedure. By failing[….] to inform Mr. Skandera accurately of the reasons for the termination of his appointment, the Bank impaired his ability to protect his interests. Although prompt and candid disclosure of reasons might well not have affected the Tribunal's decision regarding the propriety of the termination, Mr. Skandera was delayed by four months in dealing in an informed manner with the Bank's action*" (On this case, see R. A. Gorman, *The Development*, cit., pp. 439-440). Is has been noticed that "*[….] never in subsequent cases has there been any ultimate disagreement as to the more precise components of due process discipline cases – such elements as notice to the staff member of alleged malfeasance, an opportunity to respond, a fair investigation, some measure of confrontation with accusers, prompt delivery of any investigatory report on which discipline will be based, and so forth. The Bank's own published rules set forth many of these elements of due process, but the Tribunal has not been shy about supplying a good number that are unwritten. There is thus a common answer to the question "what is fair treatment?" that transcends cultural differences*" (R. A. Gorman, cit., p. 440).

patents, labour standards and anti-doping). In the case of the CEC, consultation is provided for in policy formulation, the preparation of programmes and also in specific projects and issues.

Participation is granted before public and semi-public bodies (like the Basel Committee, the IASCF, and ICANN) or before *ad hoc* bodies, like the JPAC. It is open to private parties (interested or affected persons, concerned industry, NGO representatives), but also to domestic agencies (as in the case of BCBS, where other supervisors can participate) and national governments (as in the case of "representations" to the ILO, where national governments play the role of respondents).

Global norms provide for consultation, cooperation, submissions, participation, and for ancillary obligations on the part of the institution, like making available information or documents (as in the cases of the WTO and CEC).

Participants may respond or make comments (as in the cases of BCBS, accounting standards, patent examination, environmental and labour standards in North America), view the comments of others (like in the case of ICANN), hold meetings or symposia (as the WTO does with NGOs and also in the case of the CEC) or public hearings (to discuss, for example, accounting standards).

National governments may provide comments or responses to the report prepared by the global authority following the parties' submissions, as in the cases of labour and environmental standards in North America. In the cases of the BCBS and the IASB, national governments are obliged to consider or review the comments received. In the case of ICANN, the opinion of the Governmental Advisory Committee must be requested. A triangular relationship between private party-global institution-national government is therefore established.

Only in the case of IASB is there an obligation to give reasons, while in the case of ICANN, there is a duty to reply to the interested parties' comments .

Participation of private parties at the global level is granted for two main reasons.

The first is to promote consultation. As mentioned above, the Basel Committee consulted the regulated industry in order "to ensure that the new framework keeps pace with, and can be applied to, ongoing developments in the financial services sector". WTO Secretariat interaction with NGOs is provided in order to "contribute to accuracy and richness of the public debate". The JPAC provides "relevant technical, scientific or other information" to the CEC Secretariat and contributes to the decision-making process through consultation. The same purpose is furthered by the consultation by global organizations in the field of fisheries, by the IASB for accounting standards and by the North American Commissions for Environmental Cooperation and for Labor Cooperation.

The second purpose for granting participation is to promote the right to a hearing. This may be exercised by a patent claimant in the international preliminary examination, by a State accused of having failed to observe an ILO Convention, by third parties affected by ICANN policies, or by persons accused of having violated an anti-doping rule (or by a WTO international civil servant).

III. A GLOBAL DUE PROCESS?

"[….] [A]s supranational organizations take on more of an autonomous decision-making role and face more controversial issues, they tend to develop better governance structures"[53]. The more global institutions expand their role as regulators, the more that global administrative law matures.

The development of a global law is still questioned by those who regard the supra-state as an "acephalous world", the product of negotiated understanding. Thus they argue that "*we should be very cautious in representing what are essentially negotiated orders at the regional and global level as legal orders while they remain significantly different from those at the level of the state*"[54]. But this view associates law exclusively with the State (according to Roberts,"[….] *some of these expansive moves to represent law at present as beyond the state, even as having nothing to do with governing, leave us with a diminishing sense of what law is*[55]"), while we have long observed that where there is society, there is law.

This analysis has shown that participation in the global law is multi-faceted. We can observe this by looking at who has the right to participate, which levels of government must grant participation, and which decision-making processes must allow participation.

The parties entitled to participate are private individuals or groups, national governments and global organizations. Participation is granted at the national level to both domestic and foreign

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[53] D. C. Esty, *Toward Good Global Governance: The Role of Administrative Law*, paper presented to the NYU Law School Global Administrative Law Conference, 2005.

[54] S. Roberts, *After Government? On representing Law Without the State*, in *Modern Law Review*, Vol. 68, January 2005, no. 1, p. 23.

[55] S. Roberts, op. cit., p. 3.

governmental bodies, as well as at the global level. Procedures in which participation is granted are law-making, regulatory, adjudicatory and dispute settlement procedures.

Global norms require that both domestic administrations and global institutions respect due process principles. In both cases, governments and/or private parties are entitled to participate: the domestic-international divide is preserved in the first case, and is overcome in the second.

Participatory rights granted at the global level are more intertwined, as compared to the same rights in national systems. In the WTO system, for instance, global rules requiring States to hear private parties are reinforced by other global rules requiring States to hear foreign States as well. In many regulatory regimes, there is continuity between participation and negotiation, and participation may act as a surrogate for negotiation.

This also produces some ambiguity, as it is difficult to distinguish between participation rights granted to national governments as political principals in international negotiations and participation rights like those exercised by private parties before administrative regulatory authorities.

Secondly, participatory rights have a wider application in global law than in domestic law: participatory rights are granted by private governance regimes that mirror administrative law principles.

Thirdly, participatory rights in the global legal system are always multi-polar, while in domestic law they tend to be dyadic. In the global arena there are many more conflicting interests than in the domestic domain. As the rule of law requires giving these interests a say, the parties in the global administrative proceeding are neces-

sarily numerous. They do not represent only private interests, but also public interests, both national and supra-national.

1. The maturity of global administrative law

How mature is global administrative law? Are its principles well developed or are they in a primitive stage of growth? Is global proceduralism thus similar to domestic proceduralism? To what extent are participatory rights in the global law different from domestic participatory rights? Do participatory rights in the global arena follow the same path as domestic law participatory rights do? Do these procedures embody administrative law principles as traditionally understood, or just principles of good governance?

This analysis[56] has shown that participation in the global administrative arena is not precisely defined; it is loosely structured and not always enforceable by a court.

Participatory rights at the global level have a somewhat rudimentary structure. While in domestic legal systems both notice and comment procedures (i.e. participation in rule-making processes) and hearing procedures (i.e. participation in adjudicatory proceedings) are subject to detailed analytical rules, in the global legal system they are only summarily regulated.

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[56] More examples of participatory rights in UN Economic and Social Council, Economic Commission for Europe, *Survey of selected access to information, public participation, and access to justice rules and practices in international forums*, MP.PP/2002/18/Add.1 CEP/2002/13/Add. 1 12 September 2002 and B. Morgan, *Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law*, in *European Journal of International Law*, 17, 2006, n. 1, pp. 226-228. See also C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, in *European Journal of International Law*, 17, 2006, n. 1, p. 207: "*a universal set of administrative law principles, difficult in any event to identify, is neither welcome nor particularly desirable: diversity and pluralism are greatly to be preferred*".

In the global legal system, participatory rights are more or less structured depending on the sector or area. Their regulation is most developed in areas like environmental protection, sports, trade and Internet governance, because of the particular complexity of global regulation and the need to level the playing field.

Another reason why participatory rights are less rudimentary in certain areas is because of the need to grant participation to foreign actors in domestic legal systems. The global legal system has both a vertical dimension (global institutions are superimposed on domestic institutions) and a horizontal one (domestic legal orders are obliged to open up to each other). In the latter dimension, it is crucial to give foreign actors a say vis-à-vis domestic authorities.

Moreover, while participation in the domestic legal order is just one element of a larger body of law, requiring transparency (in order to let participants know the administrative decision being prepared), a reasoned decision (in order to allow the participant know if its point of view has been taken into account) and judicial review (to make the administrative agency respect procedural requirements), transparency, reasoned decision and judicial review requirements are unknown in some of the regulatory regimes of the global legal system. In others, they are at a rudimentary stage of development. One can thus question whether participation alone, without transparency, a requirement to motivate decisions and judicial review, can be likened to the domestic due process of law.

The lines between participation and consultation, participation and negotiation, participation and cooperation are not clear. Participation is granted in order to establish links between civil society and national governments, national governments and global institutions, national governments and other national governments, global institutions and other global organizations, and between civil soci-

ety and global institutions. But these links are usually established without introducing a precise balance of powers.

The rights of individual participants and the authorities' duties to ensure participation are not well defined. Rights and obligations are more loosely defined in adjudication procedures, while they are better structured in rule-making procedures, due to the central role of rule-making in the global arena. Participation rights and duties are more detailed when addressed to national governments, and less detailed when referred to private actors, due to the persistent centrality of States in the global legal order.

As mentioned above, global agencies are not always required to give reasons: in these cases, the targets of global decisions can participate in the decision-making process, they are not entitled to know the grounds upon which the decision has been based.

In very few cases, participation rights may be enforced by a court empowered to review administrative decisions, and void those taken without consulting or hearing private parties.

Global proceduralism is thus at an elementary stage of development. We can conclude that the rule of law is not fully developed in the global legal system.

The other side of the coin is that global procedures are required more often than domestic procedures to be based on scientific evidence, independent evaluation and deliberative democracy. Being newer than their national equivalents and more removed from politics, global procedures can more easily be subjected to such rules. Moreover, the interaction between global and domestic norms produces at least two consequences. First, when global norms are added to national ones, there is a reciprocal interpenetration and

reinforcement[57]. Second, the more that global norms on participation are imposed on national administrations, the more that global institutions are themselves obliged to comply with due process requirements.

In conclusion, global participatory rights are not comparable to participation rights in national legal systems, but they are no longer at a primitive stage of development. One can foresee that they will make progress with judicial enforcement at the global level, as courts will come to play a threefold role. They will enforce existing rules. They will expand them into new areas. They will develop more general principles, not bound to individual regulatory regimes and more generally applicable.

2. How global is global administrative law?

The global legal order is full of rules prescribing participatory rights. But how global is global due process? In spite of the great number of rules providing for participation, participation is far from being a global principle, because the global law is made up of many different, separate and self-contained regimes: each regime has its own due process principle, not every one grants participatory rights and there is a lack of overarching principles, that can be applied to all regulatory regimes.

The European Union Court of First Instance has recently stated that "[...] *it appears that no mandatory rule of public international law requires prior hearing for the persons concerned in circumstances such as those of this case, in which the Security Council, acting under Title VII of the Charter of the United States, decides, through its Sanctions Commit-*

[57] M. S. Barr and G. F. Miller, *Global Administrative Law* cit., p. 46.

tee, that the funds of certain individuals or entities suspected of contributing to the funding of terrorism must be frozen"[58]. As a consequence, no right to a hearing has been granted to the affected parties on the ground that global law provides neither a general "principle of defence", nor a specific right to be heard when the UN Sanctions Committee orders private funds to be frozen.

There are strong asymmetries among the many different participatory rights granted at the global level. Therefore, the many rules examined have a cumulative effect, but do not establish a general principle in the global legal order.

Although the global legal order consists of the sum of many self-contained regulatory regimes, and participatory rights are not granted everywhere and in general terms, on the other hand, two forces push toward the generalization of participatory rights.

First, participation in the global arena is becoming a "human right"[59] and thus a universal principle. There is a tension between the limited scope of each regulatory regime providing for participa-

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[58] Judgement of the Court of First Instance (Second Chamber, Extended Composition), 21 September 2005, in Case T-306/01, para. 307. See also Case T-49/04, 12 July 2006.

[59] B. S. Chimni, *Global Administrative Law: Winners and Losers*, paper presented at the NYU Law School Colloquium on Global Administrative Law, April 2005. See also R. P. Peerenboom, *Human Rights and Rule of Law: What's the* Relationship, UCLA School of Law, UCLA Public Law Series, year 2005, Paper 5-21. One good example is Article 6 of the European Convention on Human Rights. This provides a right of defence in judicial procedures. The Strasbourg Court is widening this provision, by submitting some national administrative procedures to the participation requirement as well. See N. Mole and C. Harby, *The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights*, Strasbourg, Council of Europe, 2001, p. 10; P. Craig, *The Human Rights Act, Article 6 and Procedural Rights*, in *Public law*, 2003, IV, Winter, p. 753 and Jacobs and White, *The European Convention on Human Rights*, C. Ovey and R. White, Oxford, OUP, 2002, p. 139 ff.

tion and participation conceived as a human right, and therefore as becoming universally applicable.

Second, there is a powerful spill-over effect from one arena to another[60]: principles designed for one regulatory regime pass into other regulatory regimes, in part because of the strong connections among these regimes (for example, the connecting regimes of "trade and").

But participatory rights in the global legal order ultimately reveal a fundamental weakness. In the many different regulatory regimes making up the global governance, the right to participate in the decision-making process is granted only when prescribed by a specific rule. The right to a hearing and notice and comment procedures are not as well-established in the global legal system as in national ones. The reason for this weakness is the insufficient development of the global judiciary, because only courts can make these principles generally applicable.

3. What is the purpose of participation in the global legal order?

The functions or justifications of participation in the global legal order are not easy to analyze. As the different participation rights are loosely defined and structured, it is difficult to classify their highly diverse functions. In addition, their functions differ depending on the institutional context and nature of the right in question. Finally, participation rights often serve many purposes. It is therefore only possible to mention the prevailing functions.

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[60] G. Silverstein, *Globalization and the rule of law: "A machine that runs of itself?"*, in *International Journal of Constitutional Law*, I, 2003, n. 3, p. 428.

It has a legitimacy-building function. Global regulatory agencies are like a self-contained machine; but through participation, civil society can get closer.

Global institutions, as they are established by national governments or by other global organizations, need to link themselves to civil society, in order to get the information, the support, the consensus and the cooperation required to govern.

National governments themselves need more participation rights. They delegate powers to global institutions, but mechanisms of vertical accountability (for example, budgetary controls) are inadequate checks on them. National governments also need to be able to intervene in individual decision-making processes. Moreover, national governments' controls "*need to be supplemented by an increase in horizontal accountability, that is, by an increase in the influence of the addressees of global regulation. This can be carried out by making regulators more transparent and by forcing them to publicly justify rules*"[61].

This legitimizing function makes participation desirable to proponents of cosmopolitan democracy: "[….] *we will need to develop a concept of transnational democracy better equipped to take the legacy of traditional rule of law-virtues seriously*"[62].

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[61] D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, in *Governance*, Vol. 18, 2005, no. 4, October, pp. 621 – 622.

[62] W. E. Scheuerman, *Cosmopolitan Democracy and the Rule of Law*, in *Ratio Juris*, Vol. 15, no. 4, December 2002, p. 454. See also D. Archibugi, *Democrazia cosmopolitica: una prospettiva partecipante*, in *Rivista italiana di scienza politica*, A. XXXV, n. 2, agosto 2005, pp. 261-288, but esp. p.279. On the relations between democracy and rule of law, in general, J. Habermas, *Il nesso interno tra Stato di diritto e democrazia*, in J. Habermas, *L'inclusione dell'altro. Studi di teoria politica*, Milano, Feltrinelli, 1988, pp. 249 – 259 and J. M. Maravall and A. Przeworski (eds.), *Democracy and the Rule of Law*, Cambride University Press, 2003.

Participation in the global law has a second function: ensuring State involvement in global governance, furthering compliance with global decisions and fostering a horizontal dialogue between States. Participation integrates domestic authorities into the global decision-making process, and provides national and sub-national interests with a forum, in order to guarantee them a degree of protection. It serves, in this case, a corporatist function, because is a means for exchanging information and establishing networks, as in the "interest representation model"[63].

The third prevailing function of participation in the global legal system is familiar to us from domestic legal systems: furthering the right of defence. The right to a hearing prior to a decision provides national governments or private actors with an opportunity to present their views and protect their interests.

Finally, participation as organized discussion and negotiation (a hallmark of the international legal order) is expanding in a piecemeal fashion. The global law is based on reciprocity. Therefore, each State cannot avoid providing due process to foreign States and nationals, if it wants to benefit from the same principle.

There is a link between function and structure. If the purpose of participation is to provide legitimacy or interest representation, the parties included in the procedure will be "all interested parties" (as in the case of environmental protection). If the purpose is to provide a defence, parties will be only the affected persons (as in the case of the anti-doping procedures).

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[63] R. B. Stewart, *The Reformation of American Administrative Law*, in *Harvard Law Review*, Vol. 88, June 1975, number 8, p. 1667 ff. and R. B. Stewart, *U. S. Administrative Law: A Model for Global Administrative Law?*, in *Law and Contemporary Problems*, 2005, 68, n. 3, Summer 2005, p. 55 ff.

4. Participation at the global and the domestic levels

What if more participation is provided at the national level than at the global one? Allocation of regulatory power to the global level withholds participation rights from domestic stakeholders and poses therefore potential legitimacy problems[64]. The growth of global regulation can "marginalize opportunities for public participation"[65].

To solve this problem, different strategies can be employed. The first is to develop participation rights at the global level. The second is to enable interested parties to participate in the national government decision-making processes necessary for participating in global organizations. The third is the participation of public interest organizations in the official delegations to the meetings[66]. In the first case, umbrella organizations are established in order to bring the concerns of their constituencies to the attention of global regulators[67]. An example of the second case is the United States law that requires public participation in the formulation of United States negotiating priorities in multilateral negotiations. Costs are the main limitations upon the third strategy.

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[64] D. Livshiz, *Updating American Administrative Law: WTO, International Standards, Domestic Implementation, and Public Participation*, in *Wisconsin International Law Journal*, 2006 (forthcoming), p. 7, argues that participation ought to be available both domestically and internationally. See also S. S. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, in 54 *Administrative Law Review 2002*, p. 435, but especially p. 449, on the preclusion of effective citizen participation because of globalization.

[65] D. Livshiz, cit., p. 31.

[66] D. Livshiz, cit., pp. 33-34.

[67] For example, the Trans Atlantic Consumer Dialogue (TACD) and the Trans Atlantic Business Dialogue (TABD): see D. Livshiz, cit., p. 45 ff.

In conclusion, legal globalization cannot be reduced to a process of Americanization[68]. Global legalism – or at least global participation – accomplishes many functions: requiring reluctant national governments to respect the right to be heard; giving national governments a voice in global organizations; opening up communication between States and between global institutions, compelling them to listen, if not to cooperate; and, only at the end, giving civil society a voice vis-à-vis international organizations. Civil society or interest groups' participation in the executive decision-making process is the dominant but not exclusive feature of the American experience[69].

IV. THE VALUE OF PARTICIPATION IN THE GLOBAL LEGAL ORDER

The most important participatory rights imposed by global rules are those addressed to national governments and international institutions, for the benefit of private parties. I shall therefore conclude by focusing on the first and the last of the five categories outlined above.

Both these two participatory rights present peculiarities. The first, because State – private parties relationships are traditionally

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[68] According to M. Shapiro, *The Globalization*, cit., p. 48, "[….] Americanization and globalization partially overlap" because the American constitutional experience serves as a world model. According to D. Keleman and E. C. Sibbitt, *The Globalization of American Law*, in *International Organization*, vol. 58, Winter 2004, no. 1, p. 103 – 136, the factors determining the spread of American law are economic liberalization, political fragmentation, judicialization and the influx of American law firms. See also M.-C. Ponthoreau, *Trois interpretation de la globalisation juridique*, in *AJDA*, 2006, no. 1, 9 Janvier 2006, p. 20 – 25.

[69] According to R. Stewart, *The Reformation*, cit. See the symposium on Stewart's article in "Issues in Legal Scholarship" on The Berkeley Electronic Press (bepress) 2005.

reserved to State regulation. The second because, by establishing direct links between the global level and civil societies, global rules bypass national governments. Both types of participatory rights challenge the State.

"*As the locus of regulatory activity has increasingly shifted "upwards", the actors and procedural rules that facilitate effective and fair regulation domestically have followed*"[70]. Globalization produces two peculiar results. First, it establishes an additional level of government, which makes normative claims upon national governments. This creates a strong need to develop mechanisms for making national governments accountable to the global level.

This new level of government, however, lacks the common features of popular democracy. It is therefore in need of legitimation.

These two peculiar features of the global legal order help to explain why it is crucial for it to incorporate liberal democratic principles[71]. The global legal order redefines the relationships between government and citizens at both the national and the global levels in order to ensure compliance with global rules at the national level, and to legitimize global decision-making processes.

Let us consider the duty to hear private parties. This duty is established by global rules and addressed to national governments. Does the global legal order seek to enhance the efficiency or the accountability of national governments by subjecting them to this obligation? Or does this duty promote national governments' compliance with global rules?

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[70] K. Raustiala, *The "participatory revolution"* cit., p. 585.

[71] J. H. Knox, *Separated at Birth* cit., p. 361.

Global actors do not need to worry about the efficiency or the legitimacy of national institutions. These institutions do not generally need to improve their legitimacy, as popular elections accord them a certain measure of support. And it would be paradoxical that global institutions, relying for their legitimacy on the States, should concern themselves with the degree of legitimacy of the States providing the duty of the national governments to consult their citizens before, for example, to take environmental decisions.

The participation rights created by global rules, by contrast, benefit global actors, as private actors are "possessors of significant compliance-relevant information"[72]. Empowering private actors vis-à-vis national governments makes them actors in a "fire alarm" process[73]. Their participation triggers an investigation by national authorities, which must review their own action in light of global standards[74].

Private parties are instrumental to the implementation of global rules. These rules are addressed to the national governments, that must implement them. It would be too much complicated for the global institutions to create a compliance control mechanism from above, in order to check the compliance with the global standards at the national level. It is easier to resort to the cooperation of private parties.

Establishing such a duty of national governments to consult as a means of keeping under control State's action is a crafty devise, as

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[72] K. Raustiala, *Police patrols* cit., p. 405.

[73] M. D. McCubbins and T. Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarm*, 28 *American Journal of Political Science*, 1984, p. 165 ff.

[74] There are more effective procedures for reaching the same goal. An example is the right to make submissions to a supranational body in order to have a domestic decision reviewed.

the global legal order takes advantage of private parties as agent of that order. But how much effective can this devise be? More then a control mechanism, private participation may signal the need of a check. Private parties themselves are not necessarily instrumental to global rules. National agencies may disregard private submissions. Compliance is, therefore, incidental.

This control function is strengthened by requiring national governments to hear private parties who are not nationals of the forum State, and by establishing international organs to monitor participation at the national level (as in the WTO Agreement on Safeguards, Article 3).

The duty imposed by global rules upon national governments to hear private parties aims less at making domestic institutions more efficient or accountable to their population than at making them comply with global rules.

While participation at the national level serves mainly to induce national compliance with global rules, participation at the global level is more effective as a legitimation mechanism[75].

At the global level, there is less need to control compliance. Those who create the rules and those who implement them do not belong to different legal orders. On the contrary, there is a strong need of legitimation.

An analysis of accountability in the global legal order must be premised upon an important consideration: the members of global bodies are not popularly elected. We ought therefore to abandon

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[75] In general on interest representation as a way of promoting legitimacy of administrative governance, E. Magill, *Images of Representation*, in *Issues in Legal Scholarship*, Symposium : The reformation of American Administrative Law cit., p. 1 ff.

the domestic analogy. The global legal order has created unique accountability mechanisms, based mainly on information. This has been called "a pluralistic accountability system for world politics"[76].

In confronting the problem of legitimating global decision-making processes, it is crucial to establish the conditions under which a procedure can be considered legitimate.

Drawing upon studies on procedural justice, one can say that there is a parallel between legislative legitimacy and procedural legitimacy. "For the exercise of legislative power to be legitimate, the legislation must be the outcome of a process that satisfies norms of democratic participation". Similarly, for a proceeding to be legitimate, the affected parties must become the "authors" (though not the only authors) of the proceeding. Participation has an independent value that "cannot be reduced to a function of the effect of participation on outcomes"[77].

There are four crucial questions here. Should decision-making processes – and hence participation - be located at the local, national or global level? To whom should participation extend in order to lend legitimacy to the proceeding? What should the scope of participation be, in order to legitimize the proceeding? Do legitimate global decision-making processes suffice to make legitimate global bodies?

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[76] R. O. Keohane, *Accountability in World Politics*, in 29 *Scandinavian Political Studies*, n. 2, 2006, p. 82.

[77] L. B. Solum, *Procedural Justice*, University of San Diego School of Law, Law and Economics Research Paper Series, 2005, 12, on The Berkeley Electronic Press (bepress), pp. 276, 280 and 321.

I do not have an answer to these questions, but can contribute a few sub-questions, to facilitate the work of those willing to go into this mine-field.

As for the first question, if the decision is shifted from the local and the national levels to the global one, local and national participation becomes more difficult. However, local interests can take advantage of opportunities to participate at the global level to take decisions and participation out of the reach of national authorities[78]. This has the effect of crowding out the national agencies, that are not any more the final arbitrating authority among national interests.

As for the second question, it is clear that if the affected parties must be the co-authors of the decision, they must all be entitled to participate (or to at least waive their participation right). But who are affected parties? Those that are bound by the final decision? Or those who have a substantial interest in the final decision? And what about when they are an indeterminate mass?

As for the third question, it is clear that participation should be timely and include a minimum of notice and the opportunity to be heard. But there can be no discussion between competing interests unless cross-examination is provided. The final decision remains inscrutable unless the proceeding authority has a duty to provide reasons. There is no appeal unless there is some kind of judicial review.

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[78] As in the case of land protection, giving rise to national reactions, like the proposal of "American Land Sovereignty Protection Act" (May 13, 1999). See J. Rabkin, *The Yellowstone Affair: Environmental Protection, International Treaties and National Sovereignty*, Competitive Enterprise Institute, Environmental Studies Program, May 1997 (www.heartland.org/Article.cfm?artId=3966).

As for the fourth and most difficult question, participation does not imply actual decision-making. Participants only have the general right to be heard: therefore, "participation is a weak substitute for self-government"[79]. But consider the fact that what we call democracy at the national level is in fact oligarchy: officials elected periodically by the people take decisions in their name; the people themselves do not take decisions (except in the case of referenda), they only choose their representatives. This is why national legal orders supplement mere electoral democracy with interest representation in domestic decision-making processes (deliberative democracy).

V. CONCLUSION

While national administrative laws are two centuries old, a general obligation of administrative agencies to consult the interested parties has developed at the domestic level only in recent times and among many difficulties. Such general duty has been established by the legislators in 1925 in Austria, in 1946 in the United States, in 1978 in Germany, in 1990 in Italy, while in France and in the United Kingdom it has not yet been recognized by a statute.

Why, on the opposite, at the global level, an obligation to consult has developed so quickly and has spread so widely? Is there an explanation for such a maze of participatory rights (vertical and horizontal; local, national and global), that does not constrain data in received conceptual categories and distinctions[80]?

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[79] C. Möllers, *Patterns of Legitimacy in Global Administrative Law: Trade-offs between due process and democratic accountability*, paper presented to the Second Global Administrative Law Seminar, Viterbo, June, 9-10 June 2006, p. 3.

[80] L. Nader, *Le forze vive del diritto. Un'introduzione all'antropologia giuridica*, Napoli, Edizioni Scientifiche Italiane, 2003, pp. 62-63 and 68.

Firstly, the context is relevant. The global legal order is made of a mosaic of legal systems, with different layers (local, national, regional, global) and a plurality of sectorial regulatory regimes. There is competition and overlapping, but there is also lack of communication and coordination. It is far from being an harmonious system of law[81].

Secondly, is relevant the institutional setting. This is characterised by atrophy of the legislative and the judicial branches. There is not participation at the global level through elections. There is limited availability of recourse to courts. By contrast, negotiation plays a dominant role[82].

Thirdly, is relevant the nature of institutional relations. These are not international relations, where national governments – the States - play the role of main actors. Are, instead, inter-administrative relations, where national bureaucracies have a dominant role.

The context, the institutional setting and the nature of institutional relations are entirely new and unknown to lawyers as well as to political scientists. They are accustomed to dealing with unitary legal orders (or with a plurality of legal orders with some hierarchical structure), with institutional settings where there are three equally developed branches (legislative, judicial and executive), with relationships clearly defined by rules.

The nature of these three elements determine the method of decision and of solution of conflicts[83]. Consultation and participation are instrumental to establish links between national legal orders,

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[81] Again, compare with the legal systems studied by the anthropologists: L. Nader, cit. pp. 68, 85, 97.

[82] L. Nader, cit., p. 21.

[83] L. Nader, cit., p. 66.

to make possible a dialogue among the local, national regional and global levels of management, to surrogate parliamentary and judicial procedures, to prevent conflicts. Consultation and participation mimic – in a very inefficient way – parliaments and courts.

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