

# TRANSPARENCY AND PARTICIPATION IN THE GLOBAL POLITY: LESSONS LEARNED FROM FOOD AND WATER GOVERNANCE

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*Abstract:* Within the global polity several global regulatory regimes overlap and intersect without establishing one single and unitary legal order. Despite such fragmentation, each global regulatory regime constrains the behaviour of States and individuals through “induced compliance” and significantly impacts domestic regulation, influencing both the content and the way decisions are made. This also applies to the global regimes of food and water, where the interplay between different rules and actors (public/private, domestic/global) raises a number of questions on the complex relationship between the power makers that establish the rules and those who are affected by them. These regimes are particularly emblematic of the debate about the democratic quality of global polity. They also show the lack of balance among national governments, global institutions, and civil society organizations. As a matter of fact, at the global level, there is no directive representative democracy, but some forms of deliberative or procedural democracy, which emerge through the application of administrative procedures and formal guarantees in the decision-making processes. Among such tools, this article focuses on transparency and participation, which are two fundamental legal instruments featuring procedural legitimacy. The paper is divided in four sections. The last section contains three conclusive remarks: 1) an effective increment of transparency and participation in global decision-making would enhance pluralism, accountability and power-checking in the global polity; 2) even the increment of transparency and participation can present drawbacks, which need to be tackled and nullified by the application of specific procedural devices; 3) the main improvement would rely on procedural democracy as transparency and participation need to be combined with other administrative principles and guarantees, such as due process, duty to give reason, judicial review, and so on.

*Keywords:* transparency, participation, food, water, global governance.

## INTRODUCTION

According to Sabino Cassese the global polity is “the empire of ‘ad-hoc-crazy’”, where several global regulatory regimes overlap and intersect without establishing one single and unitary legal order<sup>1</sup>. Despite such fragmentation, each

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global regulatory regime constrains the behaviour of States and individuals through “induced compliance” (for example, by means of incentives) and, even if in different sectors, the global polity significantly impacts domestic regulation, influencing both the content and the way decisions are made.

Whereas at the global level, there is no directive representative democracy due to the absence of a global parliament or other elected representatives, there are some forms of deliberative or procedural democracy<sup>2</sup>, which emerge through the application of administrative procedures and formal guarantees in the decision-making processes<sup>3</sup>. Among such tools, this article focuses on transparency and participation. This notably applies to the global regimes of food and water, where the interplay between different rules and actors (public/private, domestic/global) raises a number of questions on the complex relationship between the power makers that establish the rules and those who are affected by them. These regimes are particularly emblematic of the debate about the democratic quality of global polity. They also show the lack of balance among national governments, transnational, global institutions, and civil society organizations.

The paper is divided in four sections, organized as follows. The first one presents the main traits of two fundamental legal instruments featuring procedural legitimacy at the global level: transparency and participation. As the article will outline, these two principles, borrowed from national administrative laws, are also applied in extra-national decision-making and influence decisions, increasing accountability and plurality. However, they still present drawbacks in the way they are applied, implemented and interpreted.

The second section is articulated in several paragraphs and relies on some practical case studies dedicated to transparency and participation. These are observed in two sectors of regulation: food and water. These two regimes are paradigmatic to exemplify how global regulation faces significant challenges in balancing conflicting interests and in justifying trade-restrictive policies and the procedural legitimacy of regulatory measures agreed at the global level.

The third section is an elaboration of the case studies mentioned above, which will aim at representing that the quality of transparency and participation guarantees in food and water governance, although being quite high, is still insufficient in the perspective of legitimizing those global regulatory regimes by increasing accountability, publicity and impartiali-

ty. Nonetheless, in the absence of effective systems of representation and accountability, procedural legitimacy remains a means for enhancing their democratic quality.

Finally, this paper will lead to three main conclusive remarks. First, in order to increment pluralism, accountability and power-checking in the global polity, we need to have an effective increment of transparency and participation in the decision-making. Given the lack of representative democracy at the global level, transparency and participation should be higher and more developed than in domestic systems. Second, even the increment of transparency and participation can present drawbacks, which need to be tackled and nullified by the application of specific procedural devices. Third, and in connection with the previous statement, transparency and participation have to be part of a general reform of global governance, based on procedural democracy: therefore they need to be combined with other administrative principles and guarantees, such as due process, duty to give reason, judicial review.

## TRANSPARENCY AND PARTICIPATION IN THE GLOBAL POLITY

Transparency and participation are present, recognized and implemented also beyond national borders. This pertains both to the organization of the various regulatory bodies and to the way these regulatory bodies put in place their activities. The two institutes can be qualified as administrative law tools, used, as well as in the national legal orders, as mechanisms provided by the law to improve public governance, which should be open, public, participated, plural and accountable. Nevertheless, they also assume, especially outside the national borders, different legal shapes: they are recognized as obligations on behalf of the regulators, general principles, procedural tools or decisional criteria. It is interesting to consider two main aspects of participation and transparency: their purposes and the way they impact and produce their effects on policy-makers and on policy-recipients.

As far as the first aspect is concerned: openness, publicity and participation<sup>4</sup> can be distinguished according to a variety of purposes and functions, which will be further analysed in section 3 and are now anticipated as follows, for sake of clarity.

First, the mechanisms guaranteeing or enhancing transparency and participation – being shared by several legal or-

ders of the world – may have the effect to increase legal harmonization and to develop integration among different regulatory systems. This would happen because the need to have common rules and common regulation – to tackle world-wide problems – can be faced, as a start, through common procedural rules concerning the way decisions are made. As it will be shown later on in the paper, if the decision-making procedures, both at national and global level, are public and open and if the access and the participation of private subjects – but also of public domestic bodies – to supranational process are facilitated, global policies can more easily share common ends and objectives, with more consensus and agreement. Transparency and participation can thus contribute to procedural harmonization and to the reduction of fragmentation in the global legal space.

Second, transparency and participation, which are both core components of the rule of law, work as complements of the same procedural tool. Once applied together, they can increase impartiality and accountability in decision-making: the possibility to consult documents and to get information – i.e. access to information – is functional to a possible intervention during the deliberative proceeding. Accordingly, transparency increases certain benefits of participation, such as pluralization of the decision-making; more accountability; improvement of the effectiveness and the quality of the decisions; and the anticipation of judicial protection in a preliminary phase. At the same time, participation makes transparency more effective, as through access to information one can more easily influence the making of the decision. Third, transparency and participation are tools to “regulate the regulators”: they can be used to force global and national regulators to justify certain decisions, and influence them towards purposes that are shared by the constituencies. For instance, whereas public authorities have to choose between two options and one is desirable for the civil society while the other is more convenient for a minority of stakeholders, the choice will probably be for the former if the decision-making has to be held in public. This may be a typical example of reputational accountability<sup>5</sup> as global regulators deciding in an open fashion will reach different conclusions than the ones acting in secret: when the activity of policy-makers conforms to the duty to make public certain key-information of the deciding process<sup>6</sup> and has to face the intervention of informed stakeholders, also the content of such policy may gain in pluralism and impartiality, as decision-makers

will necessarily follow certain trends and objectives. Transparency and participation, on the one hand, affect formal requisites of decisional processes; on the other hand they also have a teleological and indirect effect: incrementing impartiality and public-interests care.

Finally, the two institutes at stake aim at increasing the accountability of the policy-makers<sup>7</sup>. In the global space, where regulatory regimes reveal flaws and shortcomings of publicity and legitimacy of the decisions, as well as of representation of the constituencies, certain procedural devices have the effect of increasing the connection and the dialogue with decision-recipients. They can thus get acquainted with the deliberative process and contribute to it, even by affecting the final policy. In this way, as the analysis will show, the global polity does not act in clinical isolation from the world civil society.

Concerning the application and implementation of such procedural devices in the global space, they follow both a top-down and a bottom-up approach. On one side, they act as limits, or guarantees, imposed by global law to national administrations, which are called to open up their activities and grant access to information to their citizens, as far as to the foreigners. On the other side, following a bottom-up trend, transparency and participation allow a general control, a contribution to decision-making and an open mechanism of public monitoring of the global regulators itself on behalf of national institutions and of subjects – being them individual or associations – belonging to the civil societies of the world<sup>8</sup>. Moreover, such global procedural mechanisms also encourage a horizontal accountability – *peer-to-peer* – among national States or International Organizations. This paper will concentrate more on the second effect of the mentioned procedural tools, concerning their impact on accountability and pluralism of the global polity.

Despite the mentioned features, where transparency and participation provide an increment of guarantees and protections for the citizens, the present situation of several global regulatory regimes still shows a significant *deficit* in such fields. For instance, many of the proceedings occurring inside the World Trade Organization (WTO) are secret or not covered by provisions requiring openness and transparency<sup>9</sup>. Similarly, with regard to participation, non-governmental organizations (NGOs) and other civil society organizations (CSOs) have no formal access to WTO dispute settlement hearings (to

date, only a few panels have made use of their discretionary power to accept and consider briefs from private parties), while their attendance to ministerial meetings is still limited and restricted (as they cannot be directly involved in the work of the WTO or its meetings – see WT/L/162)<sup>10</sup>.

Another example of this shortcoming is given by the absence of a formal codification of the principles at stake, which are not – as they should – disciplined by any international agreement, acting merely as general principles or procedural devices<sup>11</sup>. Not to mention the fact that in many international organizations the principles of transparency or participation do not have an effective applicability, as, for instance, they do not have an effective judicial protection in case of violation<sup>12</sup>.

In addition, even when foreseen by legal provisions and actually applied by regulators, the abovementioned principles, may also present drawbacks. If applied in an indiscriminate way and without any sort of limitations or formalities, transparency can present some negative effect, above all in terms of protection of certain rights and interests: the excess of information can blur the most useful ones, more difficult to be detected in a wide quantity of data; it can decrease the substantial equality as some subjects would exploit better than others certain information made public and as certain categories of people, more skilled, would be favoured; it can be exploited for propaganda or disinformation; it can affect conflicting rights, such as privacy. For these reasons transparency is to be seen as a useful tool for good governance, but as far as used in a reasonable and proportionate way.

At the same time, participation does not necessarily leads to broader inclusiveness. In fact, especially at the global level, where participatory rights are often unequally granted to the interested parties (mostly because their exercise is limited *de facto* to those who have the necessary material, organizational and epistemic resources), participation can easily benefit only powerful actors<sup>13</sup>.

A second controversial issue, emerging by the development and enhancement of transparency and participation, concerns the scope it would cover: the complexity of the global social space and the lack of world institutions, as well as of a world Constitution, suggest the need of a more effective presence of guarantees and procedures than in domestic legal orders, where procedural guarantees are juxtaposed by other legal mechanisms of protection: democratic representation, check and balances, division of powers, rule of law, hierarchy

of the legal sources, and so on. Transparency and participation, as other procedural guarantees, can therefore assume a specific role in the global legal framework: not only for protecting private individuals from the supranational public power, but also as open tools, for citizens and policy-recipients, to control and verify, also in an indirect way, the measures adopted by decision-makers that are not enough accountable.

In the next paragraphs few models of transparency and participation adopted in the global regulatory space are considered. The analysis of such case studies shows few problematic and controversial aspects of transparency and participation, but reveals also some solutions to increase accountability and legitimacy of the global polity.

*The principle of transparency as a global limitation for global regulators*

In global law, transparency can have, as said, a bottom-up impact, affecting and limiting the action of global regulators. It is indeed a functional mechanism to increase guarantees on behalf of the citizens also towards global rule-makers and to enhance democracy, impartiality and accountability of the proceedings for adopting decisions. For instance, among others, by improving the conditions for stakeholders to participate to the decision-making and therefore giving legitimacy to policies and regulations which, otherwise, would not be supported by adequate mechanisms of representation.

The cases considered in this Section are those of the Codex Alimentarius Commission (CAC) and the International Centre for Settlement of International Disputes (ICSID).

The first one concerns the proceedings of standard-setting adopted by the Codex Alimentarius Commission, where transparency of all the procedural phases proves to be essential – although still insufficient – to legitimize the activity of a regulatory regime which otherwise would not be enough accountable and democratic for the power it owns.

The second case concerns state-investors disputes in the context of investment treaties regarding the supply of water services by private companies, and shows how the principle of transparency contributes to legitimize arbitral tribunals and give voice to individuals and communities when investors and domestic public interests appear to conflict.

*Transparency guarantees in the procedures for food safety standards*

The institutive and procedural norms regulating the activity of the CAC<sup>14</sup> aim at ensuring that the decisions concerning standards and guidelines on food safety are made according to criteria of democracy, impartiality and accountability. Considering the crucial importance of the standards and how they are observed in the member States<sup>15</sup>, the way they are negotiated, finalized and adopted needs to be proven fair and legitimate; this occurs through three legal tools: the indirect representativeness of national delegates discussing and drafting the standards; the scientific basis, as CAC's norms are generally grounded on technical assessments performed by experts; the procedural guarantees governing the decision-making. Concerning the latter, it is to note how the standard-setting process, besides being organized through several phases, following the scheme of a domestic administrative proceeding<sup>16</sup>, is also surrounded by guarantees of the due process of law clause, among which a discrete – although still insufficient – transparency. The Commission assumes the initiative of starting the standard-setting proceeding, in conformity with a motivated proposal of a member State or of a subordinate Committee, or even *ex officio*, by itself. Then it establishes which one of the subsidiary bodies is competent to follow the procedural *iter*. The process thus starts with an initiative, which can come from different kinds of authorities: national as well as extra-national. As evident, a minimum level of transparency is already ensured in this phase: all the subjects involved in such phase operate according to criteria of publicity. Nonetheless, some drawbacks can still be seen for what concerns the information of decision-recipients and of stakeholders: if we assume that the representativeness and accountability of decision-makers acting inside CAC must rely on effective procedural guarantees, we may demand that information should reach automatically and with no mediation the citizens – as it happens with the so called “FOIA” model (“Freedom Of Information Act”) – while here we notice that the latter have instead the onus of looking for it and of searching for the documents they need.

The Secretariat of the Codex, after a review of the standard proposal, follows its *iter*, guaranteeing the regularity and acting as a point of reference for the participation of public and private subjects. Once the proceeding has begun, the



CAC starts, if needed, a secondary and parallel proceeding, through a call for scientific data, which activates the scientific committees, competent to perform the risk assessment phase. The scientific committees are composed by experts appointed by the Food and Agriculture Organization and the World Health Organization and the results of their studies are made public and are available for everyone. Nonetheless, the same transparency is not ensured during the final phases of the proceeding that leads to the concluding scientific report: only the product of the research is made public, but not the steps bringing to it. Despite the scientific committees perform only a technical activity, with no onus of accountability for their decisions and no interference from politics, it is at the same time clear how such scientific reports can affect the final political decisions. In addition, in many cases the scientific methods are characterized by a high uncertainty and by choices, which make the scientific analysis a “science policy”<sup>17</sup>. This implies necessarily that also the experts can face several different solutions, and thus choose one of more options: this moment is not enough covered by transparency guarantees.

In the next step of the standard-setting procedure, the Secretariat prepares a draft of the standard, which is sent to the member States and to the interested organizations. The national governments submit memories, observations and proposals of amendments. Thus the draft is prepared and assigned to the competent committee in order to be discussed and finalized, on the ground of the scientific report and in consideration of the geopolitical, economic and sectorial interests.

This last step, although based on scientific evaluations, has a discretionary connotation involving several stakeholders. As the previous phase, also this one is not completely transparent: the national delegates and the authorized NGOs participate to the deliberation, but there are no explicit rules ensuring that civil society is informed on the discussion inside the committees and on the approach and the rationale used to interpret and elaborate the information and the data on which the standard is based<sup>18</sup>. In addition, despite the presence of such mechanisms of transparency and publicity, they lack in effectiveness as there is no judicial body monitoring their compliance.

The final decision stage is articulated in more sub-phases. After a first discussion inside the Commission, a provisory draft is distributed among member States, for comments and

proposals, through the National Codex Contact Points<sup>19</sup>. During this phase, the Secretariat can modify the draft and put it under a critical review by the Executive Committee according to the requests or complaints coming from national States. Subsequently, the standard can be approved by the Commission and published in the Codex. The final approbation is reached through consensus<sup>20</sup> or, whereas it is not possible, through simple majority (Rule XI.2, Rules of Procedure, Proc. Man.).

A significant feature of this phase is the lack of transparency during the negotiations: the interested subjects are not authorized to assist or intervene in this phase and the deliberative procedure takes place in secrecy. The decisional moment, thus, is not monitored: the standard-setters are hidden from administrative control or from direct political accountability. However, publicity is still ensured via the involvement of national Parliaments in the discussion about the standard. But the final decision, included the moment of the vote, is still deprived of transparency guarantees. In addition, no judicial review is foreseen for CAC's activity, nor it is a higher-level body with functions of political control: the possible violation of certain guarantees or formal limits cannot be judicially sanctioned, but can be only contested through diplomatic or political methods.

The above standard-setting procedure constitutes a complex decisional mechanism, articulated in more phases, all ensuring a minimum set of transparency with the aim of legitimizing the Organization. The principle at stake is meant in a wide sense and as a corollary of the right to be informed, as a fundamental institute to ensure a form of democratic control based on the accountability of decision-makers, and including: the right of being informed of the beginning of a proceeding; the transparency and publicity of the activities performed by the public authorities; the duty – for the latter – to provide an adequate justification to show the rationale and the legal premises of a decision. Nonetheless, the transparency-deficit affecting certain phases of the proceeding has a negative impact on CAC's legitimation itself, going to diminish some guarantees of impartiality and democracy. Notably, the limits concerning transparency can compromise the independence and the neutrality of the scientific committees competent for the risk assessment; they can reduce the accountability of national delegates; and finally favour undue or unbalanced pres-

tures, as well as phenomena of capture by the stakeholders with more influential powers.

### *The ICSID water services arbitration and transparency*

Although water is essentially a local issue, to make its governance effective the involvement of a number of different public and private actors at, municipal, regional, national, and, always most frequently, at global level is increasingly required. Indeed, to efficiently managing the limited water resources on Earth and secure the sustainability and quality of service provisions, a multi-level governance approach to water policy (including its global dimension) is needed. This applies to both developing and developed countries, and raise crucial considerations in terms of effective and good water governance: among these, the weak accountability and transparency in governance structures and procedures, including the lack of information and openness to public scrutiny.

It has been shown that the lack of transparency can adversely impact affected communities, and result in ineffective and illegitimate water governance<sup>21</sup>. Sometimes, although the quality of information provided by government agencies, at national and sub-national level, is adequate, the access to information by interested people remains weak. This happens because of the costs associated with accessing information and persistent technology burdens, especially where government agencies provide information only through the website, in spite of the great percentage of the public that may not access the Internet.

At the global level, on the other hand, disclosure of information is still absent or at a rudimentary stage of development, although the principle of transparency and the right to access information are set out in several international agreements and declarations concerning, among other things, the sustainable management of water resources<sup>22</sup>. Furthermore, even though “transparency is essential for the realization of human rights as it promotes access to information concerning the allocation of resources in the context of progressively realizing economic, social and cultural rights, including the right to water”, the circumstance that global water regime is only loosely institutionalized, makes it more difficult, as compared with other regulatory regimes (including food), to structure

and enforce a general duty to disclose all relevant information and provide access to the public<sup>23</sup>.

Especially in transnational urban water service delivery, which is dominated by the presence of private actors, criticism arises because of the lack of participation and transparency procedures typical of State institutions. In this context, as Bronwen Morgan clearly puts it, there are three main forms of global regulatory activity that impact upon public participation opportunities: (1) bilateral investment treaties (BITs); (2) global standards for water services and (3) a human right to water (as interpreted by the UN Committee on Economic, Social and Cultural Rights in General Comment No. 15)<sup>24</sup>. Focusing on BITs, which represents a form of interstate legal regulation, Morgan points out that the dispute settlement mechanisms usually provided in the framework of investment protection are essentially private and restricted in terms of access and participation, with little or no publicity for relevant information<sup>25</sup>. Take, for example, the case of the International Centre for the Settlement of Investment Disputes (ICSID), a leading international arbitration forum devoted to resolving disputes between States and foreign investors<sup>26</sup>. Parties voluntarily resorts to ICSID to solve a dispute usually arising out of an investment, a contract concluded between a foreign investor and the host State of the investment or, most often, a bilateral treaty<sup>27</sup>. The awards rendered by ICSID tribunals cannot be published without the consent of the parties: where a party withholds its consent, only excerpts of the legal reasoning of the tribunal can be made public<sup>28</sup>. This also applies to the minutes and other records of the arbitral proceedings.

In response to the criticism drawn for this lack of transparency (see, for example, the editorial of the New York Times entitled “The Secret Trade Courts”<sup>29</sup>), in 2006, the ICSID Arbitration Rules were amended in order to open up the arbitration proceeding to non-parties, through written submissions by *amicus curiae* (“friends of the court”) and third-parties attendance at hearings (“unless either part objects”)<sup>30</sup>.

However, when it came to the application of these rules, as the first two publicly available awards of ICSID arbitral tribunals show (see *Bivater Gauff Ltd. v. United Republic of Tanzania and Suez, Sociedad General de Aguas de Barcelona, S.A.*, and *Vivendi Universal S.A. v. The Argentine Republic*), while the arbitral tribunal granted NGOs authorization to file a written *amicus curiae* submission, both access to arbitration record and attendance to the hearings were denied<sup>31</sup>.

Interestingly, although ICSID awards regarding water issues account only for a small percentage of the overall registered cases, both the abovementioned rulings concern the provision of water services<sup>32</sup>. In the Suez case, the arbitral tribunal stated: “Public acceptance of the legitimacy of international arbitral processes, particularly when they involve States and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function”<sup>33</sup>. Thus confirming that the rationale behind the choice of the arbitral tribunals to accept *amicus curiae* submission was the awareness that the investor-State dispute at stake implicated government regulation aimed at satisfying basic human needs (i.e. access to water)<sup>34</sup>. However, it should be noted that, despite this shift toward greater openness to the public, ICSID Arbitration Rules still give each party a veto right with respect to third-parties attendance at hearings and their access to arbitration record, thus limiting, de facto, the transparency of the whole process. Furthermore, by stating that allowing for NGO’s written submission in the arbitral proceeding “is an important element in the overall discharge of the Arbitral Tribunal’s mandate, and in securing wider confidence in the arbitral process itself”<sup>35</sup> the tribunal emphasized that *amicus curiae* are not entitled to substantive rights, being, at most, functional to the better understanding of the interests at stake<sup>36</sup>.

The lesson learned from above is that there is certainly some concern that increased publicity of the arbitration could lead to a politicization of the disputes and add costs, delays and loss of confidentiality to the arbitration process, thus forming a barrier to a friendly resolution of investor-State disputes and discouraging the willingness of the investors to resort to arbitration, which is, as is known, a completely voluntary mechanism<sup>37</sup>. But, on the other hand, greater transparency may help legitimize arbitral tribunals and enables individuals and communities to have a voice when investors and domestic public interests appear to conflict, with benefits also in terms of accountability.

### *Participation in the global polity: towards a more pluralistic model?*

Within the global polity, participation can work as a functional mechanism to increase guarantees on behalf of the citizens and to enhance democracy, pluralism and accountability

in the decision-making proceedings. For instance, by multiplying the voices heard before taking a decision and therefore giving legitimacy to policies and regulations, which are, normally, not supported by adequate mechanism of representation.

The cases considered in this Section are those of the Food Security Committee (CFS) of the Food and Agricultural Organization and civil society participation in disputes arising within the context of water services privatization in Argentina.

In the first case, the system of deliberation inside the CFS reveals how, through the intervention of Civil Society Organizations, the decision-making process on policy against starvation and food insecurity may become more plural and open to the intervention of all the involved stakeholders, with a change also in the rationale of the food security policies.

Whereas, the second case deals with the question of formal and informal participation in multilevel decision-making processes that affect access to water. It shows the interplay between international and domestic levels of governance and how the involvement of transnational actors, and especially of NGOs and transnational corporations, may have the capacity to change the regulatory framework and foster accountability.

### *Civil society participation in the Food Security Committee*

The Food and Agriculture Organization deals – among other issues – with the problem of world food insecurity. During the decades, however, several initiatives and programs proved to be ineffective and sometimes even counterproductive<sup>38</sup>. In the occasion of the 2009 annual meeting of the Food Security Committee (CFS)<sup>39</sup>, a new element has been introduced in respect to the past editions, concerning the decisional procedures, and with proper attention to participation and transparency during the debates and the negotiations: the organizations representing civil society and the agro-food sector have been involved in the decision-making. The latter, meeting two weeks earlier than the official Summit have prepared and delivered to FAO, a document with criticisms, proposals and requests. Inside such a document some program or provision suggested by the stakeholders implied a different approach than the ones adopted in the previous years, opting for a change of perspective in tackling food insecurity<sup>40</sup>.

The participation of the civil society representatives has been institutionalized by FAO's Committee on Food Security,

which has been reformed in its organizational structure in order to guarantee a dialogue with NGOs and CSOs)<sup>41</sup>.

In the examined case, transparency and participation produce two effects. The first relates to the content of the regulatory activities of the CFS, influenced by the regulator's necessity to decide in public: opening the discussion and the deliberation, the contents of the decisions are shaped by the plurality of stakeholders and recipients. As a result, the regulator would opt for more general interest-oriented policy. The second effect, indirect and informal, concerns instead the increment of democratization of a decision-making, which otherwise would be void of control and verification by the relative constituencies, while now is produced in an open and plural deliberation.

Under the first respect, it is worth noting that the new deliberative procedures – having the effect of concluding years of institutionally consolidated approach which resorted in homogeneous views and proved ineffective to eradicate hunger – have led the policy-makers to also consider the dissenting requests and proposals and to open up the discussion to the public. In this way, the recommendations of the CFS, although non-binding, guarantee a better representativeness and pluralism than in the previous summits, as finalized after the intervention of stakeholders, who increment the plethora of interests and approaches to keep into consideration.

Under the second profile, we can register an increment of accountability: a new experiment of global deliberative democracy is activated through the participatory procedure and the publicity of the interventions. Even though FAO remains the competent body for the adoption of the final provisions to tackle food insecurity and the States remain the only ones to decide if and how to adopt the policies, FAO does not act unilaterally and isolated from the constituencies and the civil society that will be affected by these same decisions. On the contrary, FAO has a constructive and continuative dialogue with these subjects, through the direct participation of associations representing a variety of instances coming from the agro-food sector. Finally, the latter get all the information concerning the policies chosen by the Organization, knowing their deliberative path and the rationale that moved them; and making them known to the general public<sup>42</sup>.

*Avenues of participation in the global water sector: insights from the case of Argentina*

In Robert Cox's conceptualization of the global polity, or what he calls a "nébuleuse", very complex transnational mechanisms are put in place by élite networks that make decisions about the world economy<sup>43</sup>. These decisions result in public policy guidelines that affect vital individual interests, including access to water, a good critical to life and essential to satisfy basic human needs<sup>44</sup>. This makes the political dynamics surrounding the global water sector particularly sensitive, and the water services' supply a traditional domain of the State. Nonetheless, the recognition of water as an economic good (see *The Dublin Statement*, Principle no. 4)<sup>45</sup> resulted in the privatization of the water services which have been increasingly provided by private actors, and water supply policies and regulations have been affected by foreign investments within a global water market<sup>46</sup>.

Particularly interesting, from this standpoint, is the case of Argentina, where several foreign investors, including the French multinational Vivendi and the American water company Azurix have been awarded private concession contracts to deliver urban water services in the provinces of Tucumán and Buenos Aires. Both contracts ended up in formal international legal arbitrations before the ICSID (*Compañía de Aguas del Aconquija, SA and Compagnie Générale de Eaux v. Argentine Republic* and *Azurix Corp. v. Argentine Republic*)<sup>47</sup>, which recognized a violation of the bilateral investment treaties and required Argentina to compensate the counterpart.

Actually, over the past 15 years, the claims against Argentina brought before international arbitral tribunals were several and for the most part arising in the context of the privatization of urban water delivery under BITs. Many of these disputes had a relevant impact upon domestic regulation, by creating the premise for structural reform of the urban water service delivery at the national level. In the case of Vivendi, for example, the water and sewage concession awarded to the French company was subject to forced tariff reductions and termination by the provincial authorities of Tucumán, after mass payment boycotts by consumers due to dirty water and rising costs. Here, users and local consumer associations acted as a driver of procedural reform demanding more participation and transparency in regulation (e.g. through a public hearing in tariff setting procedures) and lodging a collective



action lawsuit in domestic courts. However, neither the right to public hearings nor access to court was granted at the domestic level (according to some because of the “political sensitivity” of the issue at stake and the role played by international powers dynamics)<sup>48</sup>. It was only through subsequent claims arising from concession of water services to Vivendi, and other foreign private companies, in the province of Buenos Aires and Cordoba that significant improvements in terms of participation opportunities for the civil society organizations were made both at international and domestic level.

In the Suez case (mentioned above), four local NGOs, together with an international environmental NGO, convinced the ICSID tribunal to accept an *amicus curiae* brief, thus granting, for the first time, participation of civil society organizations in international investment arbitration. In *CEDHA v. Provincial State and Municipality of Córdoba* – a case resolved by the Civil and Commercial Court of Córdoba – the Center for Human Rights and Environment in Argentina successfully filed a court action against a subsidiary of Suez<sup>49</sup>. Here the court’s recognition of the human right to water, in line with the approach adopted by the UN in General Comment No. 15, led to a sentence in which the provincial state was found responsible for violations of the human right to safe drinking water.

It is interesting to note that both cases relied on an interplay between domestic and global administrative law: the former on a mix of interstate legal regulation (the provision of the BIT), ICSID regulations and rules, and administrative-law type mechanisms (such as the submission of *amicus curiae* briefs), which are typical of the national legal orders; the latter, on the recognition of international human rights norms (UN GC No. 15 on the right to water) in domestic constitutional law. This is to say that participation of civil society organizations in water services governance is potentially, even though not necessarily, facilitated by the interplay of multiple levels of governance. Here, the multiplicity of rules and for a offers additional opportunities to those private parties and public actors who have the capacity to profit from them. This happens, as Sabino Cassese has efficaciously pointed out, because the global polity is a highly unstructured and fragmented polity where the interests of national governments and civil societies not necessarily coincide, but can be disaggregated with benefits either for the latter or both<sup>50</sup>.

In the specific context of participation in urban water services delivery, as the case of Argentina demonstrates, the interplay between different rules and for a opened up opportunities for the effective implementation of citizens' rights. This happened both at the global level, where NGOs were granted access to the arbitration proceeding before the ICSID, and at the domestic level, where the Civil and Commercial Court of Córdoba recognized, for the first time, the right to safe drinking water. However, as Bronwen Morgan correctly puts it, it would be inaccurate to say that the ICSID process per se enhanced civil society participation in water services delivery. Rather, what made possible expansion in citizens' participation it was a mix of domestic and global processes, including massive protests, payment boycotts, collective lawsuits and coalitions of local and international NGOs<sup>51</sup>.

Yet, what lacks, for the time being, is the capacity to make these achievements permanent and formally protected, especially in the international/global context, where binding enforcement mechanisms are missing and compliance with rules and decisions is voluntary or, at most, induced through incentives and conditionality.

## THE QUALITY OF TRANSPARENCY AND PARTICIPATION FOR THE GLOBAL POLITY AND ITS EFFECTS ON THE WORLD CITIZENS

In a reflection on transparency and participation in ultra-State legal orders we should ask: why do we need transparency and participation in global law? Such a question can thus be articulated and specified into other four interrogatives. What is the usefulness of having the principles of transparency and participation developed beyond and over the State borders? Which kind of advantages or short falls do we find in an open and participatory governance of global regulatory regimes? And therefore: are transparency and participation guaranteed in such a legal space more than at the domestic level? And finally, are they enough for having good governance or do we also need other procedural mechanisms?

The previous analysis – although partial and limited to a restricted quantity of regulators and regulatory regimes – has given, so far, some answers, having in mind that at the global scale many of the dispositions and rules aiming at making transparent, participated and public the organization, the allo-

cation of powers and functions, and the regulatory activity of the regulators are of a different kinds and often produce different effects. These can be recalled and summed up as follows.

First, in global law the mechanisms of transparency and participation have purposes of harmonization, integration or dialogue among the different legal systems: the duty to ensure a certain level of transparency and participation forces authorities – domestic or global – to justify their decisions, for instance by relying on objective or shared criteria, and open up their decision-making processes. The process of legal harmonization, occurring at the global level with the aim to face common transnational problems, mainly concerns procedural rules – such as the duties to hear stakeholders, to justify the decisions, to decide in public – instead of affecting substantial norms – concerning the content of decision-making. Such procedural harmonization has a lighter impact on the regulatory activity and enhances accountability, grounded on general control and on bottom-up monitoring, performed by citizens and by civil society organizations. In addition, it results more effective, as the need to keep public and open all the activities performed by the regulators is a general and common principle, belonging to several regimes, and recognized in most of the world legal systems.

Nonetheless, if the presence of common guarantees pushes towards a global legal integration, the different declinations and intensity of such principles do not change the actual situation of fragmentation featuring the global legal space<sup>52</sup>. At the global scale there are still different interpretations and applications of the various administrative law principles, as confirmed by the cases discussed above. However, on the ground of such principles and of their diffusion as part of a common law interpreted and judged by global courts a new world public law can develop and get settled. In order to face the problem of fragmentation in the global legal order – which is still a complex and heterogeneous mix of different legal systems – the diffusion of common principles could work as an important tool to reach more integration, balance and harmonization. This is coherent with the doctrine that follows the idea of a legal globalization based on the dialogues among courts. According to this approach the interpretative and evaluative activities performed by judges can be more effective and easily put in place if they concern general principles which have common roots in most of the world legal orders: the tribunals

called to adjudicate disputes with an impact on global rights will not have to judge the content of regulatory policies or the quality of substantial measures, but will only deal with the integration of procedural rules ensuring the uniformity of general principles and guaranty mechanisms<sup>53</sup>.

Second, transparency has a positive effect on public participation of stakeholders, as it increases and encourages the intervention in the decision making, thus enhancing pluralism and accountability, as the case of NGOs' participation in IC-SID arbitration has shown. Furthermore, as noticed above, the participatory process itself is positively influenced by guarantees of transparency and openness, as the knowledge of data and information and the possibility to check and monitor the deliberative activity reduce or sometimes eliminate certain criticalities of stakeholders' intervention in decision-making<sup>54</sup>. In addition, open and transparent participation brings the following advantages: more knowledge and awareness of the stakeholders intervening to the process; more difficulties in exercising pressures and attempts of capture of the deciding officers; easier control of the rationale and the reasonableness of public measure (once participation has occurred and produced results, which cannot be ignored).

Third, transparency and participation are used to influence the content of extra-national policies: the simple fact of obliging decision-makers to make certain information public and to hear all relevant stakeholders has an impact over the decisions, with the effect of reducing all the agreements or deliberation which would be contested by informed decision-recipients. This is confirmed by the case concerning the CFS, where the old and ineffective policies to tackle food insecurity were finally questioned by the presence of several CSOs admitted to participate to the activity of the Committee. This function of transparency and participation enhances political and reputational accountability<sup>55</sup>; although it should be supported by sanctions, also of a political kind (for instance the menace not to reconfirm the decision-maker in his/her role). If supported by other procedural and democratic mechanisms, transparency and participation can increase political accountability as well as the plurality of interests represented in the decision-making processes; also with an impact on the content of the decisions.

Finally, transparency and participation affect the accountability of regulators. As the case studies considered have shown, openness and participation have the effect to put the

decision-makers under scrutiny. This happens in two significant ways: on one side, the need to respect certain procedural mechanisms can give right to sue the global regulators for non-compliance with such requirements; on the other side, the scrutiny can also be direct and based on public opinion, as a transparent and participated polity is immediately called to give account for its decision.

Transparency and participation at the global level, nonetheless, present also flaws and limits, especially when they are not effectively guaranteed or are applied in a discriminatory way.

A first trade-off produced by the increment of transparency and participation concerns the diminishing of efficiency and the increment of costs: the necessity to actuate the different mechanisms of participation, shared deliberation and publicity is indeed a strain for the speed and efficiency of the decision-making, which at the global level is already slow and articulated in several phases (as seen, for instance, with the case of the standard-setting procedure of the CAC). In addition, the systems put in place to ensure that the information is made public and that the access to documents are generally available already presents a significant cost for the administrations.

However, it is also agreeable that opening up the proceeding, with an easier access to documents and information, as well as by enhancing participation and awareness of stakeholders – public and private – could have the effect of accelerating the procedure, instead of slowing it down. This would be longer or could even stop in the most controverted cases, in which the need to have different solutions would prevail on harmonization, and therefore also on fastness of decision. In those cases, there would not be a global solution. On the opposite, in all the other cases, a higher level of transparency and participation could facilitate the decision-making, as all the involved subjects would have all the needed information about the policy to be adopted and it would be easier, in a public contest in which all the positions are clear, to find agreements and common solutions. The above mentioned standards adopted by the CAC give a confirmation of how this can happen: if all the phases are articulated in a process ensuring transparency in all the moments, it would be easier – for the constituencies – to recognize the conflicts between experts in the risk assessment phase and the divisions of political nature during the management phase, and it would be easier and more immediate to see who and how voted in the decisional moment of the proceeding as well. This would be an advantage for all citizens

– whether food consumers or producers – and for the speed of decision too, as there would be less space for secret and long negotiations.

A second problematic issue concerns the right to privacy or confidentiality – e.g. in case of investment arbitration – which are potentially in conflict with the norms enhancing transparency. However, also in these cases, the peculiarity of the extra-national system has a weight in the assessment of such dialectic. Indeed, as far as the right to privacy is regarded, while at the national level there are procedural norms aimed at striking a balance between the two interests, for instance by setting criteria conditioning the action of public administrations<sup>56</sup>, at the global level there are not the same guarantees: the protection of privacy is identified by the international law as a fundamental right, but the procedural disposition regulating its protection are still limited or ineffective. With reference to confidentiality, it should be noted that one of the most attractive aspect of arbitration, in comparison to judicial proceedings, is exactly its confidentiality. This makes even more difficult to establish a balance between access to information and participation, on the one hand, and confidentiality, on the other.

Nonetheless, the present regime of international organizations – as well as the rules and regulations governing ICSID and many others permanent arbitration institutions – already protect in a significant way, maybe even excessive, the information about their activities. Notably, for what concerns for instance the officers employed by international organizations – which are often called to negotiate, draft or even finalize policies which affect the citizens of the world, very few personal data and information are available for the general public. And this is evident even under an empirical analysis. That is why the introduction of further transparency duties – for instance on curricula, on the selection of candidates and on the conflicts of interests of the international civil servants – would also have the positive effect to reduce the level of secrecy featuring global institutions, even if at detriment of the privacy of the involved subjects and always in the name of a reasonable and proportionate aim to protect other competing interests. While, for what concerns ICSID awards, Articles 48 (5) of ICSID Convention and 15 (1) of the Arbitration Rules state that the “Centre shall not publish the award without the consent of the parties” and that “deliberations of the Tribunal shall take

place in private and remain secret”, thus providing legal bases for keeping arbitral proceedings secret<sup>57</sup>.

Another problematic aspect concerns the effectiveness of the principles of transparency and participation. In many cases, indeed, the principle of transparency is not translated as a duty, guaranteed by controls and sanctions, to give publicity and to spread the information, but only as a freedom to get informed on behalf of stakeholders or decision-recipients. Moreover, the guarantees of transparency can be used for a formal and institutional legitimacy, to which does not correspond an effective publicity of decision-making. Similarly participation at global level is not precisely defined, and it is often recognized as a mere opportunity (as in the case of NGOs participation in ICSID arbitral proceedings) rather than a right enforceable by a court. Finally, the real capacity of the principles at stake to produce substantial democracy is also reduced: the mere introduction or extension of the principles of transparency and participation, if not properly directed and diversified in order to be used by different subjects and if not supported by other mechanisms to enforce representativeness, can have the effect to increase inequality among the actors participating to global decision, reinforcing only some interests – protected by more resources – and frustrating one of its purposes, that is ensuring more democracy and impartiality in the decision-making<sup>58</sup>. In this respect, however, the institutions of global governance are already, for the most, not very transparent and participatory. In such a situation it is not hard that forms of pressure and lobbyism already occur, favoring certain subjects and to the detriment of other ones, who are, for instance, not able to get the information or to intervene in the global decision-making. For this reason, even a general and indistinct increment of transparency would still have a positive effect on substantial equality, with a favor for knowledge and information also for underrepresented interests<sup>59</sup>.

## CONCLUSIVE REMARKS

One of the main problems affecting the global polity, in general, and the global regulatory regimes described above, specifically, is the accountability of decision-makers<sup>60</sup>: global regulators often offer reduced, partial or indirect accountability. In this context, transparency and participation can play a

key role in incrementing the accountability and democratic legitimacy of the global polity.

However, as we have tried to show in section 2, when applied on the global level, transparency and participation differ from their domestic counterpart, which are just an element of a larger body of procedural guarantees. With reference to transparency, for example, in domestic legal orders, the principle is applied with the aim to limit and regulate access to information held by public bodies, by following a rationale that keeps in mind the completeness of the system. This happens also in Italy, for instance, where Arts 22 ff. of the law n. 241 of 7<sup>th</sup> of August 1990 (“Administrative Procedure Act”) reduce public access to administrative documents: by requiring a qualified interest to access the documents; restricting the access to the case of adjudication (instead of a general overview on rule-making); and counterbalancing the right to access with other competing interests, such as privacy or State secrecy. However, at the national level, this is coherent with a system based on representative democracy, where laws are adopted by the Parliament, with free media having easy access to attend the decision-making procedures and with a judicial review to protect the right to access, in case of denial. Such a model is not reproducible at the global level, where there is not a Parliament, decisions are fragmented and articulated on more regimes, adjudicatory bodies are sectorial, and a complete and effective informative system is lacking. On the other hand, here, a general application or increment of transparency and participation can act as useful tools to increase the accountability of the global polity.

Nonetheless, as partially anticipated, this is not sufficient, as the guarantees of transparency, as well as those of participation, should also be supported by other procedural devices, such as the duty to motivate decisions and judicial review, which are all essential to increase the so called administrative democracy or procedural legitimacy<sup>61</sup>. This implies debate and negotiation among all the stakeholders, public participation and the application of the principles of due process<sup>62</sup>.

In other terms, transparency and participation are incentives for the development of some forms of accountability, as the “*public reputation*” or the “*market accountability*”<sup>63</sup>, but a balanced coexistence with the other procedural devices and principles, notably the judicial review<sup>64</sup> and sanction<sup>65</sup>, is necessary.



The request for democracy and legitimacy may appear pretentious or utopian and can be contested on the fact that States' representatives (supposedly democratically elected) still act in the international community; that their political and economic influence have always led international decisions; and finally that the presence of a global polity can act as a counterbalance towards national regulations and so increase internal democracy by dividing powers among more subjects.

Nonetheless, we have to consider three objections to what just said. First, States' representatives have to share their powers with other rule-makers intervening in the global legal space and the adopted policies enjoy a significant legal force due to the interconnectedness of the economies. This means that indirect representation is not enough to legitimize common global decisions.

Second, despite geo-political or economic powers are still relevant in global decision-making, this does not mean that global policies and the actors entitled to adopt them should be shielded from respecting certain procedural guarantees that nowadays are widely spread and shared all over the world. The dialectic between political freedom and legal limits is reproduced at an extra-national level and as in domestic regimes, it relies on administrative law devices.

Finally, the democratic-enhancement of national decision-making would be impaired or even nullified if the counter-powers composing the global polity do not ensure enough legitimacy guarantees to the decision-recipients. And, as shown, with the lack of direct representation patterns, procedural democracy – through the widespread and effective increment of transparency and participation, as well as other principles, guarantees and decisional techniques taken from administrative law – may currently be the most effective way to increase accountability and pluralism of the global polity.

#### NOTES

<sup>1</sup> S. Cassese (2012), *The Global Polity. Global Dimensions of Democracy and the Rule of Law* (Sevilla: Global Law Press), p. 27. The interconnection among many different regulatory regimes has been called by K. Raustiala and D. G. Victor in *The Regime Complex of Plant Genetic Resources*, in "International Organization", 58 (277), "a regime complex", i.e. "a collective of partially overlapping and non-hierarchical regime".

<sup>2</sup> Such form of democratic legitimacy is based on several theories relying on alternative device to democratize the decision-making: among them, the one grounded on "deliberative democracy" or "procedural legitimacy", are based on debate, openness

of the decision and participation of stakeholder and decision-recipients. According to such theory, as noted by J. Elster, “political choice, to be legitimate, must be the outcome of deliberation about ends among free, equal, and rational agents” [Introduction, in J. Elster (ed.) (1998), *Deliberative Democracy* (Cambridge: Cambridge University Press)]. On this see J. Habermas (1992), *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, translated into English by W. Rehg, Massachusetts, 1996. p. 298 ff.; J. Habermas (1996), *Postscript to between facts and norms*, in M. Deflem, *Habermas, modernity and law* (Thons and Oaks CA: Sage Publications); D. Esty (2006), *Good Governance at the Supranational Scale: Globalizing Administrative Law*, in “Yale Law Journal”, 115, p. 1547; and C. Joerges, et al. (eds.) (2004), *Transnational Governance and Constitutionalism* (Oxford and Portland Oregon: Hart), p. 3 ss.

<sup>3</sup> Moreover, the global polity seeks democratic legitimation through indirect representation – as the national States are not expelled by the decision-making, while they still are decisive actors – and relying on technical devices in order to neutralize decisions.

<sup>4</sup> The literature on these issues is quite wide: G. Arena (ed.) (1991), *L'accesso ai documenti amministrativi* (Bologna: Il Mulino); S. Cassese (1993), *La disciplina legislativa del procedimento amministrativo. Una analisi comparata*, in “Il foro italiano”; A. Sandulli (2003), *Il Procedimento*, in S. Cassese (ed.), *Trattato di diritto amministrativo. Parte Generale* (Milano: Giuffrè), p. 1082 ff.; S. Cassese (1996), *Poteri indipendenti, Stati, relazioni ultrastatali*, in “Il foro italiano”, p. 12 ff.; B. Bugarcic (2004), *Openness And Transparency In Public Administration: Challenges For Public Law*, in “Wisconsin International Law Journal”, 22 (483); T.N. Hale and A.M. Slaughter (2006), *Transparency: possibilities and limitations*, Fletcher Forum of World Affairs. S. Charnovitz (2003), *The Emergence of Democratic Participation in Global Governance*, in “Indiana Journal of Global Legal Studies”, 45 (10); S. Charnovitz (1997), *Two Centuries of Participation: NGOs and International Governance*, in “Michigan Journal of International Law”, 183 (18); S. Sassen (2003), *The Participation of States and Citizens in Global Governance*, in “Ind. J. Global Legal Stud.”, 5 (10), p. 8; R.B. Stewart (2008), *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance*, Paper presented at New York University – Law School – International Legal Theory Colloquium on Interpretation and Judgement in International Law, 7 february 2008; R.A. Dahl (1994), *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, in “Political Science Quarterly”, 109 (1), p. 23 ff.

<sup>5</sup> “The category of public reputational accountability is meant to apply to situations in which reputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms as well as in conjunction with them” [R.W. Grant and R.O. Keohane (2004), *Accountability and Abuses of Power in World Politics*, in “IJLJ Working Paper”, 7, pp. 17-18. Available at: <http://www.ijlj.org/papers/2004/2004.7%20Grant%20Keohane.pdf>].

<sup>6</sup> These are: competent bodies and individuals, political orientation and directives on the issue, stakeholders involved in the proceeding, possible conflicts of interests, and so on.

<sup>7</sup> In this paper the concept of *accountability* is meant as the power that a plurality of individuals, called sovereign, has to keep under scrutiny, evaluate the activity and influence the decisions of certain subjects, which representing that collectivity, exercise an executive authority to implement that sovereign power. And, at the same time, the opposite mirror duty, upon the latter, to give account for their actions and decisions. For this, the possibility to see, to monitor, the activity of decision-makers is central in this process, but it should also be supported by mechanisms of sanctions, of political and/or judicial nature, which should be held by the constituencies. The expression accountability thus refers to the variety of tools through which public regulators – be them national or supranational – are called to justify their activity. These tools comprise several devices: administrative rule of law; mechanisms of responsibility and sanctioning; systems of control or review, including the one from peers. The concept of accountability goes beyond its legal definition and concerns more in particular all the techniques through which decision-makers have to give account to decision-recipients for the measures they approve and adopt. On these issues see Richard B. Stewart (2006), *Accountability and the Discontents of Globalization: US and EU*

*Models for Regulatory Governance*, unpublished, Viterbo II GAL Seminar, 9-10 June 2006, p. 1; R.W. Grant and R.O. Keohane (2004), *Accountability*, cit. p. 2 ff.; A. Buchanan e R.O. Keohane (2006), *The Legitimacy Of Global Governance Institutions*, in *Ethics & International Affairs*; S. Cassese (2004), *Shrimp, Turtles and Procedure. Global Standards for national Administrations*, available at <http://iijl.org/courses/documents/HC2004.Cassese.pdf>, p. 19 ff.; E. Chiti (2012), *L'accountability delle reti di autorità amministrative dell'unione europea*, in "Rivista Italiana di Diritto Pubblico Comunitario", 1 (XXII), p. 57; R. Mulgan (2003), *Holding Power to Account: Accountability in Modern Democracies* (Basingstoke: Palgrave MacMillan); C. Harlow and R. Rawlings (2008), *Promoting Accountability in Multi-Level Governance: A Network Approach*, in D. Curtin and A. Wille (ed.), *Meaning and Practice of Accountability in the EU Multi-Level Context*, Connex Report Series Nr. 07, p. 283 ff. (also published in *European Law Journal*, 2007, p. 542 ff.).

<sup>8</sup> On these issues, see R.B. Mitchell (2011), *Transparency for Governance: The Mechanisms and Effectiveness of Disclosure-based and Education-based Transparency Policies*, in "Ecological Economics", 70, p. 1882, distinguishing the duties of transparency imposed by global law on national States, which can be defined as "transparency for governance" as opposed to "transparency of governance", that is the duty of global bodies to guarantee an adequate regime of transparency and publicity. About such distinction see A. Peters (2014), *The Transparency of Global Governance*, Available at: <http://ssrn.com/abstract=2419019> or <http://dx.doi.org/10.2139/ssrn.2419019>, p. 2. Regarding participation, as pointed out by S. Cassese, *The Global Polity*, cit., p. 144 ff., the relations established among global regulators, private parties and national governments are often triangular rather than purely horizontal (national governments – to –national governments) or vertical (national government-global institution or private parties- global institution or private parties- national government).

<sup>9</sup> On this the Sutherland Report has dedicated an entire section to the debate on enhancing transparency and civil society involvement in the WTO: P. Sutherland et al. (ed.) (2004), *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: WTO), p. 45. See also P. Van den Bossche (2006, 2010), *NGO Involvement in the WTO* (Maastricht: Working Papers Faculty of Law) and S. Charnovitz, *Two Centuries of Participation*, cit.

<sup>10</sup> NGOs are allowed to attend plenary sessions without making interventions and only if they can demonstrate that their activities are concerned with matters related to those of the Organization.

<sup>11</sup> See A. Peters, *The Transparency*, cit., p. 2 and, with reference to participation, S. Cassese, *The Global Polity*, cit., p. 159, (observing that participatory rights at the global level are "not precisely defined", "loosely structured" and "not always enforceable by a court").

<sup>12</sup> On this issue it is to insist if disclosure is compulsory or not, above all if it is also supported by sanctions, which is the main condition to have effective cases of open government, to be distinguished from the mere freedom of information for the citizens. On this, M. Hunt and R.A. Chapman (2006), *Open Government and Freedom of Information*, in R.A. Chapman and M. Hunt (eds.), *Open Government in a Theoretical and Practical Context* (Aldershot: Hashgate), p. 3, insist on the distinction between the two institutes, showing as it is not easy to define a government as "open", "when the information released and the terms of public consultation depend entirely on the government".

<sup>13</sup> See C. Harlow (2006), *Global administrative law: the quest for principles and values*, in "European Journal of International Law", 17 (1), p. 18 ff. and B.S. Chimni (2004), *International institutions today: an imperial global state in the making*, in "The European Journal of International Law", 15 (1).

<sup>14</sup> FAO/WHO, *Statutes of the Codex Alimentarius Commission*, Rome – Geneva, 1961/62, Art. 1; <http://www.fao.org>, <http://www.who.int>. The CAC is an inter-governmental public-private regulatory regime, created by FAO and WHO with the aims of: "Protecting the health of the consumers" and "ensuring fair practices in the food trade". The Commission issues food safety and quality standards, which are published in the Codex and can (formally they are soft law) be adopted by States for domestic regulations. On this see D. Bevilacqua (2012), *La sicurezza alimentare negli ordinamenti ultrastatali* (Milano: Giuffrè), *passim*.

<sup>15</sup> Annex A of the WTO SPS Agreement directly recalls standards issued by the Codex Commission: when WTO member States approve trade-restrictive national regulations they have to demonstrate that they are not disguised protectionist measures. For instance, if they refuse to import an alleged unsafe substance, either they rely on an international standard, which (according to Art 3 of the SPS Agreement) should guarantee an objective and shared decision about that good (e.g. setting the limits of that substance in determined food products), or they demonstrate the concrete risk of the contested product. If they do not comply with these requirements, they will result in violation of the mentioned Art 3 and they might be sued in front of the DSB, for violation of WTO law. The decisions of the adjudicative body of the WTO, concerning economic damages suffered by the members, if not respected by the losing parties can be enforced through the application of (normally forbidden) tariffs or duties for the amount of the estimated damage (Articles 21 and 22, Dispute Settlement Understanding). This form of sanction is a strong deterrent for member States, which joined the WTO in order to enjoy such economic advantages and therefore tend to abide by DSB decision. In addition, due to the costs and the concrete feasibility to provide an appropriate scientific justification of a SPS measure, member States of the WTO prefer to incorporate Codex standards into their legislation rather than face the expense and the risk of a stricter regulation. This makes also CAC's standards binding, to say better: *quasi-binding*.

<sup>16</sup> Standards are issued after an eight-step procedure, which resembles the structure of a domestic administrative process of law: there is a starting initiative that, through the development of linked acts aimed to collect information, assess facts and balance interests leads to a final decision, translated into a standard, which can be applied in the territories of member Countries.

<sup>17</sup> D. MilijkoVIC (2005), *Sanitary and Phytosanitary Measures in International Trade: Policy Considerations vs. Economic Reasoning*, in "International Journal of Consumer Studies", 29, p. 285. On this see also J. Tickner et al. (1998), *The precautionary principle in Action: A Handbook* (Science and the Environment Health Network), pp. 14-15: "Risk assessments are susceptible to model uncertainty. Current risk assessment is based on at least 50 different assumptions about exposure, dose-response, and extrapolation from animals to humans. All of these have subjective and arbitrary elements. As a result, the quantitative results of risk assessments are highly variable. The European Union recognized the limitations to risk assessment assumptions in its European Benchmark exercise in hazard analysis. (M. Contini et al. (1991), *Benchmark Exercise on Major Hazard Analysis*, EUR 13386 EN Commission of the European Communities, Luxembourg). At the same time, current risk assessment leaves out many variables, especially multiple exposures, sensitive populations, or results other than cancer. It does not adequately take into account sensitive populations, such as the elderly, children, or those already suffering from environmentally induced disease. It rarely looks at effects other than cancer, although many environmental health problems involve respiratory disease, birth defects, and nervous system disorders. Risk assessment is designed to analyse linear response (more exposure leads to more harm) and is stymied if this is not the case".

<sup>18</sup> The described phenomenon is typical of the so called "*club-like institutions*", in which delegates "negotiate in secret, then report their agreements to national legislatures and publics" [R.O. Keohane and J.S. Nye Jr (2001), *Between Centralization and Fragmentation: the Club Model of Multilateral Cooperation and Problems of Democratic legitimacy*, John F. Kennedy School of Government, Harvard University, Faculty Research Working Papers Series, 4, available at: <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004>].

<sup>19</sup> On this see Joint FAO/WHO (2005), *Enhancing participation in Codex activities*, Rome – Geneva, p. 31 ff., available at: [www.codexalimentarius.net/e/supra](http://www.codexalimentarius.net/e/supra), Cap. I, § 5.

<sup>20</sup> On this see, for all, A. Cassese (1975), *Consensus and Some of its Pitfalls*, in "Rivista di diritto internazionale", and A. Cassese (1994), *International Law, International Organizations: A Comparative Approach* (Westport: Praeger).

<sup>21</sup> See K.M. Krchnak (2005), *Improving Water Governance Through Increased Access to Information and Participation*, in "Sustainable Development Law & Policy", 5 (1), p. 34 ff.

<sup>22</sup> See, for example, the Preamble of the Aarhus Convention on access to information (recognizing that “in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions” (see also Art.1 and Art. 4); the Cartagena Protocol on Biosafety (see Art. 23.1.b) and the Code of Conduct for Responsible Fisheries (see Art. 7.1).

<sup>23</sup> See U.N. Economic and Social Council, Sub-Commission on the Promotion of Human Rights, Report of the High Commissioner for Human Rights, “Human Rights, Trade and Investment, paras. 5-19, UN Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003).

<sup>24</sup> See UN Doc. E/C.12/2002/11, 9th session, 2003. B. Morgan (2006), *Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law*, in “The European Journal of International Law”, 17 (1), p. 215 ff.

<sup>25</sup> *Id.*, p. 224.

<sup>26</sup> The ICSID was created by the World Bank and it is regulated by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as “Washington Convention”) entered into force on October 14, 1996 and currently ratified by 150 States.

<sup>27</sup> Disputes are solved by an arbitral tribunal, which consists, in most cases, of three arbitrators, one appointed by each party and a third appointed by agreement of the parties of the party appointed arbitrators. Once the parties have consented to the arbitration they cannot withdraw their consent. The award rendered by the tribunal is binding and can be rectified, annulled, or revised upon request of the parties.

<sup>28</sup> Article 48 (4) of the ICSID Regulations and Rules, available on the ICSID website at [icsid.worldbank.org](http://icsid.worldbank.org)

<sup>29</sup> Available at: [http://www.nytimes.com/2004/09/27/opinion/27mon3.html?\\_r=0](http://www.nytimes.com/2004/09/27/opinion/27mon3.html?_r=0)

<sup>30</sup> ICSID Regulations and Rules, cit., Rules 37(2) and 32(2), respectively.

<sup>31</sup> ICSID Case No. ARB/05/22 (Biwater) and ICSID Case No. ARB/03/19 (Suez), available at [icsid.worldbank.org](http://icsid.worldbank.org).

<sup>32</sup> In 2014 only 3% of the registered cases involved water, sanitation and flood protection.

<sup>33</sup> Suez, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, May 19, 2005, para. 22.

<sup>34</sup> As confirmed by the Biwater Order, (available at <http://www.worldbank.org/icsid/cases/awards.htm#awardarb0522>) paras. 51 and 52 and paras. 19-21. On the impact of international investments (and arbitration) on human rights see generally J.D. Fry (2007), *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, in “Duke Journal of Comparative & International Law”, 18 (1), p. 77 ff. and T. Weiler (2004), *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, in “Boston College International and Comparative Law Review”, 27 (2).

<sup>35</sup> Biwater Order, cit. para. 50.

<sup>36</sup> See E. Levine (2011), *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, in “Berkeley Journal of International Law”, 29 (1), p. 200 ff.

<sup>37</sup> See N. Rubins (2006), *Opening the Investment Arbitration Process: At What Cost, What Benefit?*, in “Transnational Dispute Management”, 3, available at: <http://www.transnational-dispute-management.com/article.asp?key=798>.

<sup>38</sup> Already at the World Food Summit of 1974 (FAO, *United Nations: Program of Action of the World Food Conference*, reproduced by UN Document n. E/5587, 22 November 1974) a series of strategies have been formulated in order to fight hunger: increasing food productions through a more intensive agriculture; supporting rural development with more investments in infrastructure; credit facilitation and improvements of transports and mechanisms of circulation; enhancement of free trade and international transactions. Twenty-two years later, in November 1996 (FAO, *Food Declaration on World Food Security and World Food Summit Plano f Action*, Rome, 13-17 November, 1996), the UN Food Summit took awareness of growth of food insecurity, starvation and malnutrition and to tackle such phenomena proposed the increment of the commercial liberalization and the growth of world trade. In 2002, a new Summit was held (FAO, *Declaration of the World Food Summit: Five Years Later*, Rome, 10-13 June 2002, available at <http://www.fao.org/DOCREP/>

MEETING/004/Y6948E.HTM.) and the result was that again food access, instead of increasing, had decreased. However, instead of rethinking the policy of contrast to hunger, it decided to reiterate the commitment to intensify food production through industrialization and world trade. On these issues see E. Holt-Giménez and R. Patel (eds.) (2010), *Food Rebellions! Crisis and the Hunger for Justice* (Bra: Slow Food), pp. 23 ss. and 27.

<sup>39</sup> On this see the website <http://www.fao.org/wsfs/world-summit/en/> and, for the Final Declaration, FAO (2009), *Declaration of the World Summit on Food Security*, Rome, 16-18 November 2009, on the website [http://www.fao.org/fileadmin/templates/wsfs/Summit/Docs/Final\\_Declaration/WSFS09\\_Declaration.pdf](http://www.fao.org/fileadmin/templates/wsfs/Summit/Docs/Final_Declaration/WSFS09_Declaration.pdf).

<sup>40</sup> The Meeting of civil society associations on food sovereignty took place in Rome for the first time from the 13 to the 17 of November 2009. The final Report of that experience is available at <http://www.foodsovereignty.org/Portals/0/documenti%20sito/final-cfs-document1.pdf> (at pages 50-54 the requests and proposals of the Forum). More information at <http://www.foodsovereignty.org> and in E. Holt-Giménez and R. Patel (eds.) (2010), *Food Rebellions!*, cit., p. 247 ff.

<sup>41</sup> FAO (2009), Committee On World Food Security, *Reform of the Committee on World Food Security*, Thirty-fifth Session, Rome, 14, 15 and 17 October 2009, [http://www.fao.org/fileadmin/templates/cfs/Docs0910/ReformDoc/CFS\\_2009\\_2\\_Rev\\_2\\_E\\_K7197.pdf](http://www.fao.org/fileadmin/templates/cfs/Docs0910/ReformDoc/CFS_2009_2_Rev_2_E_K7197.pdf). The Committee met also in the following years, still involving the CSOs. See <http://www.foodsovereignty.org/FOOTER/Insideview.aspx>, where the so called “Civil Society Mechanism” is described and where can be checked the new organization of the FAO Committee to allow such decisional mechanism.

<sup>42</sup> A possible drawback of the described model concerns the accountability of NGOs and CSOs: if they demand to be reliable as stakeholders, they should also ensure transparency, accountability and representativeness, and be open to individuals participation. On this, as far as concerns the Civil Society Mechanism (CSM) at the CFS, there are guidelines for the activity of the CSM itself ([http://www.csm4cfs.org/resources-7/csm\\_guidelines-24/](http://www.csm4cfs.org/resources-7/csm_guidelines-24/)) and the network of stakeholders is organized as an open and accountable body ([http://www.csm4cfs.org/about\\_us-2/what\\_is\\_the\\_csm-1/](http://www.csm4cfs.org/about_us-2/what_is_the_csm-1/) and [http://www.csm4cfs.org/coordination\\_committee-3/](http://www.csm4cfs.org/coordination_committee-3/)).

<sup>43</sup> R.W. Cox (1997), *Democracy in hard times: economic globalisation and the limits to liberal democracy*, in A. McGrew (ed.), *The Transformation of Democracy? Globalisation and Territorial Democracy* (Cambridge: Polity Press), pp. 49-72.

<sup>44</sup> See United Nations (2010), *The Human Right to Water and Sanitation*. UN-GA A/Res/64/292, adopted 28 July 2010. UN, New York, New York, USA, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/64/292](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292).

<sup>45</sup> The Dublin Statement on water and sustainable development was adopted at the International Conference on Water and the Environment, Jan. 31, 1992, Dublin, Ireland. Principle No. 4 states: “water has an economic value in all its competing uses and should be recognized as an economic good”.

<sup>46</sup> See *Water Utilities: Global Industry Guide*, MarketLine Industry Guides, 2013

<sup>47</sup> Case no. ARB/97/3, Award of November 21, 2000, [English original] 16 IC-SID Rev. – FILJ 641 (2001); and Case no. ARB/01/12, Award of July 14, 2006, annulled on September 1, 2009, available at: [icsid.worldbank.org](http://icsid.worldbank.org).

<sup>48</sup> See B. Morgan, *Turning Off the Tap*, cit., pp. 230-231.

<sup>49</sup> *Marchisio José Bautista y Otros c/ Superior Gobierno de la Provincia de Córdoba y otros. Juzgado de Primera Instancia Civil y Comercial de Córdoba*, Nr. 500, 14 October 2004.

<sup>50</sup> S. Cassese, *The Global Polity*, cit., p. 68.

<sup>51</sup> For a more detailed analysis of how this happened see B. Morgan, *Turning Off the Tap*, cit., p. 238 ff.

<sup>52</sup> For “fragmentation” of extra-national law we mean “the breakdown of the substance of general international law into allegedly autonomous, functionally oriented, “self-contained” regimes”, M. Koskenniemi (2007), *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalisation*, in “Berkeley Press: Theoretically Inquires in Law”, 1 (8), available at: <http://www.bepress.com/til/default/vol8/iss1/art2/>. On this issue, see M. Koskenniemi (2006), *Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion Of International Law. Report of the Study Group of the International Law Commission*, in

International Law Commission, Fifty-eighth session, Geneva, 1 may - 9 june and 3 july - 11 august 2006, available at: <http://www.un.org/law/ilc/>. The literature on the subject of fragmentation of global law has developed quite much in the last years. Among others, see R.O. Keohane and J.S. Nye Jr (2001), *Between Centralization and Fragmentation*, cit. and E. Benvenisti and G.W. Down (2007), *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, in "IJLJ working papers", 6, p. 1: "The problem of fragmentation is more serious than it is commonly assumed to be because it functions to maintain and even extend the disproportionate influence of a handful of powerful states – and the domestic interests that shape their foreign policies – on the international regulatory order, and it tends to undermine the operation of the decentralized processes described above".

<sup>53</sup> On this see S. Cassese (2011), *I tribunali di Babele* (Roma: Donzelli), *passim* and p. 89 ff.; A.M. Slaughter (2005), *A New World Order* (Princeton: Princeton University Press), pp. 65-103; M. Delmas-Marty (2004), *Le relatif et l'universel. Les forces imaginantes du droit* (Paris: Seuil), p. 196 ff.

<sup>54</sup> Sabino Cassese has recently stressed the importance to develop, aside participation, also other institutes composing the *due process of law clause*, without which the procedural guarantees ensured at the domestic level could not be transplanted at the supranational level: "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" [S. Cassese (2012), *The Global Polity*, cit., p. 160]. On *due process* in global law see, *inter alia*, S. Cassese, *L'universalità del diritto*, in *Oltre lo Stato*, cit., p. 100, and G. della Cananea (2009), *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (Bologna, Il Mulino), p. 19 ss. and *passim*. On the *due process of law clause*, in general and in the V and XIV amendments of the US Constitution, see A. Sandulli, *Il Procedimento*, cit., p. 1074 ff. and the literature there indicated. Other contributors are of A. Zito (2012), *Il principio del giusto procedimento*, in M. Renna and F. Saitta (eds.), *Studi sui principi del diritto amministrativo* (Milano: Giuffrè), p. 509 ff. In US literature see mainly J.L. Mashaw (1985), *Due Process in the Administrative State* (New Haven), pp. 6-7; R.B. Stewart (1975), *The Reformation of American Administrative Law*, in "Harvard Law Review", 8 (88), p. 1717 ff.; E.L. Rubin (1984), *Due Process and the Administrative State*, in "California Law Review", 72, p. 1044 ff.; J.L. Mashaw (1976), *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, in "The University of Chicago Law Review", 44 (1), p. 28 ff.; C.R. Farina (1991), *Conceiving Due Process*, in "Yale Journal of Law & Feminism", 108, p. 189 ff.

<sup>55</sup> See above note n. 5.

<sup>56</sup> See, for instance the Italian law on administrative process: legge n. 241 del 1990, Arts 24, paragraphs 6, letter d) and 7.

<sup>57</sup> Both documents are available on the ICSID website at [icsid.worldbank.org](http://icsid.worldbank.org)

<sup>58</sup> "Lacking any direct egalitarian political process on the international level, transparency will regularly have the effect of strengthening organized interests, be they represented by NGOs or by MNCs" [C. Möllers (2006), *Patterns of Legitimacy in Global Administrative Law: Trade-offs between due process and democratic accountability*, Viterbo II GAL Seminar, 9-10 june, p. 2]. Similar considerations apply to participation, see, for example, F. Spagnuolo (2009), *Participation: Administrative-Law Type Mechanisms in Global Environmental Governance. Toward a New Basis of Legitimacy?*, in "European Public Law", 15 (1), p. 49 ff.

<sup>59</sup> As noted, the publicity of institutions and decision-makers is on the basis of a democratic society: it is "la "forma della pubblicità", vale a dire l'insieme delle istituzioni che obbligano i governanti a dar pubblico conto delle loro decisioni e rendono impossibile la pratica degli *arcana imperii*, caratteristica degli Stati dispotici e delle monarchie assolute" [N. Bobbio, *Prefazione a I. Kant, Per la pace perpetua* (Roma: Editori Riuniti)].

<sup>60</sup> For the concept of accountability used in this article, see *supra* footnote n. 7.

<sup>61</sup> On this see again *supra* footnote n. 2.

<sup>62</sup> Marco D'Alberti (2000), *La "visione" e la "voce": le garanzie di partecipazione ai procedimenti amministrativi*, in "Rivista trimestrale di diritto pubblico", 1, pp. 31-31 has noticed that the corrections to the unbalance and to the inequalities that can be produced by participation are the strengthening of expertise and neutral powers and the guarantees of transparency and disclosure.

<sup>63</sup> In "*market accountability*" the consumers can "exercise their influence through the market" (R.W. Grant and R.O. Keohane, *Accountability*, cit., pp. 17). For what concerns the *reputational accountability*, see above note n. 34.

<sup>64</sup> Transparency and, mainly, the right to access to administrative documents is a tool in the hands of the citizen to have more awareness and knowledge of the activity of the authorities and therefore perform a better defence of his/her prerogatives.

<sup>65</sup> "It implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met" (R.W. Grant and R.O. Keohane, *Accountability*, cit., p. 3). On this see also T.N. Haleand and A.M. Slaughter, *Transparency: possibilities*, cit., p. 1: "Transparency is often used as a synonym of accountability, but real accountability requires more than monitoring. In order to hold a person or organization accountable it is necessary not only to know what they are doing but also to have some way to make him doing something else".

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