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The principle of transparency in global legal orders

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1. Introduction

If an environmental association wants to see the documents of an agency of a member Country of the Århus Convention, it can request the access to them without demonstrating a qualified interest and, whereas the national administration refuses to allow the consultation of the documents, it can suit it in front of a proper adjudicatory body, calling its own institution to respond in front of an international court.

If a citizen, or an enterprise, of one of the member states of the World Trade Organization (WTO) wants to know a decision of the Dispute Settlement Body of such Organization, he/she can take vision through its website and check all the phases and main documents of the process, gaining all the relevant information, even when the judicial iter is still on going.

Again, if a member of the European Parliament requires to the Council of the European Union the disclosure of the negotiations between EU and the USA, concerning an international agreement (in the case at stake about the availability for the United States Treasury Department to access financial messaging), the Council cannot refuse full access to the requested documents. As the European Court of Justice stated, the opinion of the Council’s Legal Service concerning a recommendation from the European Commission to the Council to authorize the opening of the negotiations must be disclosed to a member of the Parliament upon his/her request. A denial would be contrary to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001, regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

Moreover, the States composing the «Association of Southeast Asian Nations (ASEAN)» – which for more than forty years has been working on an informal regime of cooperation among the members and since 2007 is disciplined by a Constitution with principles, rules, rights and duties – can have notice of the agreements and of the tools adopted by the Organization. And this for the

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2 The research system is available at this webpage: http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results. The same mechanism is used also in other international organizations: transparency of public administrations has recently increased also for the improvement of digital devices, simplifying and speeding the circulation of information and public data. For instance, whoever is interested to know the composition and the activity performed by the Internet Corporation for Assigned Names and Numbers (ICANN), which has duties of surveillance on web functioning, can find all the useful information on the website of the Organization, with a proper page dedicated to transparency: http://www.icann.org/en/news/in-focus/accountability. On this see B. Carotti (2007), L’icann e la governance di internet, in Rivista trimestrale di diritto pubblico, n. 1, disponibile anche al sito: http://www.irpa.eu/wp-content/uploads/2011/10/Icann_Rtdp_bc.pdf.

«Rules of Procedure for Conclusion of International Agreement by ASEAN», adopted in 2011, which establish open procedural mechanisms and require a minimum degree of transparency for the conclusion of agreements inside the Organization⁴.

Finally, if a member State of the WTO adopts a sanitary measure, which may restrict the market, he is compelled to allow the other Countries partner of the IO to take vision of the acts and the documents concerning that measure, even before this reach its finalizations. For this, the former Country needs to institute apposite bodies for the relationships with other member States⁵. At the same time, if a State receives a request of importation of a food product from another Country, it has the right to access the administrative food safety structures of the exporting State⁶.

As the mentioned cases show – despite representing only a small part of the different regulatory regimes composing the global legal space – the principle of transparency is present, recognized and implemented also beyond national borders. And this pertains both the organization of the various regulatory bodies, both the way they put in place their activities.

In addition, the application of the transparency principle follows a top-down approach, as well as a bottom-up one. On one side, it acts as a limit, a guaranty, imposed by supra-national law to national administrations, which are called to open up their activities and information to the citizens, as far as to the foreigners. On the other side, following a bottom-up trend, the principle of transparency allows a general control 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 world⁷. Moreover, global law also encourages an horizontal transparency – peer-to-peer – among national States or among International Organizations.


⁵ «Enquiry point […] responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents», Art 7 and Annex B, of the Agreement on the Application of Sanitary and Phytosanitary Measures (Accordo SPS). The text of the treaty is part of the Marrakech Agreement with which the WTO has be instituted and can be consulted at this link: [http://www.wto.org/english/docs_e/legal_e/legal_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm).

⁶ «Reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures», Art. 4, Accordo SPS.

Such forms of openness, publicity and access to information and documents\(^8\) can be distinguished according to a variety of types. In addition to the existence of several procedural mechanisms, having different models of administrative transparency responds to the aim of satisfying a variety of purposes and functions, which will be analyzed later in this work more in details. We can already focus on four of them.

First, the mechanisms enhancing transparency have the aim to harmonize and develop integration among different legal orders and regulatory systems, composing the global legal space. As it will be shown later on in the paper, if the decision-making procedures, both at national and transnational 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. In addition, transparency has the effect to reinforce other procedural requirements. For instance, the duty to give reason for the assumed decisions would improve, as the global regulators could rely on common, public and agreed criteria. Finally, all the informal systems of open control would be enhanced, as every citizen will have a way to check what policy-makers are deliberating.

Second, transparency is a necessary tool for stakeholders participation to the decision-making: the possibility to consult documents and to get information is functional to an eventual intervention – for instance performed by groups representing several social or underrepresented interests – during the deliberative proceeding. According to such approach, transparency can also increase certain benefits of participation: pluralization of the decision-making; more accountability; improvement of the effectiveness and the quality of the decision; anticipation of judicial protection in a preliminary phase\(^9\). Thanks to the combination with the intervention into the decision-making procedures, the principle of transparency increases democracy and accountability in regulation, both at global both at domestic level. Despite the need to support the guarantees of openness and disclosure with mechanisms of review and sanction, the effectiveness of an transparent policy-making system is evident under the respect of monitoring of regulators’ activity: both when national authorities adopt a trans-national measure, both when global regulators make a decision with effects also in domestic territories, the disclosure of all the phases of the decision-making allows a public –

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and sometimes informal and spontaneous – control of activities and policies, which are not verified through the traditional chain of government.

Third, as well as transparency can be considered a way to regulate economic activities – when public authorities impose it to private subjects in order to affect their decisions\(^\text{10}\) –, at the same time it can be used to force global and national regulators to justify certain decisions, and therefore condition the latter towards common goods: the activity of policy-makers is influenced by the duty to make public certain key-information of the deciding process (competent bodies and individuals, political orientation and directives on the issue, stakeholders involved in the proceeding, eventual conflicts of interests, and so on), which might face unpleasant consequences from the reaction of the informed policy-recipients. Also in this case, transparency has a functional and indirect purpose: incrementing impartiality and public-interests care. And also in this case, effects would occur at global, as well as at national level.

Fourth, transparency has a fundamental function of legitimation of national authorities and of increment of procedural guarantees in the decision-making process put in place by the latter. When supranational law includes disposition requiring national administration to ensure publicity, openness of the proceedings and disclosure of the documents, it provides an extra check to verify the legitimacy and legitimation of administrations’ measures and improves the guarantees and protections for the individuals. In such a way, in addition, national regulators can also justify the measures derogating from common law, and even without changing the substance of such decision, as far as they respect all the procedural requirements: harmonization concerns only forms and procedures, requiring transparency and other guarantees of fairness, and leaves the content of decision to domestic authorities.

Despite the mentioned examples, where the application of the transparency criterion provides an increment of guarantees and protections for the citizens, the present situation of several global regulatory regimes still shows a significant \textit{deficit} in such a field. For instance, many of the proceedings occurring inside the mentioned WTO are secret or not covered by provisions requiring openness and transparency\(^\text{11}\). Similarly, among the cases mentioned before, the decisions of the ASEAN do not foresee a duty of formal publication, as for the national normative acts. Another confirmation of such drawback is given by the absence of a formal codification of the principle at stake, which is not – as it should – disciplined by any international agreement, acting merely as a


\(^\text{11}\) 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), \textit{The Future of the WTO: Addressing Institutional Challenges in the New Millennium} (Geneva: WTO), p. 45, par. 183-205.
general principle\textsuperscript{12}. Not to mention the fact that in many international organizations the principle of transparency does not have an effective applicability, as, for instance, it does not have any judicial protection in case of violation\textsuperscript{13}.

Despite the usefulness of the principle at stake, we need to look at it also under a different perspective, considering some possible drawback. 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 learned, would be favored on the other ones; it can be exploited for aims of propaganda or disinformation; it can affect conflicting rights, such as privacy. That is why transparency is to be seen as a useful tool for good governance, but as far as used in a reasonable and proportionate way.

A second controversial issue, emerging by the development and enhancement of transparency 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, 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 an open tool, 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 following paragraph, few models of transparency adopted in global law are considered. Through the analysis of some study cases, such models are focused in detail, taking in consideration their most original traits and the different aims of the transparency mechanisms (§§ 2-2.2.3).

A second part of this work is dedicated to an assessment of transparency in global law, trying to produce a general picture, which shows how much this principle – or approach – is

\textsuperscript{12} See A. Peters, \textit{The Transparency}, cit., p. 2.

\textsuperscript{13} 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 e R.A. Chapman, in \textit{Open Government and Freedom of Information}, in R.A. Chapman e M. Hunt (a cura di) (2006), \textit{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».
considered, protected and concretely applied, and trying to show its most peculiar and common aspects (§ 3).

Then, transparency is examined, more in details, with specific reference to its instrumental function, of increment of global regulatory regimes’ accountability, so as a necessary tool for the democratic development of global governance (§ 4).

Finally, we show how the principle at stake, besides having a value in itself, as a fundamental principle of a public activity that responds to the criteria of fairness and good governance, it constitutes a necessary tool – despite not so used and developed – to increase accountability, impartiality and democratic guarantees of global regimes (§ 5).

2. The different kinds of transparency in global legal space

As already noticed, in global law transparency reveals itself in different kinds and shapes. This shows the flexibility – and the indefiniteness – of such a principle, time by time interpreted and applied according to different functional perspectives: as a mechanism to increase the accountability of decision-makers; as a procedural guaranty for private individuals; as a tool to divert regulation towards more plural, impartial and general interests oriented decisions.

In the following paragraphs the research insists on each of these kinds, taking in consideration two study-cases in which the principle of transparency is declined in accordance with the different described types.

2.1 The principle of transparency: a global limitation for domestic regulators

Global law, by requiring the disclosure of documents and by requesting an elevate degree of publicity of acts and decisions, affects the organization and the activity of domestic administrative authority. This implies an increment of transparency on behalf of individual guarantees and of the impartial balance of public interests as it imposes to the administrations to justify in an exhausting way their discrentional decisions.

The analyzed cases under this typology are two. One is a decision of the Tribunal of First Instance of the European Union, which, recalling the dispositions of the Århus Convention, has imposed to the Commission (and indirectly to Germany, the involved member State) to allow the vision of certain documents for an environmental association, which requested it. The second one concerns the Agreement between Europe and China on textiles, where the EU had to provide
several guarantees of transparency and participation in order to legitimize and make conform to global law certain measures derogating to the norms of WTO on free-trade.

As can be seen, the rules of the Århus Convention use procedural mechanism based on disclosure and due process to increment and make homogeneous the protection of public common – global – interests (such as the environment), normally considered weak\textsuperscript{14} or underrepresented and that still need a public intervention for their protection, which is not so simply in a globalized world tending to harmonization.

The second case shows instead how the procedural norms contained in the Agreements forming WTO law not only favor the openness of world markets and of free trade, but also push national States to improve their domestic procedural guarantees, on behalf of the regulations-recipients, both citizens, both foreigners.

2.1.1. Study case: The Glifosate, the industrial inventions and transparency

The decision T-545/11 adopted by the Tribunal of First Instance of the EU on the 8\textsuperscript{th} of October 2013\textsuperscript{15} has established – on the basis of the Århus Convention and of the European Regulations n. 1049/2001 and n. 1367/2006 – that whereas there is a public interest to the protection of the environment, the exceptions to the right to access to documents possessed by public administration (for instance to protect industrial inventions or intellectual properties) are to be interpreted in a restrictive sense and therefore they are applicable only in few determined cases, towards the presence of a «prevailing public interest»\textsuperscript{16}, as environmental protection.

The decision at stake has accepted the complaints of the association «Stichting Greenpeace Nederland», which received a denial, by the German authorities and by the EU, for the disclosure of a set of documents concerning the first authorization – released in accordance with the ECC Directive n. 91/414/ECC – for admission to the market of the Glifosate, as an active substance among phytosanitary products. The Tribunal has considered the denial of the Commission to the request of disclosure, considering it illegitimate. The reasons of the Commission for justify its denial were grounded on the necessity to avoid that some industrial-related information were made

\textsuperscript{14}The social interests, despite their general nature, seem – and thus are defined – weak or underprotected as in need of a proper public protection. To make these rights effective there is the need of specific norms and administrative structure, with all the powers to intervene for their protection. In a global space, where all these institutes are not yet developed, such rights and interests still result under-protected. On this issue see, \textit{ex multis}, J.-B. Auby (2003), \textit{La globalisation, le droit et l'État}, Paris, Montchretien, p. 67 e ss.; J.E. Stiglitz (2002), \textit{La globalizzazione e i suoi oppositori}, Torino, Einaudi; L.M. Wallach (2002), \textit{Accountable Governance in the Era of Globalization: the WTO, NAFTA and International Harmonization of Standards}, in University of Kansas Law Review; F. Spagnuolo (2008), \textit{Globalizzazione e diritti umani. Il commercio dei servizi nella WTO}, Pisa, Plus; D. Bevilacqua, \textit{Il Free-trade e l'agorà}, cit., passim.

\textsuperscript{15}Decision of the Tribunal of the 8th of October 2013 — \textit{Stichting Greenpeace Nederland e PAN Europe/Commissione}, (Causa T-545/11), al sito http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011TJ0545:IT:HTML.

\textsuperscript{16}Ibid., par. 42.
public, in damage of the intellectual property right of the enterprise requesting the authorization. Nonetheless, as the EU is part of the Århus Convention – applied in the European legal system through the Regulation n. 1367/2006 – and as this establishes the prevalence of the right to environmental information over the right to intellectual property, the Tribunal has nullified the act of denial of the Commission, restoring the denied right to information.

Besides the conflict between industrial and environmental protections, it is of relevance how the solution of the interests balance has been found through the right to disclosure and to transparency of the administrative decisions. When certain public interests – considered sensitive, weak – are involved, transparency and access to the information are to be always guaranteed in an extended way, prevailing – apart from exceptions to be interpreted in a restrictive sense – on other competing rights, such as intellectual property.

Through the principle of transparency and its application to an administrative principle, global law affects domestic administration, with aims of procedural harmonization (the same guarantees have to be ensured in all member States), of substantial harmonization (environment protection is a primary interest, to be cared in a uniform way on a world scale, even at detriment of other competing interests) and of legitimization of regulatory policies (only the measures conforming to a common global law can be considered legitimate). In such a way, the application of the principle at stake enlarges citizens’ guarantees, not only *uti singuli*, protecting their individual complaint for disclosure of the information, but also *uti cives*, as interested subjects to the decisions concerning the protection of a public interest, such as the defense of the environment. The disclosure of documents it is thus not only a guaranty for the individual requesting it, but also a general principle, which enhances the democratic control, pluralism and impartiality.

### 2.1.2. Study case: The agreements on world textiles market and transparency

In 1995, with the Agreements instituting the WTO, also the Agreement on Textiles and Clothing (ATC)\(^\text{17}\) has been finalized, with the aim to eliminate quotas on textiles importation. Inside such Treaty, a specific clause for China has been approved, the Textiles-Specific Safeguard Clause (TSSC)\(^\text{18}\), included in paragraph n. 242 of the Report of the Working Party on the Accession of China, which is part of the protocol including China in the Organization. This clause allows

\(^{17}\) Agreement on Textiles and Clothing (ATC). Available on the web at: [http://www.wto.org/english/tratop_e/texti_e/texti_e.htm](http://www.wto.org/english/tratop_e/texti_e/texti_e.htm);

member States to introduce safeguards measures with the effect of restricting importation from China, when certain conditions occurs.

The European Union has exploited such clause, adopting specific guidelines establishing the criteria to invoke it\(^{19}\). It is thus a soft law provision, which is coherent with the discipline and the rationale of the Marrakech Agreements. The latter admit derogations to free trade but only under certain conditions and only respecting certain criteria and requisites, above all of formal and procedural nature. In such a derogative process, several forms of participation – among which, “notice and comment” – both for private subjects, both for the States which are interested or directly damaged by market restriction. Therefore, in the case at stake, the Chinese government.

The Protocol regulating the adhesion of China to WTO gives States the power to determine the conditions on which ground safeguards measures can be adopted. However, such limitation is embedded by restrictions of substantial nature – such as the special socio-economic needs for which a trade restrictions is admitted – and, above all, of procedural nature, that is the duty to hear the competent Authority of the State damaged by the domestic measures and to explain the reasons, which lead to their adoption.

As the harmonization of trade rules faces limits – such as the different perception of quality and safety of goods and the different internal situations calling for corrective intervention to regulate the market – it is necessary to allow derogations to free trade: If these were not admitted, national authorities would loose their power of checking the conditions under which goods and services are offered, with the risk to witness a reduction of the standards of public interests’ protection. At the same time, if such possibility of derogation is too wide, this would risk to become arbitrary, introducing undue forms of protectionism, which the WTO aims to eradicate. The system of the latter Organization requires States to guarantee that such restricting measures are not arbitrary or aimed at protect national interests of protectionist nature. Thus, as it is neither convenient nor easy to deal with the content of national measures, the domestic authorities are called to ensure certain formal guaranties of impartiality and procedural fairness. One of the tool used in such cases, for instance by the EU, is notice and comment, which allows States and individuals to take vision of the regulatory decision of other nations and to participate to their decision-making process.

As seen, through the procedural tools of participation and transparency, global administrative law finds a solution to the problem of the dialectics between common rights and prerogatives, on one side, and, on the other side, domestic expectations and interests. In this way harmonization is maintained and enhanced, while, at the same time the role of the State and of public regulation does not loose its main characters to correct market failures. As the procedural tools to guarantee fairness and equality are used in a system grounded and articulated on opening markets and on competition among the different national regulatory regimes, such procedures are to be preferred by exporters, with the effect that all States will abide with that regulatory approaches, conforming domestic regimes to the common ones towards a “race to the top” of regulations. Thanks to global law, a domestic legal discipline is extended on a global scale: a global regulatory regime adopts it and makes it common, giving thus birth to a mechanism of procedural harmonization, as the same discipline will be then applied by national authorities. The latter will have to abide by supranational law, increasing guaranties for individuals and facing limits and restrictions to their discrentional – and eventually arbitrary – power.

2.2. The principle of transparency as a general limit for global regulators

As it has been stated above (§ 2), in global law transparency does not only have a top-down approach, towards national authorities, but also a bottom-up one, affecting supranational 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 policy which would not be supported by adequate mechanism of representation.

The cases considered in this section are three. The first one concerns the proceeding 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 the Food Security Committee (CFS) of the Food and Agricultural Organization (FAO), which, through the intervention of Civil Society Organizations make the decision-making process on policy against starvation and food insecurity more plural and open to the intervention of all the involved stakeholders. Finally, the third case concerns the reform of the Basel Committee, which, in order to ensure better representation and more reliability, bases its new Statues on a system of notice and comment and publicity of the decisions.
2.2.1. Study case: Food global standards and transparency

The institutive and procedural norms regulating the activity of the Codex Alimentarius Commission aim at ensure 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, 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 based 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, 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 operates according to criteria of publicity. Nonetheless, some drawbacks can still be seen for what concerns the information of decision-recipients and of stakeholders: by making a comparison with the so called “Foia” model (“freedom of information act”), we can notice that the information does not automatically reach the citizens, but the latter have the onus of look for it and search for the documents he/she needs.


21 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
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 FAO and WHO and the results of their studies are made public and are available for everyone. Nonetheless, the same transparency is not ensured during the phases of the proceeding that leads to the final 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 makes the scientific analysis as a “science policy”. 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 latter 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 but considering also the involved geopolitical, economic and sectoral interests.

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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.

22 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.

23 D. Milijkovic, *Sanitary and Phytosanitary Measures in International Trade: Policy Considerations vs. Economic Reasoning*, in *International Journal of Consumer Studies*, 29, 2005, p. 285. On this see also J. TICKNER, C. RAFFENSPERGER, e N. MYERS, *The precautionary principle in Action: A Handbook*. 1st edition. 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., *Benchmark Exercise on Major Hazard Analysis*, EUR 13386 EN Commission of the European Communities, Luxembourg, 1991). 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 analyze linear response (more exposure leads to more harm) and is stymied if this is not the case.»
This last step, although based on scientific evaluations, is featured by a discrentional connotation, concerning the factual premises of the decision and involving several stakeholders. As the precedent, also this phase 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 about the discussion inside the committees and about the approach and the rationale used to interpret and elaborate the information and the data on which the standard is based\(^24\). In addition, despite there mechanisms of transparency and publicity, the latter lack in effectiveness as there is no judicial body to obtain the compliance to them.

The step of the final decision is articulated in more moments. 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\(^25\). According to the requests or complaints coming from national States, the Secretariat can modify the draft and put it under a critical review by the Executive Committee. Afterwards, the standard can be approved by the Commission and therefore published in the Codex. The final approbation is reached through consensus\(^26\) or, whereas it is not possible, through simple majority (Rule XI.2, Rules of Procedure, Proc. Man.).

A significant feature of the just mentioned step is the lack of transparency when the negotiations occur: the interested subject are not authorized to assist or intervene in this phase and the deliberative procedure take place in secret. The decisional moment, thus, is not monitored: the standard-setters are repaired from administrative control or from direct political accountability. Nonetheless, a form of publicity is still ensured by 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 is a higher-level body with functions of political or management control: the eventual violation of certain guarantees or formal limits cannot be judicially sanctioned, but can be only contestered through diplomatic or political methods.

The described standard-setting procedure constitutes a complex decisional mechanism, articulated in more phases, all ensuring a minimum set of transparency with the aims of legitimizing the Organization. The principle at stake is here 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 favor undue or unbalanced pressures, as well as phenomena of capture by the stakeholders with more influential powers.

2.2.2. Study case: The Food Security Committee and public participation

The Food and Agriculture Organization (FAO) 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. In the occasion of the 2009 annual meeting of the Food Security Committee (CFS), 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; among the latter some program or provision suggested by the stakeholders implied a different approach than the ones adopted in the previous

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27 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-GMÉNEZ e R. PATEL (eds) (2010), Food Rebellions! La crisi e la fame di giustizia, trad. it. a cura di D. Panzieri da Food Rebellions! Crisis and the Hunger for Justice, Bra, Slow Food, p. 23 ss. e 27, Box 1.

years, opting for a change of perspective in tackling food insecurity\textsuperscript{29}. The participation of the civil society representatives has thus institutionalized by FAO’s \textit{Committee on Food Security}, which has been reformed in its organizational structure in order to guarantee a dialogue with NGOs and \textit{Civil Society Organizations} (CSOs)\textsuperscript{30}.

In the examined case, transparency and participation produce two effects. The first concerns the substantial content of the regulatory activities of the CFS, conditioned and influenced by the necessity, for the regulator, to decide in public: opening the discussion and the deliberation, also the content of the decisions are conditioned by the presence of such a plurality of stakeholders and recipients, therefore they tend to opt for more general interest-oriented policy. The second effect, indirect and informal, concerns instead the increment of democratization of a mechanism of decision, which otherwise would be void of control and verification by the relative constituencies, while is produced in an open and plural deliberation.

Under the first respect, it is to note that the new deliberative procedures – having the effect of interrupting a uniformity of view which procrastinated for years even when proving ineffective to eradicate hunger – have led the policy-makers to keep into account the instances and the proposals dissenting from the institutionally consolidated approach 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 considerations.

Under the second profile, we can register an increment of accountability: through the participatory procedure and the publicity of the interventions a new experiment of global deliberative democracy is activated. Indeed, despite FAO remains the competent body for the adoption of the final provisions to tackle food insecurity, with the States that will decide if and how to adopt the policies issued by the latter, such Organization does not act unilaterally, isolated from the constituencies and from civil society affected by its decisions. On the opposite, 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


\textsuperscript{30} FAO, \textit{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. 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.
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.

2.2.3. Study case: The Basel Committee II and the notice and comment

The Basel committee is a trans-governmental body, established in 1974, with the aim of globalizing banking standards. It does not have binding power, but several international organizations, with relevant influencing powers on national regulatory policies – among which International Monetary Fund and the World Bank – request that its standards are effectively implemented in national legal orders as a requisite to obtain the benefits of their interventions. This, as understandable, gives to such standards a high coefficient of observability and diffusion – that is they are de facto binding – but put the way they are finalized under criticism as, for their material importance, are still too much conditioned by the pressure of the most economically powerful States.

In front of several observations and criticisms, the Committee started a procedure of revision of the Statues and rules governing its functioning and organization. In 1999 it published a consultative document entitled “A New Capital Adequacy Framework”. This was a report, accompanied by a request of comments, after which the Committee received about 250 memories from different stakeholders, such as banks and public regulators. Before the revision was approved and finalized – in June 2004 - the new agreement, named “Basel II” went under other participatory and consultative processes. Several comments were submitted both with reference to the second draft, both to the third one, until the final deliberation. The new Basel Committee, born in 2004, finds its legitimacy and finds its ground, already in the moment of its constitution, through a mechanism of notice and comment, inspired by the principle of transparency and participation. These apply thus as fundamental principles, as the criteria inspiring the “Constitution” of an international body and as a tool to legitimize it.

We thus note that a system of banking regulation – although informal and void of binding powers – in order to overcome certain limits of scarce representativeness and impartiality, begins a significant reform of the institution. To do that, it produces a system based on participation and notice and comment: through public participation, but also through transparency in the constitutive process, an institutional reform of the Committee takes place, with the aim to guarantee the legitimation of the Organization and to provide more guarantees of impartiality and accountability.

31 For more information see http://www.bis.org/bcbs/.
3. The quality of transparency in global regulation and its effects on the world citizens

In a reflection on transparency in ultra-state legal orders we should ask: why do we need transparency in global law? Such a question can thus be articulated and specified into other four interrogatives. What is the usefulness of having a principle of transparency developed beyond and over the state borders? Which kind of advantages or drawbacks do we find in an open governance of global regulatory regimes? And therefore: is transparency guaranteed in such a legal space more than the one ensured at the domestic level? And finally, is transparency 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 – 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 allocation 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 have purposes of harmonization and integration among the different legal systems: the duty to ensure a certain level of transparency forces authorities – domestic or global – to justify their decisions, for instance relying on objective or shared criteria, such as the general principle of good governance. In this way uniformity and harmonization concern procedural rules governing the regulatory activity, as well as the system of political accountability, grounded on general control and on bottom-up monitoring, performed by citizens and by civil society organizations. Moreover, the need to keep public and open to the access all the activities performed is a general and common principle, belonging to different regimes: this is a first step in a process of legal harmonization, as related to procedural and formal norms.

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. At the global scale there still are

different interpretations and applications of the various administrative law principles, as confirmed by the cases about transparency. 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 global – which is still a complex and heterogeneous mix of different legal systems – the diffusion of common principle could work as an important tool, at present, to reach more integration, balance and harmonization. In addition, this is coherent with the doctrine that follows the idea of a legal globalization based on the dialogues among courts. In this sense, indeed, the interpretative and evaluative activities performed by judges can be more effective and more easy to be put in place if they concern general principle 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

Second, transparency has a positive effect on public participation of stakeholders, as it increases and encourages the intervention in the decision making, enhancing pluralism and accountability. As noticed, the participatory process itself is positively influenced when accompanied 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 such a model. In addition, an open and transparent participation has certain advantages: more knowledge and awareness of the stakeholders intervening to the

that shape their foreign policies – on the international regulatory order, and it tends to undermine the operation of the decentralized processes described above».  
34 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 pre- pared), 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: Global Dimensions of Democracy and the Rule of Law, Sevilla, Global Law Press, p. 160. On due process in global law see, inter alia, Id., L’universalité del diritto, in Oliere 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 emendaments of the US Constitution, see A. Sandulli, Il Procedimento, cit., p. 1074 ff. and the literature there indicated. Other contributes are of A. Zito, Il principio del giusto procedimento, in M. Renna and F. Saitta (eds) (2012), Studi sui principi del diritto amministrativo, Milano, Giuffré, 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, Vol. 44, No. 1, p. 28 ff.; C.R. Farina (1991), Conceiving Due Process, in Yale Journal of Law & Feminism, 108, p. 189 ff.
process; more difficulties in exercising pressures and attempt 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 is used as well to influence the content of extra-national policies: the simple fact of obliging rule-makers to make certain information public, 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 function of transparency enhances political and reputational accountability\(^\text{35}\); 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 can increase political accountability as well as the plurality of interests represented in the rule-making processes. With an impact also on the content of the decisions.

Transparency at the global level, nonetheless, presents also flaws and limits, above all when it is not effectively guaranteed or applied in a correct way. Recalling the second question of the ones presented before, we have to focus on the drawbacks of transparency in global law.

A first trade-off produced by the increment of transparency guarantees 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, to ensure that the information is made public and that the tools to access 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 only 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 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. For instance, the above mentioned standards adopted by the CAC give a confirmation in this sense: if all the phases

\(^{35}\) «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 e R.O. Keohane, Accountability, cit., pp. 17 e 18
were articulated in a process ensuring transparency in all the moments, it would easier – for the constituencies – to recognize the conflicts between experts in the risk assessment phase, 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. This would be an advantage for all citizens – despite their role of food consumers or producers, for instance – and also for the speed of decision, as there would be less space for secret – and long – negotiations.

A second problematic issue concerns the right to privacy, notably in conflict with the norms enhancing transparency. However, also in this case the peculiarity of the extra-national system has a weight in the assessment of such dialectic. Indeed, 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, 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. Nonetheless the present regime of international organizations already protect in a significant way, maybe even excessive, the information about their activities. Notably, for what concerns for instance the officers employed in these regimes – 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 on 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.

Another problematic aspect concerns the effectiveness of the principle of transparency. In many cases, indeed, the principle at stake 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.

Finally, the real capacity of the principle at stake to produce substantial democracy is also reduced: the mere introduction or extension of the principle of transparency, if not properly directed and diversified in order to be used by different subjects and if not supported by other mechanisms to

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36 See, for instance the Italian law on administrative process: legge n. 241 del 1990, Arts 24, paragraphs 6, letter d) and 7.
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 ensure more democracy and impartiality in the decision-making. In this respect, however, global organizations are already, for the most, not very transparent. In such a situation it is not hard that forms of pressure and lobbyism already occur, with a favor for certain subjects and at detriment of other ones, for instance not able to get the information or to intervene in the global decision-making. For this, even a general and indistinct increment of transparency in the organizations would still have a positive effect on substantial equality, with a favor for knowledge and information also for underrepresented interests.

4. The administrative transparency as a pillar of accountability: a solution for global orders’ legitimacy?

One of the main problems concerning the system of global governance concerns the accountability of decision-makers: global regulators often offer a reduced, partial or indirect accountability. Thus, transparency is a key element although not the only one – necessary to increment the accountability of global polities.

On the issue of transparency it is necessary to distinguish between the application of such a principle in the global space and in the domestic legal orders. In the latter, indeed, national legislators meant to limit and regulate transparency of public bodies following a rationale that keeps in mind the completeness of the system: in the Italian legal order, for instance, the discipline of Arts 22 ff. of the law n. 241 of 7th of August 1990 (“Administrative Procedure Act”) reduces the access

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37  «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. MOLLERS (2006), Patterns of Legitimacy in Global Administrative Law: Trade-offs between due process and democratic accountability, Viterbo II GAL Seminar, giugno 9 – 10, p. 2.

38  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. BOBIO, Prefazione a I. KANT, Per la pace perpetua, Editori riuniti, 1009, trad. it di N. Merker da Zum ewigen Frieden (1795).

39  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. On this 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 giugno, 2006, p. 1; R.W. Grant e R.O. Keohane (2004), Accountability and Abuses of Power in World Politics, IILJ Working Paper, 7 (Global Administrative Law Series) (http://www.iilj.org/papers/2004/2004.7%20Grant%20Keohane.pdf ), p. 2 ff.; A. Buchanan e R.O. Keohane (2006), The Legitimacy Of Global Governance Institutions, Draft, Duke and Princeton Universities, February 1, p. 10 ss., ora in Ethics & International Affairs, 2006; S. Cassese, Gamberetti, tartarughe, cit., p. 676 ff.
to administrative documents but this is coherent with a system in which laws are adopted in public by a representative 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 all cases 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 sectoral and decides disputes only between states, a complete and effective informative system is lacking. That is why even a general application or increment of the transparency guarantees can act as useful tools to increase the accountability of global polities.

However, as partially anticipated, this is not sufficient, as the guarantees of transparency should be also supported by other procedural devices. Transparency constitutes a procedural rule, among many, useful to increase the so called administrative democracy or procedural legitimacy\(^40\), which foresees a debate and a negotiation among all the stakeholders, public participation and the application of the principles of due process\(^41\). Transparency is an incentive for the development of some forms of accountability, as the «public reputation» or the «market accountability»\(^42\), but it still necessitates a balanced coexistence with the other procedural devices of participation, review\(^43\), and sanction\(^44\).

For all these reasons we can affirm that a general, widespread and effective increment of transparency guarantees in global regimes would constitute an effective tool to increment pluralism, accountability and power-checking in global governance. Nonetheless, transparency alone is not enough to reach such an objective: the efficacy of this principle would be more if it was included in a wider picture of procedural democracy, based on principles, guarantees and decisional techniques

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\(^{41}\) MARCO D’ALBERTI (2000), La ‘visione’ e la ‘voce’: le garanzie di partecipazione ai procedimenti amministrativi, in Rivista trimestrale di diritto pubblico, n. 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.

\(^{42}\) In «market accountability» the consumers can «exercise their influence through the market», R.W. GRANT e R.O. KEOHANE, Accountability, cit., pp. 17. For what concerns the reputational accountability, see above, § 3., note n. 35.

\(^{43}\) 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 defense of his/her prerogatives. On this see A. RULLO (2000), Funzione di tutela ambientale e procedimento amministrativo, Napoli, Editoriale Scientifica, p. 122: «la trasparenza, e, in particolar modo, il diritto d’accesso ai documenti amministrativi, è strumento per il cittadino per giungere – attraverso una migliore conoscenza dei fatti – ad una più consapevole decisione sull’azionabilità della propria pretesa al bene della vita».

\(^{44}\) «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 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. HALE 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». 
taken from administrative law, such as due process, duty to give reasons, impartiality, good governance, reasonableness, proportionality and judicial review.

5. Conclusions

The previous analysis has shown that transparency is, in global law, something more than a mere principle of administrative action. It constitutes a necessary tool to overcome certain evident limits and drawbacks of the regulatory system developing beyond the State: such as fragmentation, scarce democracy and insufficiency of guarantees of impartial action. The global regimes already provide a good set of transparency and publicity guarantees, but the present condition of regulation has been targeted, by more subjects, with the request of more transparency: such a principle, indeed, is still not effective and concretely implemented in the global law. Thus extra-national regulators are called to be organized to increase transparency, working in “glass estates”\(^45\), i.e. open to the public and completely accessible to the citizens.

In order to reach such a purpose, it is to ensure a series of guarantees of ostensive nature: through websites global bodies can make their activity public; information should be spread on a daily basis through media tools easy to consult; the possibility to know the organization, the functions and the actions of every global regulators should be ensured to everyone; the mechanisms of notice and comment should be provided in many decisional bodies; every measure should be accessible and, if not adopted in a regime of publicity, it should be sanctioned through a process of judicial review. This is not completely absent, in the present system, but, as noticed, there still are many flaws, drawbacks and inefficiencies.

In addition, it is fundamental that a legal presumption of transparency is foreseen: everything that is not made public needs to find a justification and should be motivated. In this way, the reasons for the non-transparency are to be made public and this should find place into a proper legal discipline, which can be recalled in front of an adjudicatory body case of violations, with the possibility to nullify the contested measure or to sanction the decision-makers\(^46\).

Finally, the increment of the system of access and of the transparency procedures would be functional to reduce a typical drawback of global governance: the insufficiency of accountability. This, as seen, can be effective if transparency is included in a mechanism which proceduralize

\(^45\) The expression recalls the idea of a transparent building, where it is always possible to see what is going on inside. It is a quotation of another famous expression, referred by Filippo TURATI, who stated: «la casa dell’amministrazione dovrebbe essere di vetro", Atti del Parlamento italiano, Camera dei deputati, sess. 1904-1908, 17 giugno 1908, 22962. More recently it has been used also by Sabino CASSESE (1996) in Poteri indipendenti indipendenti, Stati, relazioni ultrastatali, in Il Foro Italiano, n. 1, parte V, p. 12.

\(^46\) On these issues: A. Peters, The Transparency, cit. p. 5.
global rule-making, which should thus be participated, guaranteed by proper motivations, reasonable, proportionate, submitted to judicial review and, as said, transparent.
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