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DEMOCRACY AND ACCOUNTABILITY IN EARTH SYSTEM GOVERNANCE

Why does administrative law matter?

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ABSTRACT

This paper aims to briefly illustrate some early findings of an ongoing research project on procedural democracy in earth system governance. The primary focus is to explore whether administrative-law type mechanisms, such as the right to a hearing, the duty to provide a reasoned decision and to disclose relevant information, could enhance democratic legitimacy and equal participation in earth system governance. The democracy-enhancing potential of these mechanisms, which in the national context have proved to be beneficial in strengthening citizens' participation and the acceptance of decisions, in the global arena can be limited by a number of factors. By drawing on the current debate concerning the democratic quality of global governance, this paper aims to investigate whether the adoption of administrative- law type principles, mechanisms and rules could lead to greater procedural democracy or turn into an "empty ritual". The analysis suggests that in order to realize their democracy-enhancing potential, global administrative procedures should be widely perceived as legitimate and fair and be supported by financial and technical instruments enabling developing countries and marginalized groups to engage in dialogue and participation with powerful actors.

SERIES FOREWORD

This working paper was written as part of the Earth System Governance Project, a ten-year research initiative launched in October 2008 by the International Human Dimensions Programme on Global Environmental Change under the overall auspices of the Earth System Science Partnership.

Earth system governance is defined in this Project as the system of formal and informal rules, rule-making systems and actor-networks at all levels of human society (from local to global) that are set up to prevent, mitigate and adapt to environmental change and earth system transformation. The science plan of the Project focusses on five analytical problems: the problems of the overall *architecture* of earth system governance, of *agency* of and beyond the state, of the *adaptiveness* of governance mechanisms and processes, of their *accountability* and legitimacy, and of modes of *allocation and access* in earth system governance. In addition, the Project emphasizes four crosscutting research themes that are crucial for the study of each analytical problem: the role of power, of knowledge, of norms, and of scale. Finally, the Earth System Governance Project advances the integrated analysis of case study domains in which researchers combine analysis of the analytical problems and crosscutting themes. The main case study domains are the global water system, global food systems, the global climate system, and the global economic system.

The Earth System Governance Project is designed as the nodal point within the global change research programmes to guide, organize and evaluate research on these questions. The Project is implemented through a Global Alliance of Earth System Governance Research Centres, a network of associate faculty members and research fellows, a global conference series, and various research projects undertaken at multiple levels (see www.earthsystemgovernance.org).

Earth System Governance Working Papers are peer-reviewed online publications that broadly address questions raised by the Project's Science and Implementation Plan. The series is open to all colleagues who seek to contribute to this research agenda, and submissions are welcome at any time at workingpapers@earthsystemgovernance.org. While most members of our network publish their research in the English language, we accept also submissions in other major languages. The Earth System Governance Project does not assume the copyright for working papers, and we expect that most working papers will eventually find their way into scientific journals or become chapters in edited volumes compiled by the Project and its members.

Comments on this working paper, as well as on the other activities of the Earth System Governance Project, are highly welcome. We believe that understanding earth system governance is only feasible through joint effort of colleagues from various backgrounds and from all regions of the world. We look forward to your response.

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1. INTRODUCTION

According to Biermann (2006:7), earth system governance can be defined as "the sum of formal and informal rule systems and actor-networks at all levels of human society (from local to global) that are set up to influence the co-evolution of human and natural systems in a way that secures the sustainable development of human society"[1]. As such, earth system governance requires a multilevel analysis and a transdisciplinary approach, which traverses the borders of academic disciplines and goes beyond traditional environmental policy analysis, combing the study of environmental factors with social processes[2].

It has been observed that "the more we confer regulatory competence and authority upon formal and informal institutions and systems of governance (…) the more we will be confronted with questions of how to ensure the accountability and legitimacy of the governance systems"[3]. This is especially true at the global level, where the absence of a constitutional system makes it particularly difficult to establish accountability relationships between those who wield power and make rules and those who are affected by them[4].

The aim of this paper is to contribute to the research on this specific topic, using the lens of global administrative law to shed new light on the democratic quality of earth system governance[5]. The level of analysis will therefore be primarily global. In fact, even when local in scope, issues related to earth system governance are mostly encountered all across the globe, thus requiring a global-scale and multi-actor approach (e.g. climate change).

Within the earth system governance theoretical framework and conceptual model (as developed by BIERMANN AND AL., 2009), the question of how administrative law can

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[1] See also BIERMANN AND GUPTA, 2011.

[2] This approach is largely linked to the emergence of a new scientific paradigm that, according to Clark-Crutzen- Schellnuber (2005:24): "is driven by unprecedented planetary-scale challenges, operationalized by transdisciplinary centennium-scale agenda, and delivered by multiple-scale co-production based on a new contract between science and society". For a detailed analysis, see SCHELLNHUBER, 1999.

[3] See BIERMANN ET AL. 2009:4.

[4] On accountability in the global context see generally KEOHANE, 2003.

[5] According to Kingsbury, Krisch and Stewart (2005) global administrative law can be defined as "comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make". Further, these authors understand global governance as administrative action, including rulemaking and adjudicatory proceedings as well as other forms of regulatory and administrative decisions.

ensure greater democratic legitimacy in earth system governance will then be investigated combining the traditional method of legal research with some concepts borrowed from the social sciences (e.g., governance, hegemony, inclusiveness).

The primary focus is to explore – without the presence of comprehensiveness or precision - whether administrative law could enhance equal participation and democracy in earth system governance.

On the premises that administrative law is, in large part, a product of the attempt to control and legitimate public power (even when it is delegated to private entities), this paper will seek to sketch some of the key problems associated with the development and use of mechanisms of administrative law at the global level, where the line between public and private is blurred and there is no clear delegation of powers from States to other actors (international institutions and non-state actors).

2. THE DEMOCRACY DILEMMA IN EARTH SYSTEM GOVERNANCE

A democratic dilemma exists, according to Robert Dahl (1994:24), "wherever and whenever the societies and economies within democratic states are subject to significant external influences beyond their control". These pressures can be the result of deliberate decisions, but can also derive from unintended actions.

The *anthropogenic* transformation of the earth system, for instance, produces natural and social interdependencies, which transcend the boundaries of states and influence national economies and societies beyond their control[6]. To face the challenges deriving from this "Global Change" (STEFFEN ET AL, 2004), governments increasingly resort to intergovernmental networks and organizations or hybrid public-private entities that facilitate cooperation and joint action, reduce costs and instability[7].

If, on the one hand, this shift from the national to the global level is necessary for coping with global problems, on the other hand, it reduces the opportunities for exerting democratic control over decisions that critically impact citizens' lives.

From this standpoint, therefore, a democratic dilemma also exists in earth system governance, where the need to find effective solutions to transnational sustainable development problems, is confronted with the opportunity for citizens to participate in - and influence - decisions that affect their actions. Since a trade-off between the two horns of the dilemma is neither simple nor desirable, efforts should be made to

[6] An example of such interdependencies is the increase of food prices as a consequence of regional climate change.

[7] According to Dua and Esty (1997:59-60), in the absence of multi-country cooperation, certain environmental problems, such as climate change, can result, in fact, in economic inefficiency and market failures.

develop mechanisms of participation, which also favor qualitatively acceptable outcomes.

To put it slightly differently, democracy will become an "empty ritual" if the political choices, although derived from citizens preferences, are not able to produce effective outcomes in "achieving the goals, and avoiding the dangers, that citizens collectively care about"[8].

The current debate is thus deficient insofar as it only focuses on the "democratic deficit" which results from the shift of decisional power from the national to the global level, omitting that the extension of power beyond the State is necessary for dealing with problems that exceed the capacity of the nation-state. Instead, to address the consequences of natural and social interdependencies and at the same time to supervise and sanction abuses of power, new and meaningful mechanisms of accountability should be devised on the global plane[9].

The lack of accountability- or to be more precise- the absence of adequate accountability mechanisms above the state, has not prevented, however, the engagement of national governments in global governance, where substantive standards, rules and procedures are increasingly negotiated in conjunction with private actors and without a clear delegation of power. Nevertheless, these norms penetrate domestic legal systems and affect national law and administration giving rise to legitimacy concerns[10].

A prominent example concerning earth system governance is the Codex Alimentarius Commission (CAC). The CAC is a global administration body that adopts food safety standards through decisional processes including government representatives and private actors. Even though Codex standards are not legally binding, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, using the technique known as "borrowing regimes", requires member states that wish to go beyond them to comply with the level of protection established by the Codex[11]. As a result, food safety standards adopted by a hybrid private intergovernmental administration body and not formally compulsory, can gain semi-binding status and force a State to revise its regulations[12]. This has led some to question the legitimacy of

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[8] SCHARPF, 1996:2.

[9] KEOHANE, 2006. On the democratic deficit in governance above the level on the nation-state, see, among others, HELD AND KOENIG ARCHIBUGI, 2005, STEIN, 2001 and NYE, 2001.

[10] On penetration of global law in national legal systems see CASSESE, 2004.

[11] Agreement on the Application of Sanitary and Phytosanitary measures (SPS Agreement), April 15, 1994, Annex 1A of the Agreement establishing the World Trade Organization.

12 As occurred in the WTO Sardines dispute, where the WTO Appellate Body found that the European Union Regulation for trade description of sardines (Council Reg. (EEC) No 2136/89) violates international food standards and consequently forced the EU to change it in line with the Codex (EC Reg. No 1181/2003, 2Jul.) See the Report of the Appellate Body, European Commission- Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002.

these standards and the accountability of the global administrative body responsible for their adoption[13].

In order to boost their legitimacy and produce more desirable outcomes, global bodies most frequently adopt administrative-law type mechanisms that, although typical of the State-system, are increasingly being applied also in the "global administrative space" where, according to Esty (2006) the procedural rigor of administrative law can promote fairness and limit the potential abuses of power.

This also applies to earth system governance, where the deployment of administrative-law type mechanisms, such as the access to information and the duty to provide a reasoned decision, might improve participation, guarantees control over the exercise of power and increase the inclusiveness of the system.

3. THE INCLUSIVENESS OF EARTH SYSTEM GOVERNANCE. WHAT ROLE FOR ADMINISTRATIVE-LAW?

The inclusion of new actors in policy deliberations and decision-making procedures on the global plane has been explained as the consequence of the increased policy interdependence among private and public sectors (see RITTBERGER ET AL., 2008). In fact, most of the trans-sovereign problems that dominate the global agenda are generated by private actors and can be solved only through collaboration and cooperative action among states, international organizations and private entities. A pressing example is the climate regime, where the exchange of regulatory, material, organizational and epistemic resources between private and public actors has been proved essential to try to address the causes and consequences of climate change[14]. Here, private actors have played an important role both in the development and implementation of market-based flexible mechanisms (see KUVOLESI, 2007) and in the provision of expert scientific information to policy makers (HAAS, 1992).

If the resource exchange theory could explain the emergence of inclusive institutions, it is dating back to the theory of collective goods where Rittberger et al. (2008) find the rationale for determining which actors need to be part of these institutions in order to ensure their effectiveness. To be an efficient solution for the provision of global public goods, inclusive global institutions must bring together all the actor groups affected by the cross-sector and cross-border externalities that arise on the global scale and, additionally, solve internal problems of collective action among them. Subject to these conditions, inclusive global institutions appear as a solution to governance gaps deriving from the inability or unwillingness of institutions of "exclusive" executive

[13] See ROSMAN, 1993 (commenting critically upon the modus operandi of the Codex Alimentarius Commission) and SHAPIRO, 2002 (discussing problems of accountability created by the movement toward international standards).

[14] See RAUSTIALA AND BRIDGEMAN, 2007.

multilateralism to grant access to those affected by trans-sovereign problems to policy deliberation and decision-making procedures[15].

However, what should be especially acknowledged here is that the involvement of new actors in deliberative processes is not untrammeled, but reflects the political will of the most influential actors to take advantage of the contributions that other actors, particularly the private ones, can bring to the solution of specific problems. This, paradoxically, can lead to a lack of inclusiveness and seizure by powerful interests rather than to improving access to deliberation and decision-making procedures.

To take one widely quoted example concerning earth system governance, the intervention by a cluster of non-governmental environmental organizations (NGOs) in the GATT/WTO *Shrimp-Turtle* dispute, although interpreted by some scholars as a positive development in terms of deliberative democracy (see, e.g., KINGSBURY, KRISCH AND STEWART, 2005), it has been criticized by others as "an interpretation which transforms substantive rules to the disadvantage of the third world countries" (CHIMNI, 2005:7)[16]. Therefore, on the one hand, if the inclusion of NGOs, business associations, epistemic communities and other organized interest groups and non-state actors can be understood in line with Rittberger and al. (2008) as a means of increasing the inclusiveness (and effectiveness) of earth system governance; on the other, it can also be seen as an instrument of dominance.

To see how this works let's explore the Shrimp-Turtle dispute further. Here, the US import ban on shrimps and shrimps products was sponsored by US environmental NGOs and instrumentally used by domestic producers to mask their self-serving motives and impose the costs of the US regulatory priorities on developing countries' constituencies (see SHAFFER, 2005). In the context of this litigation, the Appellate Body (i.e., the judicial organ that hears appeals from reports issued by panels in disputes brought by WTO Members) authorized the intervention of a cluster of industrialized countries' environmental NGOs (acting as *amici curiae*[17]). This decision was harshly criticized by developing countries (and their environmental NGOs) as a transformation of the dispute settlement mechanism to their disadvantage. More precisely while the US and the EC welcomed the submission of amicus curiae briefs from non-state actors as a legitimacy-enhancing instrument, most developing

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[15] As RITTBERGER ET AL. (2008) correctly pointed out, the dominant organizational structure of international intergovernmental organizations is characterized by non- public negotiations and bargaining between national governments and it is, therefore, "exclusive", isolated from public scrutiny and participation.

[16] The *Shrimp-Turtle* dispute originated from the embargo imposed by the U.S. on the importation of shrimps from countries using fishing methods harmful to marine turtles, which are a protected endangered species. The trade restrictions decided by U.S. government were officially motivated, therefore, by the concern to protect turtles from extinction. See Report of the Appellate Body, *United States- Import Prohibition of Certain Shrimps and Shrimp Products* (Shrimp-Turtle), WT/DS58/AB/R, adopted 12 October 1998.

[17] An amicus curiae (literally, friend of the court) is a person (or organization) with a strong interest in the subject matter of an action, but not a party to the action. The friends of the court normally assist the court by furnishing information or advice regarding questions of law or fact.

countries opposed it as being a contamination of the dispute settlement mechanisms by political issues and underlined the risk of underrepresentation of their interests (See WTO doc. WT/GC/M/60, §§ 46 and 70). In particular, the developing countries stressed the instrumental use of the "trade-environment" discourse to impose changes in their regulatory policies and advance industrialized countries domestic priorities[18].

One of the arguments of this paper is that administrative-law type mechanisms might well be used as a prop for the dominant position of the most powerful actors. As Chimni (2005:3) clearly puts it "experience tends to confirm that [...] power plays a key role in the framing, invocation, and implementation of administrative law", so that powerful actors are in a better position to use it to their advantage. However, as this author also observes, there are circumstances in which administrative-law type mechanisms and principles can serve rather "as an instrument of change" by giving those currently excluded from the administrative process the opportunity to make their voice heard. The aforementioned *Shrimp-Turtle* dispute is an illustration of how this can happen. Here, the power vacuum resulting from the conflict between Northern and Southern countries in respect of the involvement of non-institutional players, served as an instrument of change exploited by environmental NGOs to demand inclusion in adjudicatory proceedings before the Appellate Body[19]. In other words, the North-South division about the access of private actors to the WTO adjudication procedures resulted in a legislative impasse that gave the Appellate Body the power to open the process to environmental NGOs.

Yet again, the crucial question here is under which conditions administrative-law type mechanisms can be truly used as an instrument to secure the inclusion of all the relevant interests and, further, whether these mechanisms are available in the global arena and, specifically, in earth system governance.

To begin with, although administrative law has been traditionally regarded as State law, the rise of an international administrative law and the increasing production of global rules adopted by global administration bodies and addressed to state and private parties, have changed this perspective (CASSESE, 2004 AND 2010). While some years ago global administrative law was an emerging but still unnoticed body of law, at present, it is not only considered as "an entirely new area of law that may provide a set of rules for accountability in globalization" (CHESTERMAN, 2008), but also as an instrument of democratic legitimacy (ESTY, 2006). As mentioned above, by providing procedural rigor and a framework for the review of regulatory decisions, administrative law is thought to be able to partially compensate for the lack of democratic foundations in global governance. A prominent example relating to earth system governance is the Aarhus Convention on access to Information, Public

[18] For a fuller elaboration of this line of reasoning see SHAFFER, 2005. See also CHIMNI 2000 and 2002.

[19] For a more detailed analysis, see BENVENISTI, 2005 (especially at 332-36). For different interpretation of this dispute see BHAGWATI, 2001; BIERMANN, 2001; HOWSE, 2007; MATSUSHITA, SCHOENBAUM AND MAVROIDIS, 2006; STEWART AND RATTON SANCHEZ BADIN, 2009.

Participation in Decision Making and Access to Justice in Environmental Matters[20]. Although the Aarhus Convention is a regional, European treaty, it is open for accession to any member State of the United Nations and can be considered in many regards as an element of global administrative law (see DALLE, 2008). Unlike other international treaties, the Convention, in fact, establishes procedural requirements which domestic authorities are forced to implement in their direct relationship with citizens (*e.g.* the rights to access to information and to participate in decision-making[21]) and, in case of non compliance, explicitly recognizes the right of every person to ask for a review by a "Compliance Committee[22]", resembling – in many regards- national administrative courts as they were in their embryonic stage[23].

The Convention - which is, until now, the only binding effort at implementing principle 10 of the Rio Declaration on Environment and Development (1992)[24]- is a valid example of how administrative law can be deployed as a democracy-enhancing instrument. Moreover – according to Kofi Annan - although regional in scope, it might serve as a model and incentive for strengthening environmental democracy in other regions of the world[25]. As illustrated by the case of China, which, although not a member of the Convention, after an exchange of experience with the Aarhus Convention Secretariat, adopted on April 2007 the Regulations on Government Disclosure of Information. These Regulations, which took effect on 1 May 2008, at the same time as other measures adopted by the State Environmental Protection Administration on Open Environmental Information, marked as Horsley (2007:1) asserts "a turning point away from the deeply ingrained culture of government secrecy".

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[20] Adopted on 25th June, 1998 in Aarhus (Denmark) and entered into force on 30 October 2001.

[21] See Art. 4 (Access to environmental information); Art. 6 (public participation in decisions on specific activities); Art. 7 (public participation concerning plans, programmes and policies relating to the environment); and Art. 8 (public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments.

[22] As occurred in the case of Kazakhstan. See, Decision II/5a "Compliance by Kazakhstan with its obligations under the Aarhus Convention", 13 June 2005. ECE/MP.PP/2005/2/Add.7.

[23] As CASSESE (2010), points out with reference to the Conseil d'État (the French supreme administrative court) in the first century after its foundation, when despite exercising judicial review it was not recognized as a judicial body.

[24] According to this principle "environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authority, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".

25 In his foreword to the Implementation Guide to the Aarhus Convention, 2000 (at v) KOFI ANNAN states: "the significance of the Aarhus Convention is global (...) it will open to accession by non-ECE countries, giving it the potential to serve as a global framework for strengthening citizens' environmental rights".

4. IMPLEMENTING ADMINISTRATIVE-LAW TYPE MECHANISMS IN EARTH SYSTEM GOVERNANCE. CHALLENGES AND PROBLEMS

The main argument of this paper has been that mechanisms of administrative law, which in domestic settings *favor* openness and transparency and promote greater participation, could enhance the inclusiveness and democratic quality of earth system governance. The basic idea behind this argument is close to Habermas's procedural concept of democracy and, particularly, to the idea that "democratic procedure (…) grounds the presumption that reasonable or fair results are obtained insofar as the flow of relevant information and its proper handling have not been obstructed"[26]. Insofar as administrative mechanisms ensure that global administration bodies meet adequate standards of transparency, participation and reasoned decision, they can be deemed an instrument of procedural democracy[27].

Versions of procedural rights, which have been used in domestic contexts to legitimate and control public power, are increasingly granted in earth system governance, as a few examples illustrate. The right to access information, for instance, is granted, among other treaties, by the Aarhus Convention[28], the Code of Conduct for Responsible Fisheries[29], and the Cartagena Protocol on Biosafety[30]; the right to participate in adjudicatory and rule-making procedures is provided by the Dispute Settlement Understanding of WTO (e.g. in *Shrimp-Turtle* case)[31], the Programme for

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[26] HABERMAS, 1992 (trans. by Rehg, 1996: 291).

[27] See DINGWERTH, 2007 (noting that discursive quality is one dimension of democratic legitimacy beyond the State).

[28] See art. 4-5 of the Convention, supra note 31, which provide access to environmental information and collection and dissemination of environmental information.

[29] See art. 7.1 of the Code of Conduct for Responsible Fisheries, elaborated by the FAO Committee on Fisheries and unanimously adopted by the FAO Conference on 31 October 1995. Art. 7.1 establishes that "representatives from relevant organizations, both governmental and non-governmental, concerned with fisheries should be afforded the opportunity to take part in meetings of sub-regional or regional fisheries management organizations (…) and should be given timely access to the records and reports of such meetings, subject to the procedural rules on access to them".

[30] The Cartagena Protocol on Biosafety was adopted on 29 January 2000 by the Conference of Parties to the Convention on Biological Diversity as a supplementary agreement to the Convention and entered into force on 11 September 2003. According to Art. 23.1. lett. b): "the Parties shall (…) endeavor to ensure that awareness and education encompass access to information on living modified organism identified in accordance with this Protocol that may be imported".

[31] See *supra*, note 16. See also art. 10 (2) and 17 (4) of the Dispute Settlement Understanding (See Annex 2 to the WTO Agreement) and § 27 (Oral Hearing) of Working Procedures for Appellate Review, WT/AB/WP/5, adopted 4 January 2005.

Endorsement in Forest Certification[32], and the Codex Alimentarius Commission[33]; the rights to reasons and judicial review are provided by the Aarhus Convention and the Subsidiary Body on Dispute Settlement of the Commission on Phytosanitary Measures of the International Plant Protection Convention[34].

The deployment in the earth system governance of such administrative mechanisms, however, though grounded by analogy with domestic settings, goes beyond typical patterns of national administrative law, which leads us to question whether a comparison with domestic archetypes is always possible.

Unlike domestic legal orders, where these procedural rights, as Cassese (2006:55) argues, are "just one element of a larger body of law" requiring transparency and compliance with due process provisions, at the global level, they are more or less structured, defined and enforceable depending on the sector or area. This is due to the elementary stage of global proceduralism and to the particular characteristics of the global legal order, which adapts to the functions to be performed, on a sector by sector basis.

To begin with global proceduralism, it has been observed that the two legitimating principles of administrative law systems in the Western, liberal model of the State – where "modern" administrative law was founded in the 19th century - are democracy and the rule of law. Despite allegedly not being fully developed in the global legal system, both these principles have started their "long march" towards global governance, where, even if in a soft version, rule of law values and principles are increasingly utilized (HARLOW, 2006: 209FF.). Due process principles generated by the rule of law have been applied, for example, by the WTO Appellate Body in the

[32] See art. 3.4.1. of the Rules for Standard Setting of the Programme for the Endorsement of Forest Certification (PEFC), adopted by the General Assembly of the PEFC on 22 November 2002 and amended on 24 October 2004, on 28 October 2005 and on 27 October 2006. The article provides that: "the process of development of certification criteria shall be initiated by national forest owners' organizations or national forest sector organizations having the support of the major forest owners' organization in that country. All relevant interested parties will be invited to participate in this process. Their views will be documented and considered in an open and transparent way".

[33] See Part 3 of the Procedure for the elaboration of Codex standards and related texts, steps (3) and (4) which respectively provide that "the proposed draft standard is sent to Members of the Commission and interested international organizations for comment on all aspects" and that "the comments received are sent by the Secretariat to the subsidiary body or another body concerned which has the power to consider such comments and to amend the proposed draft standard".

[34] Art. 6.9 of the Arhus Convention provides that "Each Party shall make accessible to the public the text of the decision along with the reasons and consideration on which the decision is based"; while, art. XIII of the International Plant Protection Convention, establishes a specific dispute settlement mechanism, which- although not resulting in legally binding solutions- provides "the basis for renewed consideration by the contracting parties concerned of the matter out of which the disagreement arose".

Shrimp-Turtle case[35]. As noted above, in the course of this dispute - and in the subsequent *Asbestos* case[36] – the world trade "judges" also decided to open up the process to all the interested parties, thus giving rise to unprecedented discussions on participation in WTO adjudicatory proceedings[37]. On the one hand, if the legal approach of the Appellate Body indicates that "excluding voices affected by one's decision and not hearing arguments by them [run] counter not only to the ethic of open and public process but to the very principles of natural justice"(WEILER, 2000:12), on the other hand, it also highlights that the way in which these principles are implemented is far from being universally accepted.

From this standpoint, the elementary stage of global proceduralism, instead of being a hurdle for the full development of global administrative law, could be an advantage, to the extent that legal pluralism and cultural diversity will be taken into account when it comes to determining how administrative law mechanisms can be shaped and implemented[38].

Put another way, to make global administrative law work for all, procedures and norms on which administrative law is built at the global level should be framed contemplating that they are not neutral and it depends on how they are structured if "some people in some countries will benefit, while others will face deepening deprivation" (MARKS, 2005). Here again, the example of the Codex Alimentarius Commission can be particularly illustrative. Although the Codex grants all the interested parties to have their view considered before a decision is taken - by providing, as already mentioned, some sort of public consultations - its standard-setting procedures have so far been dominated by transnational corporations. The weak influence of the third world has been ascribed not only to the difficulties in meeting the expenses of participation - partly surmounted through a Codex Trust Fund[39] - but also to the absence of expertise and the inability of developing countries' national structures to increase their administrative capacity and support the work of their representatives within the Codex[40].

This would point to the need for thinking about the mechanics of the procedures of participation in global administration, which are far from being neutral.

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[35] WT/DS58/AB/R para. 180 ff.

[36] See the Report of Appellate Body, *European Commission- Measures Affecting Asbestos and Products Containing Asbestos* (Asbestos), WT/DS135/AB/R, adopted 12 March 2001.

[37] For an early comment see MAVROIDIS, 2001.

[38] This has been elaborated further in SPAGNUOLO, 2011.

[39] The Codex Trust Fund was launched on 14 February 2003, for detailed information see http://www.who.int/foodsafety/codex/trustfund/en/ (last visited March 3, 2009).

[40] For fuller expression of this view see CHIMNI, 2005: 14 FF. See also KRISCH AND KINGSBURY 2006, especially at 260 ff. (observing that, in contrast with the Codex Alimentarius Commission, in the process leading up to the Cartagena Protocol on Biosafety, developing countries and environmental NGOs have played a strong role, resulting in the rules and implementing mechanisms) and SPAGNUOLO (forthcoming).

To overcome this problem – understood, dating back to Gramsci, as an hegemonic project put in place by the most powerful actors[41] - administrative-law type mechanisms should be shaped by drawing some cross-cultural, universal concepts from domestic administrative law[42], but also by building new approaches based on a "lively dialectic between consent and dissent, hegemonic and counter-hegemonic forces, mainstream and critical approaches" (MATTEI, 2003: 389).

According to this argument, a principal challenge of earth system governance will consist, therefore, in developing generally accepted mechanisms which enable all interested parties to effectively control how decisions are taken and affected parties to become - directly or through appropriate procedures at the domestic level - co-authors of the decisions[43]. Additionally, to achieve these goals, the technical, organizational and financial capacity of administrative bodies in developing countries should be increased in any area and sector of earth system governance. It is only by granting financial support and enhancing administrative capacity building that developing countries might have an opportunity to be effectively involved in earth system governance.

This is linked to the problem of the overall architecture of earth system governance, a major policy concern that this paper has chosen to leave out of the account, but that needs to be addressed in future research[44]. It may, in fact, not be possible to grant the practical effectiveness of administrative-law type mechanisms without ensuring that they will be fairly implemented by the single institutions of global governance.

5. SOME CONCLUDING REMARKS

The core conclusion is that administrative-law type mechanisms, which force global decision-makers and regulators to publicly justify their choices and subject their decisions to review, can be deployed to enhance the democratic quality of earth system governance only to the extent that they are implemented by all the relevant actors. Insofar as such mechanisms are perceived as a legal instrument of hegemony to reproduce the dominant position of industrialized countries, they are unlikely to serve "as instruments of change".

This paper has tried to show, in effect, that even when the opportunity to be involved in global proceedings is theoretically granted to all the interested parties (as in the case

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[41] Gramsci's notion of hegemony refers to a process of moral and intellectual leadership through which a dominant group is able to link its interests to those of the subordinate groups, pursuing an order that reproduces its dominant position. See GRAMSCI, 1971.

[42] E.g., the right to access to information, which is granted, even though with different degrees of effectiveness, in many different systems of law. For an overview of government information laws, see BANISAR, 2006.

[43] For example, by providing, on the model of the Aarhus Convention, that the persons affected by a decision have a right to participate in national decision-making (art. 6).

[44] See in more detail BIERMANN ET AL. 2009.

of the Codex Alimentarius Commission), in practice, the lack of financial and technical capacities can frustrate developing countries and marginalized groups' legitimate expectations to effectively participate in decision-making and deliberations. From this perspective, the deployment of procedural guarantees by the agents of earth system governance may, at best, turn into an "empty ritual"[45].

It is only by granting all the actors of earth system governance the opportunity to effectively participate in - and influence- decisions that affect their actions, that administrative law can be used to produce reasonable and fair results, thus enhancing the democratic quality of earth system governance and its capacity to produce desirable outcomes.

[45] SCHARPF, 1996.

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