TEL AVIV UNIVERSITY
THE BUCHMANN FACULTY OF LAW
ANNY AND PAUL YANOWICZ CHAIR
IN HUMAN RIGHTS
PROFESSOR EYAL BENVENISTI

אוניברסיטת תל-אביב
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Legal Regulation of the Decision-Making Process within Global Governance Bodies (from "The Law of Global Governance" (forthcoming, 2014))

Eyal Benvenisti

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Abstract

The following is the text of Chapter 4 of my Hague Lectures on "The Law of Global Governance" forthcoming in the 368 Recueil des cours and in the Pocketbook Series of the Hague Academy of International law.

The book argues that the decision-making processes within international organizations and other global governance bodies ought to be subjected to procedural and substantive legal constraints that are associated domestically with the requirements of the rule of law. The book explains why law – international, regional, domestic, formal or soft – should restrain global actors in the same way that judicial oversight is applied to domestic administrative agencies. It outlines the emerging web of global norms designed to protect the rights and interests of all affected individuals, to enable public deliberation, and to promote the legitimacy of the global bodies. These norms are being shaped by a growing convergence of expectations that global institutions adopt rules and institutions that ensure public participation and representation, impartiality and independence of decision-makers, and accountability of decisions. The book explores these mechanisms as well as the political and social forces that are shaping their development by analyzing the emerging judicial practice concerning a variety of institutions, ranging from the UN Security Council and other formal organizations to informal and private standard-setting bodies.

The aim of this Chapter is to outline the legal constraints on the decision-making process of global governance bodies. The underlying assumption is that the decision was issued by a body that has competence to issue such decisions, so possible *ultra vires* concerns have been ruled out. Tracking the decision-making process sequentially, the chapter first discusses the norms regulating the identity of the decision-maker, where they exist, and the general demands of independence and impartiality. The second part focuses on the decision-making process itself, examining in particular the requirement of a structured fact-finding and decision process, as well as the obligation to hear affected parties, to ensure their participation or representation, and in general to provide a transparent process. The third part covers the regulation of the decision, which includes the obligation to pursue legitimate goals (and only those goals) and the need to respect and protect individual rights, balance conflicting interests and seek proportionality.

Chapter 4

Legal Regulation of the Decision-Making Process within Global Governance Bodies

The aim of this chapter is to outline the legal constraints on the decision-making process of global governance bodies. The underlying assumption is that the decision was issued by a body that has competence to issue such decisions, so possible *ultra vires* concerns have been ruled out.[1] Tracking the decision-making process sequentially, the chapter first discusses the norms regulating the identity of the decision-maker, where they exist, and the general demands of independence and impartiality. The second part focuses on the decision-making process itself, examining in particular the requirement of a structured fact-finding and decision process, as well as the obligation to hear affected parties, to ensure their participation or representation, and in general to provide a transparent process. The third part covers the regulation of the decision, which includes the obligation to pursue legitimate goals (and only those goals) and the need to respect and protect individual rights, balance conflicting interests and seek proportionality. Two additional topics require distinct and elaborate treatment and hence will be taken up in the subsequent chapters: Chapter 5 is devoted to the scope of review of state regulation by global governance bodies, and Chapter 6 focuses on the ways to review those global bodies.

4.1 The Decision-Maker

4.1.1 Internal Authority

Often principals – whether state legislatures or IGO designers – take pains to spell out clearly the identity and composition of the decision-makers. There are several reasons for doing so: sometimes the intention is to ensure that the decider is competent to perform the required task; sometimes the deciders represent specific principals who wish to ensure that their interests are reflected by the decision; and sometimes principals simply want to ensure the accountability of the decider who will have to stand behind the decision and explain it. The identity of the decider is also crucial for gauging his/her/their impartiality vis-à-vis the relevant stakeholders, and hence information about it can contributes to the perceived legitimacy of the decision.[2]

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[1] On this question, see *supra* Chapter 3, text to notes 1-12, and *infra* Chapter 6, text to notes 32-36.

[2] On the link between known identity and legitimacy, *see* Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1528 (2006) [hereinafter Esty, *Good Governance*].

Moreover, and perhaps even more importantly, by ensuring that the decider may not share his/her responsibility for deciding with others prompts the decider to take action and to take responsibility for that action. It prevents the dilution of individual responsibility.[3] As Dennis Thompson stated:

> Insofar as we can locate those officials who are personally responsible and thus most closely connected with the policies and decisions that governments promulgate, we refine and fortify the praise and blame that, as democratic citizens, we direct toward public officials. Personal responsibility in this way can lay a foundation for democratic accountability of the officials who make objectionable decisions and policies. But it also supports accountability for harmful policies and decisions that are less attributable to any current officials as moral agents than to bureaucratic routines and structural defects of the organization in which the officials act.[4]

And there is another important consideration at play. This is borne out by a 1960 advisory opinion of the ICJ concerning the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization.[5] In contrast to its generally complacent approach to claims concerning the *ultra vires* of IGOs,[6] when it came to the internal question of *ultra vires within* an IGO, the ICJ insisted on strict adherence to the identity of the decider as stipulated in the founding treaty. In this case, which Klabbers described as "most explicit constitutional interpretation,"[7] the court regarded the founding treaty as the internal constitution of the IGO, and insisted that a decision taken not according to the treaty had no legal effect.

In that case, the Assembly of the Inter-Governmental Maritime Consultative Organization elected members to the Maritime Safety Committee not according to the criterion stipulated by the treaty. The criterion provided that the members be elected from "those nations having an important interest in maritime safety, of which not less than eight [out of fourteen] shall be the

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[3] André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: a Conceptual framework*, 34 MICH. J. INT'L L. 359 (2013).
[4] Dennis F. Thompson, *Moral Responsibility of Public Officials: The Problem of Many Hands*, 74 AM. POL. SCI. REV. 905, 914 (1980).
[5] Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150, 154, 170-171 (June 8), *available at* http://www.icj-cij.org/docket/files/43/2419.pdf [hereinafter ICJ, *Maritime Safety*].
[6] *See supra* Chapter 3, text to notes 1-12.
[7] JON KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 89 (2nd ed., 2009).

largest ship-owning nations."[8] The question arose as to what "ship owning" meant, and the UK pushed for a vote that would ignore Liberia and Panama (with the third and eighth largest registered fleets, respectively) as "flag of convenience" states. Instead, France and Germany (ranked ninth and tenth) were elected. It smacked of condescension when European delegates mentioned the need to include "those nations which were in a position to make a contribution … through their knowledge and experience in the field of maritime safety."[9]

The Advisory Opinion rejected that view. Based *inter alia* on the text of the convention and the subsequent practice of the member states in giving effect to the treaty, the ICJ determined that "ownership" was based strictly on registered tonnage.[10] But what is important to note here is that the court went beyond the text, the *travaux préparatoires* and other interpretive tools and paid attention to the constitutional aspects of the decision-making process within the IGO. It rejected the suggestion that the Assembly should have discretion to determine which states had the largest fleets based on "the realities":

> If Article 28 (a) were intended to confer upon the Assembly such an authority, enabling it to choose the eight largest ship-owning nations, uncontrolled by any objective test of any kind, […], the mandatory words […] would be left without significance.[11]

In this specific context, insisting on strict adherence to the text demonstrates another powerful reason for insisting on the identity of the decider. The specific identity may reflect a concession granted by the powerful state parties to the weaker ones, or reflect a carefully designed system of internal checks and balances that protects minority interests. Insisting on attention to such matters is as important for weaker parties of IGOs as it is important to minorities and other disadvantaged groups in domestic constitutional systems. A robust system of checks and balances carries additional benefits: it creates friction between actors, and that friction increases transparency as it produces information about the motives and goals of the actors, thereby reducing slack and the potential for misuse of powers.[12]

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[8] *See* ICJ, *Maritime Safety*, *supra* note 5, at 160 (citing Article 28(a) of the convention).
[9] *See id.*, at 157.
[10] *Id.*, at 167.
[11] *Id.*, at 166.
[12] According to Madison, in THE FEDERALIST NO. 51 (James Madison), authority should be distributed among "so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable." Separation of powers promotes careful decision-making, disciplines abuses of power, and institutionalizes a system of policymaking cross-checks. *See* Eyal Benvenisti & George W. Downs, *Democratizing Courts: How National and International Courts are Promoting Democracy in an Era of Global*

There is no discrepancy between the ICJ's attention to the internal allocation of authority within the IGO and the generally permissive approach to the mission creep of IGOs as reflected in the "implied powers" doctrine and others.[13] In fact, the two approaches fit well together: the court is content with IGO expansion of powers as long as the parties keep to their bargain about who makes the decisions.

This tension between the internal and external aspects of the *ultra vires* question were highlighted two years later in the Advisory Opinion on Certain Expenses of the United Nations (Article 17, Paragraph 2, of The Charter) (1962) ("Certain Expenses").[14] The question arose as to whether the UN General Assembly's "United for Peace" resolution intruded on the authority of the Security Council and therefore, as *ultra vires*, could not be regarded as "expenses of the organization" which member states were hence obliged to cover. The court found that the General Assembly did have the authority to issue that resolution and to incur the costs. Crucially for our purposes, the ICJ added that the question of internal *ultra vires* doesn't necessarily affect the obligations of member states as long as the IGO does not overstep its external *vires*:

> If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent.[15]

Stated differently, the ICJ is careful to safeguard the internal allocation of authority within the IGO. But to the extent that such questions threaten the functionality of the IGO – for example, if member states use these distinctions as a pretext for not paying their dues – the ICJ will opt for ensuring the IGO's effectiveness.

Governance, NYU J. INT'L L. & POL'Y (Forthcoming, 2014), *available at* http://globaltrust.tau.ac.il/publications [hereinafter Benvenisti & Downs, *Democratizing Courts*].

[13] On the expansive reading of IGO powers see *supra* Chapter 3, text to notes 13-22.

[14] Certain Expenses of the United Nations (Article 17, Paragraph 2, of The Charter), Advisory Opinion, 1962 I.C.J. 151 (July 20), *available at* http://www.icj-cij.org/docket/files/49/5259.pdf [hereinafter ICJ, *Certain Expenses*].

[15] *Id*., at 168.

4.1.2 Independence

The decision-maker is independent when she enjoys the freedom to decide the way she deems fits her authority. If the IGO constitution allows or requires her to take into account the wishes of her principals she of course must regard those as a legitimate consideration when deciding. But an independent agent is independent insofar as she is free to prefer opposing considerations when balancing conflicting interests, and doing so will not adversely affect her own position in the IGO or elsewhere.[16]

The same reasons that prompt courts to insist on the identity of the decider are relevant in this context as well: if the founding document allocates authority to a certain actor, the assumption is that the system's designers wanted that actor to decide, and not those upon whom she depends. This is certainly the case when the treaty assigns authority to experts who must decide on the basis of their technical skills. But this assumption is rebuttable, and the IGO's constitutive instrument may indicate that the system's designers wished to control the IGO's organs and direct which course they should take. In such instances, dependency should be accepted. It is noteworthy that powerful states often appear more attracted to the political advantages of minimizing the independence of IGO bureaucrats and judges to ensure their domination. For that reason, when courts insist on the independence of IGO bodies they check the powerful member States and promote the interests of relatively weaker parties, as well as the interests of outsiders to the IGO.

A case in point is *Bustani v. Organisation for the Prohibition of Chemical Weapons*.[17] In this case, the ILA Administrative Tribunal (ILOAT) found that the dismissal of Mr. Bustani from his position as the Director-General (DG) of the Organisation for the Prohibition of Chemical Weapons (OPCW) constituted a violation of the Chemical Weapons Convention (CWC). The CWC bodies were designed to implement the resolution to outlaw the use of chemical weapons and to oversee the destruction of stockpiles, and the DG was tasked with the sensitive and crucial responsibility for coordinating the verification efforts. Hence it was crucial to ensure that the DG

[16] This definition is reminiscent of the definition of judicial independence that usually refers to the independence to interpret and apply the law, although obviously here an independent decision-maker is free also to consider non-legal considerations.

[17] Bustani v. Org. for the Prohibition of Chemical Weapons, Judgment No. 2232, (Int'l Lab. Org. Admin. Trib. 2003), *available at* http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2232&p_language_code=EN [hereinafter *Bustani*].

remain independent and no state party influence his or her discretion, and two sections of the CWC were devoted to ensuring the DG's independence.[18] As it turned out, however, just before the U.S. invasion of Iraq in 2003, Mr. Bustani lost favor with the U.S., which sought to remove him from office. At the time, Bustani was proposing nonviolent methods for eliminating Iraq's alleged stockpiles of WMD. He was reported to be on the verge of persuading Saddam Hussein to sign the CWC and allow OPCW to return to Iraq. The U.S., which had earlier supported Bustani's reappointment, was now trying to remove him from office. At its insistence, a special session of the Conference of State Parties was convened. The U.S. financed the attendance of several state representatives at that session. It also threatened to withhold its financial contributions to the OPCW if Bustani was not removed.[19]

The ILOAT found that "At the insistent request of the United States, the Conference of the States Parties felt bound to terminate the complainant's appointment, despite the fact that it had been renewed by acclamation less than two years prior to the no-confidence motion."[20] And while the ILOAT did not find a procedural error in convening the special session, it faulted the reasons for the dismissal:

> In accordance with the established case law of all international administrative tribunals, the Tribunal reaffirms that the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organisations. In the case of heads of organisations, that independence is protected, inter alia, by the fact that they are appointed for a limited term of office. To concede that the authority in which the power of appointment is vested – in this case the Conference of the States Parties of the Organisation – may terminate that appointment in

[18] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction art. VIII(46), Jan. 13, 1993, 1974 U.N.T.S. 45, *available at* http://www.opcw.org/index.php?eID=dam_frontend_push&docID=6357. ("In the performance of their duties, the Director-General, the inspectors and the other members of the staff shall not seek or receive instructions from any Government or from any other source external to the Organization. They shall refrain from any action that might reflect on their positions as international officers responsible only to the Conference and the Executive Council"). *Id.*, art. 47 ("Each State Party shall respect the exclusively international character of the responsibilities of the Director-General, the inspectors and the other members of the staff and not seek to influence them in the discharge of their responsibilities").

[19] Ana Stanic & David D. Caron, *Removal of the Head of a Multilateral Organization -- Independence of International Organizations and Their Secretariats -- Political Interference by Member States in the Operation of International Organizations*, 98 AM. J. INT'L L. 810, 813 (2004); Colum Lynch, *Disarmament Agency Director Is Ousted: U.S. Assails Record on Chemical Arms*, Wash. Post, Apr. 23, 2002, at A13; *Bustani*, *supra* note 17, ¶ 14.

[20] *Bustani*, *supra* note 17, ¶ 15.

> its unfettered discretion, would constitute an unacceptable violation of the principles on which international organisations' activities are founded (and which are in fact recalled in Article VIII of the Convention, in paragraphs 46 and 47), by rendering officials vulnerable to pressures and to political change.[21]

This decision demonstrates the obvious, namely that it does not suffice to state in the constitutive treaty that decision-makers must be independent. The necessary institutional and legal machinery to ensure that independence must also be secured, by, for example, offering long-term and nonrenewable terms or judicial review.

Clearly, the demand for independence is highest in the context of adjudication. Several international judicial bodies, public or private, are set up for a variety of reasons, too complex to discuss here. That such bodies need to be independent from any of the parties to the litigation is trite. Nevertheless, concerns have been raised as to the actual independence of judges and arbitrators in specific instances,[22] and criticisms have led to major reforms in IGOs, such as, for example, the United Nations Administrative Tribunal,[23] or in PIs, such as in the case of the Court for Arbitration for Sport.[24]

4.1.3 Impartiality and Open Mindedness

That the decider is independent is not sufficient. It is equally important to ensure that she does not mix her own personal interest in the decision, and that she decides with an open mind, without bias. These requirements are part of the traditional demands of natural justice that are fundamental to any domestic system of administrative review.[25] Although this requirement is

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[21] *Id.*, ¶ 16.

[22] *E.g.*, concerning arbitrators in investment arbitrations (GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 169 (2008). *See also* A Public Statement by Scholars, Public Statement on the International Investment Regime, OSGOODE HALL L. SCH. (Aug. 31, 2010), *available at* http://www.osgoode.yorku.ca/public-statement/documents/Public_Statement_%28final%29_%28Dec_2013%29.pdf. *But see* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1596 (2005); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 50 (2007).

[23] Tamara A. Shockley, *The Evolution of a New International System of Justice in the United Nations: The First Sessions of the United Nations Appeals Tribunal*, 13 SAN DIEGO INT'L L.J. 521 (2012); and see discussion *infra* Chapter 6, text to notes 41 – 42.

[24] Rachelle Downie, *Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport*, 12 MELB. J. INT'L L. 315 (2011). For the argument that the reforms are not sufficient, see Sergei Gorbylev, *A Short Story of an Athlete: Does he Question Independence and Impartiality of the Court of Arbitration for Sport?*, 13 INT'L SPORTS L. J. 294 (2013).

[25] *See e.g.*, PAUL CRAIG, ADMINISTRATIVE LAW 371 *et seq.* (6th ed., 2008).

considered to be a fundamental aspect of procedural fairness, the motivation behind it is also functional: bias on the part of the agent could harm the IGO and prevent it from fulfilling its tasks. Beyond the need to ensure the proper functioning of IGOs as well as other global governance bodies, what is at stake is also the institution's reputation.

How the World Health Organizations (WHO) handled the Swine Flu epidemic in 2009 can illustrate the problem. For some years the scientific community questioned the WHO's impartiality and therefore its efficiency, given its reliance on experts associated with large pharmaceutical companies. As Abigail Deshman pointed out,[26] these concerns played out quite significantly in the way the WHO reacted to the epidemic. Although the epidemic had a minimal health impact, public expenditure in many countries greatly outstripped budgets allocated to the seasonal flu. Although the WHO's recommendations were not binding on Member States, several European countries had dormant purchase contracts with pharmaceutical companies that were drafted to come into effect automatically if and when the WHO declared a pandemic. Therefore the WHO decision to declare a global pandemic had significant and direct consequences for many states and arguably constituted a windfall for pharmaceutical companies. The disparity between the money spent and the severity of the pandemic led many to question the WHO's governance structure and the adequacy of its conflict of interest provisions.[27] The WHO had to undertake reform to alleviate global concerns.[28]

Rules concerning the prevention of conflicts of interest are important to ensure unbiased decision-making and the semblance of such lack of bias. Such rules should therefore require disclosure of personal financial interests and other limitations on deciding on one's own interests,[29] and institutional review mechanisms should be set up to monitor compliance with such rules.[30] "Softer" codes of ethics that are not legally binding may also help in creating a culture of scrupulousness (or at least an impression of such culture). The United Nations, for

[26] Abigail Deshman, *Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture*, 22 EUR. J. INT'L L. 1089 (2011).
[27] EUR. PAR. ASS., *The Handling of the H1N1 Pandemic: More Transparency Needed*, Report, Soc. Health & Family Aff. Comm., Doc. No. AS/Soc (2010) 12 (June 24, 2010), *available at* http://assembly.coe.int/CommitteeDocs/2010/20100329_MemorandumPandemie_E.pdf.
[28] Deshman, *supra* note 26, at 1098-1099.
[29] Esty, *Good Governance*, *supra* note 2, at 1525.
[30] On such mechanisms see *infra* Chapter 6 text to notes 39 – 43.

example, in 2002 and again in 2013 adopted a code of ethics called Standards of Conduct for the International Civil Service,[31] and also set up an Ethics Office.[32]

Moreover, as the experience in the UN has revealed,[33] to fight conflicts of interest and corruption it is important to protect so-called "whistleblowers" who inform on their superiors' misuse of their offices. The United Nations has come under pressure in recent years by the US Congress and others to promulgate an internal set of rules and institutions aimed at protecting those who report misconduct against retaliation by their superiors. [34]

4.2 The Regulation of the Decision-Making Process

The regulation of the decision-making process serves two main goals. First, it is aimed at promoting the public interest by ensuring that the decision targets appropriate goals through an inclusive and informed process. For that purpose it seeks to ensure open channels of communication between the decision-makers and the public, providing for bi-directional exchange of information through norms concerning transparency and participation. The second goal is to provide due process for those persons whose rights may be adversely affected by the decision and fair opportunity to challenge that decision. This is the concern that informs the right to be heard. This section will deal with these two aspects sequentially.[35]

4.2.1 Transparency and Public Participation

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[31] Int'l Civ. Serv. Comm'n, *Standards of conduct for the international civil service*, 2013, *available at* http://icsc.un.org/resources/pdfs/general/standardsE.pdf.

[32] U.N. ETHICS OFFICE, http://www.un.org/en/ethics/index.shtml (last visited Feb. 13, 2014).

[33] U.N. Secretary-General, bulletin, Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations, U.N. Doc. ST/SGB/2005/21 (Dec. 19, 2005), *available at* http://www.un.org/depts/oios/wb_policy.pdf. See Tamara A. Shockley, *Ethics and the United Nations International Civil Servant: The United Nations Dispute Tribunals and the United Nations Appeals Tribunal's Jurisprudence on Workplace Retaliation – The Rights of The 'Whistleblower' in the United Nations* (2013), *available at* http://works.bepress.com/tamara_shockley/4. *See also supra* Chapter 2, text to notes 146-147, and *infra* Chapter 6, text to notes 49-51.

[34] Oren Dorell, *U.N. urged to protect whistleblowers - or pay the price*, USA Today, Feb. 7, 2014, *available at* http://www.usatoday.com/story/news/world/2014/02/06/us-law-links-whistleblower-protections-un-funding/5268355/ (last visited Apr. 19, 2014); *see generally* Paul Latimer & A. J. Brown, *Whistleblower Laws: International Best Practice*, 31 U.N.S.W.L.J. 766 (2008).

[35] Although traditionally, the right to be heard preceded the more general rights to transparency and participation: Francesca Bignami, *Three Generations of Participation Rights Before the European Commission*, 68 LAW & CONTEMP. PROBS. 61, 63-75 (2004).

Opening up the decision-making processes within IGOs and other global governance bodies serves two crucial purposes. One purpose is instrumental: to enhance control over the decision-makers, thereby reducing slack and promoting the collective welfare. The other purpose is intrinsic: to respect the rights of individuals to have an opportunity, however small, to provide input on matters that shape their lives' opportunities.

The instrumental aspect highlights the quality of policies that are informed by input from the general public. As in the case of national bureaucratic systems,[36] open deliberations among the decision-makers reduce the slack that otherwise enables officials to cater to the demands of narrow, often short-term, interests.[37] Open deliberations can enable the formation of coalitions of weaker actors and NGOs representing civil society[38] and facilitate their coordinated resistance to powerful parties and narrow interests, balancing them at least to a certain extent.[39] It provides information to the parties who designed or joined the institution but have limited ability to monitor what their agents are doing ostensibly in their name. Moreover, independent information yields better-informed decisions that also take into consideration facts and assessments that the narrow interest groups do not wish to present to the decision-makers. Finally, apparently because of the greater legitimacy assigned to policies adopted through such procedures,[40] their relevant addressees are

[36] Mathew D. McCubbins, Roger G. Noll & Barry R, Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L. J. 359, 359-362 (1972); Richard B. Stewart, *The Reformation of the American Administrative Law*, 88 HARV. L. REV. 1669, 1670, 1714 (1975); Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 341-345 (1990) (interests get more involved in notice and comments and especially in negotiated notices and comments).

[37] Anne Peters, *Towards Transparency as a Global Norm*, *in* TRANSPARENCY IN INTERNATIONAL LAW 534, 554-68 (Andrea Bianchi & Anne Peters eds., 2013) [hereinafter Bianchi & Peters, *Transparency*]; Megan Donaldson & Benedict Kingsbury, *Power and the Public: The Nature and Effects of Formal Transparency Policies in Global Governance Institutions* [hereinafter Donaldson & Kingsbury, *Power*], *in* Bianchi & Peters, *Transparency*, *id.*, at 502, 525-32. Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999) [hereinafter Benvenisti, *Voice*]. For a similar claim with respect to NGO participation in the World Trade Organization procedures, see Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123 (1998), Daniel C. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 U. PA. J INT'L ECON. L. 709 (1998). For the opposite view, see, e.g., John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000).

[38] On the link between transparency and NGO involvement in the human rights area, see Theo Van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, 20 CAL. W. INT'L L.J. 207 (1990). *See also* Martha L. Schweitz, *NGO Participation in International Governance: The Question of Legitimacy*, 89 AM. SOC'Y INT'L L. PROC. 415 (1995).

[39] Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 275-277 (1997) (suggesting that many NGOs will also try to help underdeveloped, small states that lack influence).

[40] Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1117 (1994) ("institutional legitimacy is enhanced by transparent procedures and decision-making processes"); David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79

more likely to honor them.[41] As Sabino Cassese notes, "a fair procedure plays an important role in building social consensus. Process control or voice encourage people's cooperation with authorities and lead to legitimacy."[42] As the literature on the emergence of cooperation in the management of common-pool resources suggests, institutions that provide for diverse actors equal voice are more likely to resolve the collective-action problems that they face.[43]

Even before the instrumental benefits that accrue from an open and inclusive decision-making process, the intrinsic argument applies: decision-makers that affect the lives of others must respect and ensure the individual rights of those whom they affect.[44] As we saw in Chapter 3,[45] among those rights that merit respect is the right to participate in decisions that affect one's life opportunities. In addition, the right to be heard, or *audi alteram partem*, has traditionally been regarded as part of the demands of natural justice that ensures the fairness of the administrative process.[46]

The claim that through transparency and participation individuals would be able to actually shape decisions affecting their lives, despite the fact that they do not vote or otherwise take part in the decision itself, is quite strong, and could be challenged. After all, decision-makers can abuse the requirement of transparency by providing information selectively;[47] at the end of the deliberations, decision-makers could simply ignore all the public comments and complaints. This assessment may be too bleak, however, and it certainly is not commonly shared. Most famously,

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IOWA L. REV. 769, 798 (1994) ("procedural integrity is itself an important source of authority and legitimacy for international law").

[41] Daniel M. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 602 (1999) (arguing that perceptions of legitimacy are an important basis of effectiveness and consequently legitimization plays an important role in the regime's long-term success); Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L. J. 377 (1998).

[42] Sabino Cassese, *A Global Due Process of Law?* [hereinafter Cassese, *Due Process*], *in* VALUES IN GLOBAL ADMINISTRATIVE LAW 6 (G. Anthony, J.-B. Auby, J. Morison, T. Zwart eds., 2011). *See also* Esty, *Good Governance*, *supra* note 2, at 1527-1528.

[43] See ELINOR OSTROM, GOVERNING THE COMMONS : THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION, Chapter 6 (1990); EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES (2002).

[44] On the democratic aspects of participation, see Kal Raustiala, *The 'Participatory Revolution' in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 565-568 (1997).

[45] *See supra* Chapter 3, text to notes 46 – 47.

[46] On the concepts of "natural justice" and "fairness" in English administrative law, see Craig, *supra* note 25, at 371-79.

[47] Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, *in* Bianchi & Peters, *Transparency*, *supra* note 37, at 1; Megan Donaldson & Benedict Kingsbury, *The Adoption of Transparency Policies in Global Governance Institutions: Justification, Effects and Implications*, 9 ANNU. REV. L. SOC. SCI. 119, 133 (2013) [hereinafter Donaldson & Kingsbury, *Adoption*] (referring to ways to mask "the enduring presence of practices of secrecy").

Habermas's theory of deliberative democracy is built upon the assumption that deliberation matters.[48] And if it matters, it could replicate itself in IGOs and other global governance bodies. This belief is shared by the German Constitutional Court decision that approved Germany's ratification of the Maastricht Treaty.[49] In an integrated European Union, reasoned the Court, the demand for democracy will be satisfied if the union will provide an "ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified, and as a result of which public opinion molds political policy."[50] To preserve democracy, in the Court's view, "it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which it is subject."[51]

The preamble to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) succinctly summarizes the motivations. Focusing on environmental matters, it emphasizes the right of every person "to live in an environment adequate to his or her health and well-being [and] to be able to assert this right." It also "[r]*ecognizes* that, in the field of the environment, improved access to information and public participation in decision-making enhance[s] the quality and the implementation of decisions, contribute[s] to public awareness of environmental issues, give[s] the public the opportunity to express its concerns and enable[s] public authorities to take due account of such concerns," and further notes that it is "*aiming* thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment."[52]

Debates in recent years concerning institutional design do not revolve as much around the recognition of such participatory rights. There is wide agreement that modalities to ensure transparency are necessary, and many global governance bodies have adopted them despite their

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[48] Jürgen Habermas, *Three Normative Models of Democracy*, *in* JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 239 (Ciaran P. Cronin & Pablo de De Greiff eds., 1998).

[49] BVerfGE 89, 155 (12 October 1993) (trans. in 33 I.L.M. 388 (1994)).

[50] *Id., id.*

[51] *Id., id.*

[52] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S 447, *available at* http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf [hereinafter *Aarhus Convention*].

insistence that they are under no obligation to do so, so as to enhance their reputation and respond to growing public demand.[53]

Transparency and participation address the bi-directional process of deliberations that should take place. To facilitate this process, it is necessary to ensure open channels of communication between the different stakeholders and decision-makers, and that the communication is based on sufficient and reliable information. These requirements can be translated into several more concrete requirements. There is the demand that information be imparted to the public: providing access to existing information and preparing more digestible information if such is not yet available. Then there is the demand that information also be received from the public – the right to participate. Lastly, there is the demand that the decision be adequately reasoned.

The obligation to provide access to information is essentially a passive obligation: the assumption is that the public authority has the information in its files, and all it is required to do is to allow access to it. Issues of secrecy may arise, also questions of intellectual property or trade secrets protections, there may be costs involved with access, and thus balancing questions may arise. But the obligation to provide access also entails active obligations: to generate and maintain information about decision-making processes, such as by transcribing protocols of meetings that reflect the participants' considerations; to inform the public about planned measures and invite comments; and to create and process the necessary data so that even unprofessional members of the public can act upon it when responding to the authority.

The obligation to receive information from the public entails the obligation to allow effective participation by creating the proper public venues and by allowing ample time so that participation is effective. This obligation too raises issues, such as who has standing to comment, and how to prevent participation from excessively burdening the decision-making process. Such questions also call for more specific tailoring and balancing.

Finally, there is the obligation to provide reasons for the decision taken. The text of the decision and the reasons on which it is based are crucial for ensuring accountability.

Although we have come a long way in our understanding of how transparency and participation shape decision-making in global governance bodies, and many global actors subscribe to the growing expectation concerning the need to ensure these principles, there are still important venues where progress is wanting. The WTO is a case in point. The battle to open

[53] Donaldson & Kingsbury, *Power*, *supra* note 37, at 508; Donaldson & Kingsbury, *Adoption*, *supra* note 47, at 127.

up the standard-setting processes within the WTO has been raging since the late 1990s, as key states have insisted on informal, behind-the-scene negotiations and consultations.[54] There was official support for such a closed-doors approach by the WTO bodies. The official website still maintains that "informal consultations within the WTO – and even outside – play a vital role in bringing a vastly diverse membership round to an agreement."[55] Whereas NGOs representing diverse interests could sometimes use this opacity to present their views and gather information,[56] their influence remained a matter of discretion for states, who find it opportune to support some NGOs on certain matters under discussion and not others. Despite great efforts by NGOs, little has been accomplished in that respect. In 2011 Richard Stewart and Michelle Ratton Sanchez Badin documented "the persistence in the WTO of the GATT 'club' model of decision making through confidential diplomatic negotiations among members." [57]

Noteworthy in this debate is the fact that developing countries have been resisting the efforts to improve transparency and participation. Many of these countries simply lack the resources to play an effective role in these processes, and are concerned that NGO participation will only promote Northern concerns about competition masked as worries about the environment and labor rights.[58] Despite the expectation that procedural guarantees will protect the weaker parties, it is sometimes unclear whether the weak can actually make the effort that participation requires.

4.2.2 The Right to be Heard

The right to a hearing before a decision affecting a person is rendered is "one of the classical elements" of domestic administrative law[59] reflecting the recognition of the affected person's rights and dignity,[60] and it is also recognized in international human rights law.[61] Versions of

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[54] Eyal Benvenisti, *Welfare and Democracy on a Global Level: The WTO as a Case Study* [hereinafter Benvenisti, *WTO*], *in* CHALLENGES TO THE WELFARE STATE IN AN ERA OF GLOBALIZATION, 343 (Eyal Benvenisti & Georg Nolte eds., 2003).

[55] From the WTO official website, WHO, *Understanding the WHO: the Organization*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (last visited Feb. 12, 2014).

[56] Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 504-09 (2001); Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433 (1998).

[57] Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization: Multiple dimensions of Global Administrative Law*, 9 INT'L J. CONST. L. 556, 560 (2011).

[58] *Id.*, at 563-64; Benvenisti, *WTO*, *supra* note 54 at 355.

[59] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 37 (2005).

[60] On the dignity aspect protected by the hearing, see Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 206 (2006) [hereinafter Harlow, *Global*]; LAURENCE TRIBE,

such a principle are increasingly being applied in global administrative governance.[62] As in domestic law, administrative agencies are rarely favorably inclined to provide hearing to affected individuals, but pressure from reviewing courts or from public criticism has prompted them to adapt.[63] There are two situations where hearing has been sought and ultimately granted. The first involves employees of IGOs who seek protection against breaches of their employment contracts. The second involves persons who have no formal connection with the IGO but are affected by its decisions.

(a) Employees of IGOs

Employees of IGOs cannot expect their governments to support them when their employer breaches their contractual rights. Although states may exercise diplomatic protection to protect their citizens against violations of their rights by other states, it is not clear whether there is any such right vis-à-vis an IGO, and there is no state practice on this subject.[64] This dearth of practice attests to states' disinclination to challenge IGOs, and should discourage individuals working in IGOs. By contrast, national courts have been more obliging, but in a concession to IGO

AMERICAN CONSTITUTIONAL LAW 666 (2nd ed., 1988). *See also* Jerry L Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433 (1987).

[61] *See supra* Chapter 3 text to notes 43-69.

[62] Kingsbury, Krisch & Stewart, *Emergence*, *supra* note 59, at 37.

[63] On the evolution of the internal justice system within the United Nations and other IGOs as prompted by intensive criticism by staff, legal practitioners and academics, and in particular the overhaul of the UN system and the creation of the United Nations Administrative Tribunals, see August Reinisch & Christina Knahr, *From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal – Reform of the Administration of Justice System within the United Nations*, *in* 12 Max Planck Yearbook of United Nations Law 447 (Christiane E. Philipp et al. eds., 2008); Tamara A. Shockley, *The Evolution of a New International System of Justice in the United Nations: The First Sessions of the United Nations Appeals Tribunal*, 13 SAN DIEGO INT'L L.J. 521 (2012); August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement*, 1 INT'L ORG. L. REV. 59 (2004); Phyllis Hwang, *Reform of the Administration of Justice System at the United Nations*, 8 L. & PRAC. INT'L CTS. & TRIBUNALS 181 (2009).

[64] This outcome corresponds with the rationale behind regarding the IGOs as having standing to protect its employees vis-à-vis states, namely the wish to insulate the IGO from the influence of member states: see the Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 183 (Apr. 11) [hereinafter ICJ, *Reparation*] ("To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization"); John Dugard, *Diplomatic Protection*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW [hereinafter MPEPIL] 1028 (2009) http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1028#law-9780199231690-e1028-div1-4/. Although there seems to be (or were) diplomatic issues between Brazil and the U.S. regarding the *Bustani* case. *See* Silvia Palacios & Lorenzo Carrasco, *U.S. Arrogance Behind Ouster of UN's Bustani*, 29 EXEC. INTELLIGENCE REV. 67 (2002), *available at* http://www.larouchepub.com/eiw/public/2002/eirv29n18-20020510/eirv29n18-20020510_067-us_arrogance_behind_ouster_of_un.pdf.

immunity they have been satisfied with the reasonable alternative that the IGO agreed to implement.[65]

In line with the traditional penchant for fragmentation, and the logic of maintaining control over outcomes,[66] most IGOs have set up unique administrative tribunals to handle management-staff disputes. Each was expected to adjudicate on the basis of the IGO internal regulations and the terms of the contract. However, the disparate tribunals set up by those IGOs reacted – reflecting on their part the tendency of international tribunals to "de-fragment" and create a system of law[67] – by weaving this tapestry of regulations and contract together with so-called "general principles of civil service law."[68] This was the philosophy enunciated in the first-ever World Bank Administrative Tribunal *de Merode* decision in 1981:

> The Tribunal does not overlook the fact that each international organization has its own constituent instrument; its own membership; its own institutional structure; its own functions; its own measure of legal personality; its own personnel policy; and that the difference between one organization and another are so obvious that the notion of a common law of international organization must be subject to numerous and sometimes significant qualifications. But the fact that these differences exist does not exclude the possibility that similar conditions may affect the solution of comparable problems. While the various international administrative tribunals do not consider themselves bound by each other's decisions and have worked out a sometimes divergent jurisprudence adapted to each organization, it is equally true that on certain points the solutions reached are not significantly different. It even happens that the judgments of one tribunal may refer to the jurisprudence of another. Some of these judgments even go so far as to speak of general principles of international civil service law or of a body of rules applicable to the international civil service. Whether these similar features amount to a true *corpus juris* is not a matter on which it is necessary for the Tribunal to express a view. The Tribunal is free to take note of solutions worked out in sufficiently comparable conditions by other

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[65] August Reinisch & Ulf Andreas Weber, *supra* note 63.
[66] Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007) [hereinafter Benvenisti & Downs, *Empire*].
[67] *Id.*; and Eyal Benvenisti, *The Conception of International Law as a Legal System*, 50 GERMAN Y.B. INT'L L. 393 (2008).
[68] For a survey and analysis, see Renuka Dhinakaran, *Law of the International Civil Service: A Venture into Legal Theory*, 8 INT'L ORG. L. REV. 137 (2011).

> administrative tribunals, particularly those of the United Nations family. In this way the Tribunal may take account both of the diversity of international organizations and the special character of the Bank without neglecting the tendency towards a certain *rapprochement*.[69]

Based on these general principles, the Administrative Tribunal of the International Monetary Fund[70] addressed the right to a hearing as an integral part of "international administrative law":

> That the Fund's rules do not appear to prescribe an evidentiary standard for pursuing an investigation into alleged misconduct […] does not mean that fair and reasonable procedures do not require that such an evidentiary threshold be met. As this Tribunal has recognized, the Fund's internal law "includes both formal, or written, sources . . . and unwritten sources.[71]

Among the "unwritten sources of law within the internal law of the Fund" are

> > certain general principles of international administrative law, such as the right to be heard (the doctrine of audi alteram partem) [which] are so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations, including the [IMF].[72]

The IMF tribunal elaborates on the meaning of the right as including the "require[ment] that a staff member whose position is abolished be given reasonable notice of that prospect [….] and be in a position when such a decision first is conveyed to him to set out any reasons that he or she may have to contest the propriety or equity of the abolition decision."[73] It emphasized that "to 'hear both sides' is a core element of due process,"[74] and explained that "the dignity interest of the staff member" is not the only interest furthered by the fair hearing obligation, but "also those of the Organization as a whole."[75]

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[69] De Merode and others v. World Bank, 83 I.L.R. 639, ¶ 28 (World Bank Admin. Trib. 1981), *available at* http://lnweb90.worldbank.org/crn/wbt/wbtwebsite.nsf/(resultsweb)/470F6C6098A11FDF852569ED006BB877 (last visited Feb. 13, 2014) [hereinafter *Merode*].
[70] Ms. "EE" v. Int'l Monetary Fund, judgment No. 2010-4 (Admin. Trib. of Int'l Monetary Fund, 2010), *available at* http://www.imf.org/external/imfat/pdf/j2010_4.pdf [hereinafter, *Ms. "EE"*]
[71] *Id.*, ¶ 100.
[72] *Id.*, ¶ 100 (citations omitted); *see also Id.*, ¶ 183.
[73] *Id.*, ¶ 188.
[74] *Id.*, ¶ 190.
[75] *Id.*, ¶¶ 193, 192 respectively.

(b) Other Individuals Affected by Global Governance Bodies

IGOs, InGOs, PPIs and PIs regularly impact business interests, health conditions and, in general, the life opportunities of diverse communities and individuals. Assuming that the right to a hearing is a general principle of international administrative law, does it apply in this context, and if so, how? Two questions arise. First, it is argued that an affected person may not necessarily have a right to be heard in person, and his or her state may act as his/her proxy, exercising a version of diplomatic protection. Second, if a personal right to a hearing is recognized, the next question is to whom it should be granted: who are those "affected" by a decision and who therefore deserve to have the right to be heard?

As Sabino Cassese noted, that individuals have the right to a direct hearing before global governance bodies, as opposed to indirect hearing through the mediation of their state, is "the most important part of the picture" of the emerging phenomenon of public participation in global decision-making.[76] The growing recognition of this right derives from the concern that the state representing the individual may not provide adequate representation due to possible conflicts of interest. This could be the case, for example, when the affected individual belongs to a minority or if the relevant state submits to strong international pressure. The issue is whether the government has the ability and interest to represent its citizen, thus making indirect hearing through government representatives sufficient. In order to address this issue, examples of governmental indirect representation need be discussed.

The first example concerns the implementation of the Mumbai Urban Transport Project in India. The project was intended to create substantial improvements in the Mumbai transport system. It included the demolition of several homes and shops, and the transfer of 77,000 residents to other areas. It was financed partly by a loan from the World Bank (WB). Under the WB resolutions, individuals affected by projects financed by the Bank may request inspection by the World Bank Inspection Panel (WBIP) through "a community of persons such as an organization, association, society or other grouping of individuals."[77] The WBIP Operating Procedures allow for broad participation in inspections by the interested parties, including the

[76] Cassese, *Due Process*, *supra* note 42, at 6.

[77] Int'l Bank for Reconstruction & Development, Int'l Dev. Ass'n, *The World Bank Inspection Panel*, Res. No. IBRD 93-10, Res. No. IDA 93-6, ¶ 12 (Sep. 22, 1993), *available at* http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf.

affected parties, governmental representatives of the country benefiting from the loan, and any interested local NGOs. Moreover, "any member of the public" may provide information "that they believe is relevant to evaluating the Request."[78]

In 2004 the WBIP received requests for inspection by NGOs representing local businesses and residents, and by private citizens. The requestors alleged violations of operational bank policies and procedures, regarding in particular the project resettlement and rehabilitation scheme under which they were entitled to an area of 225 square meters. Some of the requestors objected to the classification of the particular area from which they were forced to evacuate as a slum, and to the decision to be moved to a resettlement site located near the main municipal dump, alleging that it was one of the most polluted areas in Mumbai. They also claimed that they were not heard or consulted.

Following the inspection, an Investigation Report was made and submitted to the WB Board. The WBIP acknowledged that the project did not comply with the WB's policies, and especially that it had failed to consult with parties affected by the relocation. Tellingly, the report criticized the local government for delegating the enormous task of relocation to NGOs who could not undertake such a complex task. The complaints were then taken into account by the management of the WB and satisfactorily resolved.[79]

This dereliction of authority by the local government and the inability of the local courts to intervene effectively highlight the promise of global hearing procedures, which may be more effective than the traditional domestic hearings before indifferent domestic agencies and courts.

The second example is quite well known and my analysis will therefore be brief. The "Targeted Sanctions" regime adopted by the UN Security Council in Resolution 1267 froze the assets of individuals suspected of financing global terrorism.[80] Whereas the listing of such

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[78] The World Bank Inspection Panel, *Operating Procedures*, http://go.worldbank.org/C6MIJ7MIP0 (last visited Feb. 13, 2014). *See* D. Hunter & L. Udall, *The World Bank's New Inspection Panel: Will it Increase the Bank's Accountability?*, CENTER FOR INT'L ENVTL. L., http://www.ciel.org/Publications/issue1.html (last visited Feb. 13, 2014); THE WORLD BANK INSPECTION PANEL, ACCOUNTABILITY AT THE WORLD BANK. THE INSPECTION PANEL 10 YEARS ON (2003), *available at* http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8_07.pdf.

[79] On this case, see Mariarita Circi, *The World Bank Inspection Panel: The Indian Mumbai Urban Transport Project Case*, *in* GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK 100 (Sabino Cassese *et al.* eds., 3rd ed. 2012) [hereinafter, GAL CASEBOOK].

[80] For the political and legal background of the sanctions regime, see Katalin Tünde Huber & Alejandro Rodiles, *An Ombudsperson in the United Nations Security Council: a Paradigm Shift?*, ANUARIO MEXICANO DE DERECHO INTERNACIONAL, DÉCIMO ANIVERSARIO 107 (2012), *available at* http://biblio.juridicas.unam.mx/revista/pdf/DerechoInternacional/11.5/art/art4.pdf.

individuals was not subject to prior hearing, due to the need to act with speed, the Security Council, after much criticism, offered a process of delisting in cases of false identity, insufficient evidence, etc. The delisting procedure did not provide for direct hearing for the listed individuals and the relevant committee, but did allow for indirect petitions through a so-called "focal point" and later an Ombudsperson.[81] As is well known, the European Court of Justice found this arrangement wanting. In the *Kadi* judgment it ruled that "the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected. […] It is to be borne in mind in this respect that the applicable procedures must also afford *the person concerned* a reasonable opportunity of putting his case to the competent authorities"[82] (my emphasis).

When the *Kadi* case returned to the ECJ Grand Chamber, it was after the Commission granted Mr. Kadi the opportunity to comment directly on the grounds for the measures against him.[83] This time, however, the court had the opportunity to expound on the meaning of a proper procedure. The competent European authority must

> disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons […], so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the Courts of the European Union. […] When that disclosure takes place, the competent Union authority must ensure that that individual is placed in a position in which he may effectively make known his views on the grounds advanced against him […] When comments are made by the individual concerned on the summary of reasons, the competent European Union authority is under an obligation

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[81] See S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June. 30, 2008); S.C. Res. 1989, U.N. Doc. S/RES/1989 (June. 17, 2011).

[82] Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union, ¶¶ 334, 368, 2008 E.C.R. I-6351, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=853625 [hereinafter *Kadi*2008].

[83] Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, European Commission and Others v. Yassin Abdullah Kadi, ¶ 33, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=139745&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=452459 (last visited Feb. 13, 2014) [hereinafter *Kadi* 2013].

> to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those comments and any exculpatory evidence provided with those comments.[84]

Notably, the Court is conscious of the need to balance "the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned," but that balance does not diminish the right to a hearing and to effective judicial review. What it calls for is only "to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question," possibilities that remain subject to its review.[85]

The third and final example will be taken from the realm of PIs. It turns out that in this context, too, individuals are directly or indirectly affected by the decisions and policies of private global governance bodies, and state governments do not step in to protect them. The case of GlobalG.A.P., discussed in Chapter 2, is one example in this regard.[86] Another example concerns the PIs that regulate sporting activities. The International Olympic Committee (IOC), itself a major PI,[87] set up the World Anti-Doping Agency (WADA) in 1999 to combat doping in sports. WADA is a private foundation subject to the Swiss Civil Code. Its tasks consist of setting lists of prohibited substances and standards and devising procedures for enforcing compliance with the prohibitions. In 2003 it adopted the World Anti-Doping Code (revised in 2009).[88] The Code provides for the right to a fair hearing of athletes before all anti-doping organizations,[89] as well as recourse to judicial review.[90] The Swiss Federal Court, which sits in review of the Court of Arbitrations for Sports (CAS), and the CAS itself have had several opportunities to criticize anti-doping procedures that did not comply with the right to hearing.[91]

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[84] *Id.*, ¶¶ 111-114.
[85] *Id.*, ¶ 129.
[86] *See supra* Chapter 2, text to notes 130-136.
[87] Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L. J. 1317 (2011).
[88] World Anti-Doping Agency, *World Anti-Doping Code*, *available at* http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf [hereinafter WADA, *Anti-Doping Code*].
[89] *See Id*., Introduction & art. 8.
[90] *Id.*, art. 8. *See also* Alessandro E. Basilico, *Due Process and Fairness in the Sporting Legal Order*, *in* GAL CASEBOOK, *supra* note 79, at 133.
[91] WADA, *Anti-Doping Code*, *supra* note 88, art. 7. *See* Basilico, *supra* note 90, at 137-38; see also Alec Van Vaerenbergh, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime*, 3-34 (Inst. for Int'l L. & Justice, Working Paper 2005/11, 2005).

4.2.3 Who has the Right to be Heard? Attention to the "All Affected Principle"

The second question concerns the circle of those entitled to a hearing. If the circle is drawn too liberally, it might unduly burden the decision-maker. At the same time, the fact of the matter is that global governance bodies do affect innumerable individuals across territorial boundaries. Decision-makers often respond to the demand for hearing by arguing that the effect is only indirect and hence there should be no standing to seek hearing, or by stating that a general policy that does not address a person specifically is not subject to the duty of hearing.

A case in point is a 1999 decision by a panel of the CAS in a dispute between two soccer teams and the Union of European Football Associations (UEFA), a PI. [92] The two teams were owned by the same company, but UEFA ruled against "multi-club ownership." The two clubs brought a suit against UEFA, claiming *inter alia* the denial of the right to be heard. The Panel rejected their claim. First, it refused to regard them as entitled to be heard because under the constitutive document only the members of national soccer associations have that right, and individual soccer clubs are therefore excluded. As a reason for rejecting the expansion of such rights, the Panel alluded to what all seasoned domestic administrative lawyers have encountered as the "opening of the floodgates" scenario. If the right were recognized,

> [a]s all players, coaches and referees are also affiliated to their national federations – millions of individuals throughout Europe –, they could also claim to be indirect members and every one of them could request that he/she be heard by UEFA. Even if one was to limit the right to be heard only to clubs potentially interested in UEFA competitions – *i.e.* all clubs competing in the highest championship of every UEFA member federation – there would still be hundreds of clubs to be consulted. For an international federation, this would amount to a procedural nightmare and would paralyze any possibility of enacting regulations.[93]

Second, the Panel pointed out that the aim of the new rule was general and not specific with respect to the complaining clubs:

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[92] AEK Athens & SK Slavia Prague v. Union Eur. Football Ass'ns (UEFA), CAS 98/200 (Ct. Arb. for Sport, 1999), *available at* http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/200.pdf [hereinafter *AEK & SK v. UEFA*].

[93] *Id.*, ¶ 56.

> With regard to the right to be heard, the Panel wishes to stress that the CAS has always protected the principle *audiatur et altera pars* in connection with any proceedings, measures or disciplinary actions taken by an international federation *vis-à-vis* a national federation, a club or an athlete […] However, there is a very important difference between the adoption by a federation of an *ad hoc* administrative or disciplinary decision directly and individually addressed to designated associations, teams or athletes and the adoption of a general regulation directed at laying down rules of conduct generally applicable to all current or future situations of the kind described in the regulation. It is the same difference that one can find in every legal system between an administrative measure or a penalty decided by an executive or judicial body concerned with a limited and identified number of designees and a general act of a normative character adopted by the parliament or the government for general application to categories of persons envisaged both in the abstract and as a whole. […] Therefore, the Panel finds that, unless there are specific rules to the contrary, only in the event of administrative measures or penalties adopted by a sports-governing body with regard to a limited and identified number of designees could there be a right to a legal hearing. For a regulator or legislator, it appears to be advisable and good practice to acquire as much information as possible and to hear the views of potentially affected people before issuing general regulations – one can think of, *e.g.*, parliamentary hearings with experts or interest groups – but it is not a legal requirement.[94]

Even if the Panel was correct in categorizing the demand as a demand for transparency rather than for hearing, its reasoning and outcome are incompatible with the evolving concept of transparency elaborated above. The years since have witnessed a transformation in the understanding of the value of inclusion and participation, and in people's expectations regarding proper public decision-making. More importantly, it has by now become clear that global governance bodies affect foreign stakeholders on a regular basis, without the latter having the right to vote for any specific such body or otherwise being able to influence its decisions.[95] Scholars have accordingly acknowledged that the "geography-based constituency definition

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[94] *Id.*, ¶ 58.

[95] Richard B. Stewart, *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance* (Jan. 2008) (discussion draft), *available at* http://www.iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf.

introduces an arbitrary criterion of inclusion/exclusion right at the start"[96] and have sought to outline theories defining the scope of the affected stakeholders to whom decision makers must be accountable as encompassing all those subjected to a structure of governance that sets the ground rules that govern their interaction,[97] or all those subject to anything that might possibly happen as a result of the decision.[98]

The following example better captures the contemporary approach and indicates future trajectories. It highlights the practice of the Aarhus Convention Compliance Committee (ACCC), a body set up in 2004 to promote and improve compliance with the Aarhus Convention.[99] As will be recalled, the convention requires state parties to provide public access to national decision-making processes in environmental matters. The question came up in regard to a Ukrainian plan to construct a navigation canal in the Ukrainian part of the Danube Delta, whether Ukraine was required under the convention to provide access to information also to Romanian citizens.[100]

The ACCC found that the project had also an international dimension, as it "potentially affects a nature conservation area of national and international importance and has clearly generated a great interest among both the Ukrainian and international civil society."[101] Perhaps on this basis, the ACCC extended the right to take part in domestic environmental decision making, which the convention provides to those "affected or likely to be affected by, or having an interest in, the environmental decision-making,"[102] to foreign citizens residing outside the country:

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[96] Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 397 (2008); Jean L. Cohen, *Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach)*, 2 HUMANITY 127 (2011); Nancy Fraser, *Reframing Justice in a Globalizing World*, 36 NEW LEFT REV. 1 (2005). For similar concerns about the "political space" in the context of local government, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

[97] NANCY FRASER, SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD 65–66 (2009).

[98] Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 40 (2007).

[99] The ACCC was set up in 2004 to promote and improve compliance with the Aarhus Convention (*supra* note 52). *See* U.N. Economic & Social Council, Decision I/7, Rev. of Compliance, U.N. Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004), *available at* http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf.

[100] Gianluca Sgueo, *The Aarhus Compliance Committee and the Danube River Case*, *in* GAL CASEBOOK, *supra* note 79, at 20.

[101] U.N. Economic & Social Council, *Findings and Recommendations with Regard to Compliance by Ukraine with the Obligations Under the Aarhus Convention in the Case of Bystre Deep-Water Navigation Canal Construction*, ¶ 13, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.3 (Mar. 14, 2005), *available at* ttp://www.unece.org/fileadmin/DAM/env/pp/compliance/S2004-01/S01C03findings.pdf [hereinafter *Bystre*].

[102] *Aarhus Convention*, *supra* note 52, art. 2(5).

> With regard to the facts [discussed earlier in the decision], there is, in the opinion of the Committee, sufficient evidence that there were members of the public, both in Romania and in Ukraine, interested in or concerned about the project that had to be notified.[103]

It specifically rejected the argument about the volume of information requested:

> [I]nformation within the scope of article 4 should be provided regardless of its volume. In cases where the volume is large, the public authority has several practical options: it can provide such information in an electronic form or inform the applicant of the place where such information can be examined and facilitate such examination, or indicate the charge for supplying such information.[104]

The ACCC further recommended that member states provide "guidance to assist Parties in identifying, notifying and involving the public concerned in decision-making on projects in border areas affecting the public in other countries."[105]

Along the same line, a "Task Force on Public Participation in Decision-Making," which was convened under the auspices of the Aarhus convention, issued a "draft list of recommendations on public participation."[106] That list calls for clear identification of "the public concerned" which is entitled to take part in the decision-making processes under the convention. Conspicuously, the approach seeks to be as inclusive and proactive as possible, involving "groups that are hard to reach for different reasons. Groups can be willing but unable to participate (vulnerable and/or marginalized groups such as children, older people, migrants, handicapped people, economically disadvantaged groups etc.) but also able but unwilling (people with previous bad experiences, lack of time, see no benefits in participating etc.)"; at worse, decision-making processes should "[s]trive to involve at least a minimum of organizations representing such groups." The draft list expands the range of interests beyond the environmental to include also social and economic interests. Most conspicuously, the task force disregards the national identity of the "public concerned," as what it suggests is to "[e]xamine the possibility to use Geographic Information

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[103] *Bystre*, *supra* note 101, ¶ 27.
[104] *Id.*, ¶ 33.
[105] *Id.*, ¶ 41.
[106] U.N. Econ. Comm'n for Eur., Task Force on Pub. Participation in Decision-Making, 1st meeting, Geneva, Oct. 25-26, 2010, *Draft List of Recommendations on Public Participation*, U.N. Doc. (Oct. 25-26, 2010), *available at* http://www.unece.org/fileadmin/DAM/env/pp/ppdm/PPDM_recommendations.pdf.

Systems (GIS) to determine who is the public concerned."[107] Similar attention to the participatory rights of foreign citizens is found in the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (1991), which requires parties to "ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin."[108]

On the basis of this brief survey, it may be concluded that although there are several regulatory regimes with different commitments to rights to participation in the decision-making process, there is wide recognition that such rights are a necessary component of proper decision-making, a pervasive expectation that the public is entitled to participate effectively in decisions that affect it, and a firm conviction that because global governance creates democratic deficits, participatory rights are even more important than in domestic settings in protecting democracy.

4.3 The Regulation of the Exercise of Discretion

The third and final step in evaluating the proper exercise of authority entails scrutiny of the stated reasons for the decision. Usually it will not suffice that the administrative agency acted within its authority and followed the proper procedure. It is also necessary that the deciders weighed all relevant considerations and only the relevant considerations, and, if there were conflicting considerations, that they assigned proper weights to them and balanced them in a proper way. The reviewing body is not authorized to step in and replace the agency's discretion with its own, but it is certainly authorized – indeed, required – to ensure that the agency acted within the confines that the law provided for. It is immediately apparent that this third step is the most sensitive, as the boundary between the agency's discretion and that of the reviewing body becomes blurred and contentious. Questions of relative competence of the different bodies and of their legitimacy become pertinent.

In some exceptional cases, this tension will be avoided by the reviewing body deciding that it has no authority to undertake such review. The prototypical example is the ICJ's attitude toward the UN Security Council's acting under Chapter VII of the UN Charter. In the Certain Expenses

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[107] *Id.*, §2.1(e).

[108] Convention on Environmental Impact Assessment in a Transboundary Context art. 3(8), Feb. 25, 1991, 1989 U.N.T.S. 309. *See also Id.*, art. 4(2), concerning the distribution of environmental impact assessment.

Advisory Opinion,[109] the ICJ refused to question the legality of the Security Council's action, stating as follows:

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization."[110]

Later on the ICJ insisted that "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned."[111] Famously, in the Lockerbie case,[112] the ICJ deferred to a Security Council Chapter VII resolution without discussing its validity, even though that resolution was aimed at barring Libya's request for a chance to vindicate its rights before the ICJ.[113]

But this deference may not be shared by all reviewing bodies. Most recently, in the latest round of the *Kadi* litigation,[114] the Court of Justice of the European Community (CJEU) refused to allow to the European institutions that implement the Security Council's Chapter VII resolutions the same latitude that the ICJ provides to the Security Council. The CJEU explained that review of the lawfulness of the contested decision "is indispensable to ensure a fair balance

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[109] ICJ, *Certain Expenses*, *supra* note 14.
[110] *Id.*, at 167.
[111] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South–West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 89 (June 21), *available at* http://www.worldcourts.com/icj/eng/decisions/1971.06.21_namibia.htm (last visited Feb. 13, 2014).
[112] Case Concerning Questions of Interpretation And Application of The 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.A.), Request For The Indication Of Provisional Measures, 1992 I.C.J. 114 (Apr. 14).
[113] On this decision, see Michael W. Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993)**;** Vera Gowland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643 (1994); Edward McWhinney, *The International Court as Emerging Constitutional Court and the Co-ordinate UN Institutions (especially the Security Council): Implications of the Aerial Incident at Lockerbie*, 30 CAN. Y.B. INT'L L. 261 (1992); José É. Alvarez**,** *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996)**.**
[114] *Kadi* 2013, *supra* note 83.

between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned […] those being shared values of the UN and the European Union."[115]

This recent development indicates the growing potential of indirect, external review that may be more intrusive and constraining than direct, internal review. This aspect will be dealt with in Chapter 6.

4.3.1 A Properly Grounded Decision

For the proper exercise of discretion to be evaluated, it is necessary for the decider to base its decision on proper assessment of facts and of law. This is reflected in the obligation to state the reasons for the decision, including the provision of the necessary factual support for the stated arguments. Clearly, this requirement also derives from the obligations of transparency and hearing, including the right of affected persons to judicial review.

Esty outlines the ideal format for decision, which should (1) clearly delineate the legal basis for the policymaking activity and the scope of authority delegated to the decision-making body; (2) provide a statement of the public interest that highlights the designated policy ends and presents any critical normative assumptions; (3) outline the rationale for the outcome settled upon, providing a basis for judging whether the choices made were arbitrary or capricious; (4) build on an established administrative record or docket; (5) respond to criticisms advanced through the notice-and-comment process; and (6) address relevant policy alternatives.[116]

When the decision addresses specific individuals, more may be needed, because questions of identification could arise. This is borne out in the *Kadi* litigation just mentioned,[117] where the CJEU demands that implementing sanctions again persons be based on "evidence against that person [that is] available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons […] so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action."[118]

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[115] *Id.*, ¶ 131.
[116] Esty, *Good Governance*, *supra* note 2, at 1529-1530.
[117] *Kadi* 2013, *supra* note 83.
[118] *Id.*, ¶ 111.

4.3.2 Weighing All and Only Relevant Considerations

In its first decision, the WBAT outlined the limits of its own authority in examining the exercise of discretion by World Bank officials in amending employment conditions. Emphasizing that "it is not for this Tribunal to substitute its own judgment for that of the competent organs of the Bank" in exercising discretionary power, it emphasized that

> [d]iscretionary power is not absolute power and therefore should be subjected to the following limitations: non-retrocative deprivation of accrued rights; acting for reasons alien to the proper functioning of the organization [… Decisions] must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups [… and] must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff.[119]

The Tribunal added that it "must satisfy itself in each case" that the Bank's power "has not been exercised either retroactively or in an arbitrary or otherwise improper manner."[120]

Preceding the review of the exercise of discretion is a process of interpretation of the goals that the decider is authorized to pursue. Such interpretation will take account of the specific purposes of the agency which can be learned from the constitutive instrument, and the more general constraints, such as the need to respect human rights and to protect legitimate expectations. This is highlighted in the jurisprudence of the Council of Europe Administrative Tribunal (CEEA), which acknowledged that

> [w]here a decision is challenged, an international court naturally cannot substitute its judgment for that of the Administration. However, it must ascertain whether the decision challenged was taken in compliance with the Organisation's regulations and the general principles of law, to which the legal systems of international organisations are subject. It must consider not only whether the decision was taken by a competent authority and whether it is legal in form, but also whether the correct procedure was followed and

[119] *Merode*, *supra* note 69, ¶¶ 45-47; Mariangela Benedetti, *The Rise of International Administrative Tribunals: The Mendaro Affair*, *in* GAL CASEBOOK, *supra* note 79, at 70; THE DEVELOPMENT AND EFFECTIVENESS OF INTERNATIONAL ADMINISTRATIVE LAW, ON THE OCCASION OF THE THIRTIETH ANNIVERSARY OF THE WORLD BANK ADMINISTRATIVE TRIBUNAL (Olufemi Elias ed., 2012).
[120] *Id*., ¶ 48.

> whether, from the standpoint of the Organisation's own rules, the administrative authority's decision took account of all the relevant facts, any conclusions were wrongly drawn from the evidence in the file, and there was any misuse of power.[121]

The legitimate purposes of the governing body may be inferred not only from the text of the constitutive document or from general law, or general principles of law, but also from the nature of the enterprise. Thus, for example, a panel of the Court of Arbitration for Sport (CAS) found that UEFA was entitled to pursue the aim of ensuring the "integrity of the game," and elaborated what that principle meant, in order to examine whether a new rule against multi-club ownership was within its discretionary power.[122]

Once a legitimate goal is identified, the next step is to examine whether the means chosen is effectively connected to the aim. In this last case, having endorsed the aim of ensuring the "integrity of the game," the panel went further:

> Having clarified what is meant by integrity of the game, the question is then whether multiple ownership of clubs in the context of the same competition has anything to do with such integrity and, therefore, represents a legitimate concern for a sports regulator and organizer. In other words, can multiple ownership within the same football competition be publicly perceived as affecting the authenticity of sporting results? Can the public perceive a conflict of interest which might contaminate the competitive process when two commonly owned clubs play in the same sporting event?[123]

4.3.3 Equal Treatment and the Protection of Basic Rights

As many of the global governance bodies directly or indirectly affect basic individual rights, special attention must be given to the justifications for limiting such rights. The same goes for the obligation to treat "like parties alike." Many of the examples discussed thus could illustrate these obligations. But to avoid repetition I will briefly present a recent decision by the International Football Association Board (IFAB), a private association under the Swiss Civil

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[121] Zimmermann v. Secretary General, Appl. No. 226/1996, ¶ 37 (Council Eur. Admin. Trib. 1997); Diebold v. Secretary General, Appl. No. 181/1994, ¶ 24 (Council Eur. Admin. Trib. 1994); Danielle Schmitt v. Secretary General, Appl. No. 250/1999, ¶ 25 (Council Eur. Admin. Trib. 1999); Nathalie Verneau c/ Secrétaire Général, Recours N° 413/2008, ¶ 51 (Council Eur. Admin. Trib. 2009).
[122] *AEK & SK v. UEFA*, *supra* note 92, ¶¶ 22-27.
[123] *Id.*, ¶ 28.

Code[124] that determines the rules for playing football (soccer). Until 2014, Law 4 of "The Laws of the Game"[125] was interpreted to prohibit the wearing of head covers, such as the hijab, the turban or the kippah, by male and female players allegedly for safety concerns. As a result, several female and male players, as well as whole teams, were banned from games. World-wide protests, and the insistence of Jordan's Crown Prince that the hijab was an object of cultural modesty, not a religious symbol,[126] ultimately convinced IFAB to strike a more refined balance between the competing concerns that is adequately sensitive to the players' basic rights and prevents discrimination.[127]

4.3.4 Balancing and Proportionality

The final and most intrusive step in reviewing agency decisions is the examination of the internal weights assigned to the conflicting relevant considerations. This process is sometimes described as "balancing" and increasingly more as "proportionality analysis," which requires a rational fit between means and ends, and means that limit rights no more than reasonably necessary to accomplish the relevant objective.[128] As Cohen Eliya and Porat show, the doctrine of proportionality has in a few decades "spread dramatically into national legal systems far and wide and is considered to be one of the most prominent instances of successful migration of constitutional ideas."[129] Stone-Sweet and Mathews documented the spread of proportionality analysis also to global reviewing bodies, from human rights courts and committees to trade and investment tribunals.[130] It is therefore no surprise that the same proportionality analysis serves as a measure for reviewing the discretion exercised by global governance bodies. Two examples will demonstrate the applicability of such review.

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[124] FIFA, *Statutes of the International Football Association Board (IFAB)* (Jan. 13, 2014), *available at* http://www.fifa.com/mm/document/affederation/ifab/02/26/11/50/14.01.13_ifab_foundmeeting_statutes_approvedandsigned_en_neutral.pdf.

[125] FIFA, *Laws of the Game*, *available at* http://www.fifa.com/aboutfifa/footballdevelopment/technicalsupport/refereeing/laws-of-the-game/index.html (last visited Mar. 14, 2014).

[126] Carolyn Prouse, *Harnessing the hijab: the emergence of the Muslim Female Footballer through international sport governance*, 20 GENDER, PLACE & CULTURE 1 (2013).

[127] Prouse, *id*.; Aisha Ahmed, *British football: where are the Muslim female footballers? Exploring the connections between gender, ethnicity and Islam*, 12 SOCCER & SOC'Y. 443 (2011).

[128] Kingsbury, Krisch & Stewart, *Emergence*, *supra* note 59, at 40-41.

[129] MOSHE COHEN ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 2 (2013). *See also* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012).

[130] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008).

In a key judgment that imposed the discipline of EU competition law on the private regulation of sport, The ECJ applied proportionality analysis in reviewing the standards set by the International Swimming Federation (FINA).[131] FINA, a PI operating under the auspices of the IOC, had applied the IOC's Anti-Doping Code (which preceded that of WADA[132]). Two suspended swimmers who had failed drug tests challenged the rules as excessive, arguing that the PI, being keen to achieve economic success and willing for that purpose to cater to public demands for clean games, had sacrificed the interests of the athletes. The court determined that the private rules issued for sporting events, because they could result in an athlete's unwarranted exclusion from sporting events and therefore produce adverse effects on competition, "must be limited to what is necessary to ensure the proper conduct of competitive sport."[133] The rules raised two distinct questions of proportionality, "first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of those penalties."[134]

Similarly, the CAS panel in the UEFA case used proportionality analysis to examine UEFA's rule against multi-club ownership.[135] It was satisfied that the rule was "narrowly drawn" and that there were no less restrictive alternative means available.

This is also the view of the ILA Report on Accountability of International Organisations:

> Any action of an organ of an IO is undertaken in order to achieve the objectives laid down in the constituent instrument and should not go beyond what is necessary to that end (e.g. in relation to the burdens imposed on Member States). Likewise, it is desirable that acts of IO-s should not fall short of what is reasonable and necessary to achieve their objectives. The principle of proportionality is therefore relevant in this and other contexts in order to constitute a relevant framework for the exercise of power.[136]

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[131] Case C-519/04 P, David Meca-Medina & Igor Majcen, v. Comm'n of Eur. Cmtys., 2006 E.C.R. I-06991, *available at* http://curia.europa.eu/juris/showPdf.jsf?text=&docid=57022&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1114 (last visited Feb. 13, 2014) [hereinafter *Meca-Medina & Majcen*].
[132] WADA, *Anti-Doping Code*, *supra* note 89.
[133] *Meca-Medina & Majcen*, *supra* note 131, ¶ 47.
[134] *Id*., ¶ 48.
[135] *AEK & SK v. UEFA*, *supra* note 92, ¶¶ 131-136.
[136] Int'l L. Ass'n, Comm. Accountability Int'l Org., *Accountability of International Organisations Final Report* 22, Berlin Conference (2004), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/9 (last visited Feb. 11, 2014) .

The above brief survey of substantive administrative law principles demonstrates that norms, standards and expectations that have crystalized in most domestic legal systems have migrated to global governance bodies and now frame perceptions about the legitimacy of their decision-making processes and decisions. At the same time, this process of migration creates pressure for convergence, in what sociologists would call a process of isomorphism.[137] However, several administrative law scholars have highlighted the differences that still persist among domestic administrative law systems; as a result, as late as 2006 some of them still questioned the feasibility of developing a "universal set of administrative law principles," even suggesting that such an outcome is not only "difficult in any event to identify," but is also "neither welcome nor particularly desirable; diversity and pluralism are greatly to be preferred."[138]

Indeed, not all legal systems provide similar opportunities for transparency, hearing and other measures of protection. Even more clearly, not all global governance bodies offer the same standards and opportunities to review their decisions. But the commitment to the same basic obligations of participation, hearing, etc. is widely shared. There is no need to press hard for uniformity, as institutions are not alike and all require fine-tuning to adapt to their specific tasks. The rules that fit the UN are not necessarily appropriate for UEFA, and vice versa. Moreover, there is value in diversity that allows for experimentation, as long as such diversity and adaptation are aimed at achieving the goals of administrative review.

4.4 The Institutional Dimension: Can Power Masquerade as Law?

Whereas the substantive norms of administrative law – whose gist was outlined above – are generally similar in most domestic and global legal systems, and are certainly undergoing a process of assimilation, the same cannot be said for the processes and institutions of review. Significant cross-national differences in administrative law as a field show up not in its substantive aspects, but in diverse processes and institutions.[139] The same is the case with respect to global governance bodies. When focusing on the types and modalities of review mechanisms they adopt, one notices great diversity: some allow for ombudspersons with limited authority to hear and verify complaints, others set up tribunals and appoint permanent judges, and still others

[137] Olga Frishman, *Transnational Judicial Dialogue as an Organisational Field*, 19 EUR. L. J. 739 (2013).
[138] Harlow, *Global*, *supra* note 60, at 207.
[139] On comparative administrative law, see Francesca Bignami, *Comparative Administrative Law*, *in* CAMBRIDGE COMPANION TO COMPARATIVE LAW 145 (Mauro Bussani & Ugo Mattei eds., 2012); COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

only wish to maintain a semblance of administrative justice and rule of law by ensuring that the judges depend on them for reappointment.[140] This diversity may be hailed as a global experiment in good governance, but it could also be regarded as worrisome. It suggests that the institutional dimension is even more important for ensuring the accountability of global governance bodies than a unified set of substantive norms. The reliability of a global governance body depends more on the question whether it is effectively monitored by a skillful and impartial reviewer than on whether it invokes lofty principles of good governance but merely feigns adherence to them.

To understand what makes a global governance body really accountable, it is necessary to delve beyond the rhetoric of the law and explore the incentives that motivate the designers of global governance bodies. The key to the divergence is the different motivations for developing administrative law requirements. Since administrative law serves to contain power, those who pressed for its various paths of evolution were those seeking to control an emerging power. The different historical national trajectories can provide the clue by explaining why, for example, administrative legal processes in France are so different from those in England, and why U.S. law, or German, etc., each has its distinct characteristics.[141] In England, for example, the drive to develop administrative law came, according to Lindeth, from the common law courts, due to "the increasing encroachment of the administrative sphere onto the core province of the ordinary courts – the protection of the rights of private property as guaranteed at common law."[142] In the U.S., while the courts during the New Deal era adopted a policy of deference, it was Congress that promulgated the Administrative Procedure Act.[143] As McNollGast explained, Congress sought to restrain the executive branch by outsourcing to the citizens the opportunity to invoke rights before the courts.[144] As a consequence, the source of administrative law in England is the judge-made common law, whereas in the U.S. governmental bodies are regulated by statute.

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[140] Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, 12 GERMAN L. J. 1057 (2011).

[141] For such a historical analysis, see Bingami, *supra* note 139.

[142] Peter L. Lindseth, *Always Embedded' Administration: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance, in* THE ECONOMY AS A POLITY: THE POLITICAL CONSTITUTION OF CONTEMPORARY CAPITALISM 117 (Christian Joerges, Bo Stråth & Peter Wagner, eds., 2005). *See also* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 151-153 (4th ed., 2007).

[143] Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH L. REV 399 (2007).

[144] Matthew D. McCubbins, Roger C. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); *see also* McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999); Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 LAW & CONTEMP. PROBS. 319 (2005) [hereinafter Benvenisti, *Interplay*].

Similar reasons explain the different structures of review that have developed, their nature and effectiveness. We should not forget that in some systems where political power in undivided and courts are institutionally dependent on that power, administrative law and institutions can only be a tool for legitimizing unbridled power,[145] or of internal review of the bureaucracy (in which case we would find courts that depend on the leadership).[146] When political power tends to fluctuate between coalitions, we will find stronger administrative rules and independent courts, because effective constraints on future decision-makers can offer enacted policies a longer life span (and when political power is constant, the opposite picture will emerge).[147]

The factors that explain the evolution of administrative law domestically can also explain the evolution of administrative law within global governance bodies. Because administrative law is a method for restraining actors, and therefore a reflection of the balance of power among actors within political institutions, the law on decision-making within global institutions reflects the interplay between the actors that participate in the decision-making process within that institution: state executives, bureaucrats working within the institution, interest groups, NGOs and other representatives of more diffuse constituencies, and ultimately reviewing bodies such as ombudspersons or judges. Their interaction will shape the evolution of administrative norms and procedures within each global body.[148]

But as opposed to domestic administrative law systems, which developed in relative isolation from each other because each political system had its own unique power structure, the global arena is less compartmentalized. Although global governance institutions are distinct from each other and seek to maintain their uniqueness, many of them are governed by the same set of state actors or are influenced by similar interest groups originating from the same affluent

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[145] ROGER COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 169-171 (2nd ed., 1992); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1334 (1984). *See also* Tom Ginsburg, *Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 597 (2001) (suggesting that the motivation for the enactment of the Korean Administrative Appeals Act of 1984 was President Chun Doo Hwan's attempt to gain legitimacy for his government).

[146] J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 217-18 (1999) (describing how politicians of the ruling LDP party sought control over the local bureaucracy through judicial review of local government).

[147] Ginsburg, *supra* note 145, at 613-14 ("Parties that govern for an extended period have less need to rely on independent courts as monitors because they will be able to manipulate bureaucrat[s'] careers and develop other alternative means of control"); *see also* Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON 349 (1993).

[148] For more, see Benvenisti, *Interplay*, *supra* note 144. For a more general analysis of domestic systems, which seeks to find a principal and an agent within each country, *see* Nuno Garoupa & Jud Mathews, *Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review*, 62 AM. J. COMP. L. 1 (2014).

democracies seeking similar gains and concessions. While these forces would tend to limit accountability mechanisms, there are other external actors who have demonstrated both interest and ability to impose administrative law requirements on global bodies. Although "peer review"[149] between global governance bodies is still limited,[150] some actors are seeking convergence of the standards of review (such as arbitrators who seek to create a general legal framework in international employment law,[151] or in investment law[152]). There are also important domestic actors that are quite effective in reacting to unaccountable global governance. National courts have shown concern over the bleeding of decision-making power away from the state, and are sometimes in a position to impose discipline on recalcitrant global actors.[153] In specific situations, public opinion has managed to prompt certain legislatures into action. Kristina Daugirdas recently showed how the U.S. Congress was effective in making the World Bank more accountable both to its employees and to the populations in those countries receiving loans, and also to Congress itself.[154] Moreover, "a culture of accountability" that has developed in several democracies is spilling over into the global arena, as people accustomed to receiving information and participating increasingly view opaque global processes as illegitimate.[155]

Therefore, the distinct balance of power – both internally and externally – within each global governance body will shape the evolution of administrative law in that institution and indirectly shape others' expectations regarding what good law means. Therefore, observers of the accountability of global bodies must pay close attention not only to the norms these bodies subscribe to, but more importantly to the question whether there are skilful and impartial institutions that can ensure that such norms are actually complied with. In the "endless game of catch-up" played with administrative law chips,[156] it is crucial to focus not only on the chips themselves but also on who's playing them and how.

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[149] On "peer review" and other types of review see Ruth Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POLI. SCI. REV. 29 (2005).
[150] Deshman, *supra* note 26; Eyal Benvenisti & George W. Downs, *Toward Global Checks and Balances*, 20 CONST. POL. ECON. 366 (2009).
[151] *Ms. "EE"*, *supra* note 69.
[152] Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (N.Y.U Pub. L. Res., Working Paper No. 09-46, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980 (last visited Feb. 13, 2014).
[153] Benvenisti & Downs, *Democratizing Courts*, *supra* note 12; For details see *infra* Chapter 6 text to notes 106-143.
[154] Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT'L L. 517 (2013).
[155] On the influence of domestic transparency practices on peoples' expectations, see Donaldson & Kingsbury, *Power*, *supra* note 37 at 502-504.
[156] On this see *supra* Chapter 2, text to notes 178 – 186.