

# PROACTIVE STRATEGIES IN THE GLOBAL LEGALITY REVIEW

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*In the last fifteen years the number of mechanisms and proceedings for reviewing the legality of decisions adopted by global administrative bodies has significantly increased. As a result, various kinds of approaches and standards have been developed. This paper points at the emergence of a number of resembling solutions adopted by global courts in the process of review and sketches them in terms of “proactiveness”. On the ground of a set of landmark case studies, it reflects on this topic along three different dimensions. First, by understanding when and why the global reviewing entities have shown a “proactive” response while dealing with the review of legality. Are we observing errant solutions provoked by contingencies or, conversely, the brainchild of the complex nature of the global legal system? Second, by proposing a preliminary model of proactive review in the effort to forge a forthcoming rule- (instead of power-) oriented global legal system. At a time when the progressive ramification of the global arena is becoming manifested, this paper attempts to outline whether and how a diffuse proactive-driven review of legality would affect the global edifice and its relationship with the domestic systems. Third, and contextually, throughout a critical look of proactiveness, the paper indicates which steps can be considered instrumental to spur the gathering of the global judiciary to modulate its presence in agreement with the magmatic evolutions of the global administrative law*

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## 1. Foreword

The adoption of strategies is a persistent habit in courts. Either ancillary to the cardinal components of a given legal system or secondary to the judicial purport of performing specific tasks, strategies compass the boundaries of the judiciary and crystallize judges' rationale towards relevant matters. Borrowing on insights from legal history, two examples are worth a brief mention. In tenth century Iceland, the laws were passed by the "legislature" – the *Lögrétta* – by the majority of its members, the *godord*. Their enforcement, however, was entirely left to the private parties' bargaining. Ultimately, the sanction behind all legal judgments or arbitrated settlements was the blood feud or the fear of it. In time, whether the claimant could not receive satisfactory reparations, alternative solutions would have been made accessible by courts. Privates could coalesce against the outlaw and repeatedly suit him and his supporters. Tort claims could be transferred to neighbours with sufficient economic strength to prosecute them. Eventually, primitive forms of arbitration could be recurred.<sup>1</sup> Nine centuries later, in the East German Democratic Republic, the *Gesellschaftliche Gerichte* promoted legality in minor cases. These social courts adopted a strategy of dialogue and composition. They operated in the absence of uniform hearing procedures, primarily upon the request of workers or labour groups. Their final resolutions put forward measures for settling disputes in the prevalent form of recommendations to local councils, officials or private citizens.<sup>2</sup>

The quantity and variety of strategies by courts is potentially unlimited in its extent.<sup>3</sup> With specific regard to the global legal system, the number of mechanisms and proceedings for reviewing the legality of decisions adopted by global administrative bodies has undergone a significant transformation in the last fifteen years. To begin, the number of judicial or quasi-judicial bodies has increased. Simultaneously, different actors, both at the supranational and national level, have been involved in the process of review. As a result, various kinds of approaches and standards have been adopted. For the sake of rationalization, however, this paper's canonical assumption is that two major approaches are conceivable. I outline the first in terms of a "reaction". In turn, I describe the second in terms of proactiveness. In reality, the difference between the two strategies is much less clear-cut than in this dichotomous representation. In many cases, they are images of different moments along the same *continuum*, converging in a conclusive effort to reassert the respect of legality. Yet, in a theoretical perspective, these two forms of review are utterly dissimilar.

Reactivity can be streamlined as a fast, direct, and mainly top-down oriented answer. Aimed at delivering a prompt restoration of the *status quo ante*, a reactive review is committed, first, to quick solutions in pursuing the certainty of legal and social order. Secondly, the effectiveness of this form of review is hinged on its steadiness. Typically, ousting the agent that has determined the condition of illegality is conceived as a crucial pace in a

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<sup>1</sup> See D.D. FRIEDMAN, *Law's Order. What Economics has to do with law and why it matters*, Princeton 2000, at 263; R. POSNER, *Medieval Iceland and Modern Legal Scholarship*, 40 *MLR* 1495 (1992); I.W. MILLER, *Avoiding Legal Judgement: The Submission of Disputes to Arbitration in Medieval Iceland*, 28 *AJLH* 96 (1984)

<sup>2</sup> See P.W. SPERLICH, *The East German Social Courts; Law and Popular Justice in a Marxist-Leninist Society*, Santa Barbara, 2007; N. TRAVIS WOLFE, *The Proactive Responsibility of East German Criminal Courts*, 15 *CJR* 22 (1990)

<sup>3</sup> The number of contributions on judicial strategies is vast. See A. CHAYES: *The Role of the Judge in Public Law Litigation*, 89 *HLR* 504 (1976); A. SCHWARTZ, *Relational Contracts in the Courts: an Analysis of Incomplete Agreements and Judicial Strategies*, 21 *JLS* 271 (1992); A.D. VESTAL, *Reactive Litigation*, 47 *ILR* 11 (1961-1962). Specifically on the international sphere See L. DIAZ, B. HART DUBNER, *On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: a Proactive Approach to the Evolution of International Law*, 32 *SJILC* 1 (2004-2005); H.H. KOH, *The Value of Process*, 11 *ILT* 27 (2005); P. KOOIJMANS, *The ICJ in the 21<sup>st</sup> Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy*, *LVI ICLQ* 741 (2007)

reactive *manoeuvre*. The cassation of an administrative act, the abrogation of a contract, or the withdrawal of a document are all exemplary countermeasures in a reactive strategy. Ultimately, a bottom-up drive is very likely to occur. The complainant's position is initially managed at the global level and, afterwards, enforced at the domestic level.

Albeit distant to be fully paradigmatic, the range of variance presented by a proactive review shows a captivating digression from the reactive rationale. At the bottom, a proactive strategy is durative, tendentially designative in its overture, multi-directional in its proceeding and multi-phased in its accretion. Furthermore, proactiveness exhibits a germane degree of variformity when crafting practical solutions for effectively dealing with disputes. Upon closer examination, a proactive strategy is developed, firstly, alongside a prevalently extended timetable. Secondly, the legality's reinstatement is infused and intermixed with constant negotiation. The aim is twofold: to produce valuable information for the parties and to dispose of the breach through dialogue and composition. In turn, the party structure is amorphous and subjected to iterated changes over the course of the litigation. Thirdly, legality is reinstated through a number of progressive steps rather than a single direct decision. At last, proactiveness reveals a complex – and therefore fascinating – structure in committing the global level alongside the domestic level in the review of legality. Case in point, the superintendence of composite forms of ongoing relief at the global level relies on the intercession of the local expertise, namely domestic administrations and tribunals. Consequently, in place of the distinct articulation presented by the reactive review, a top-down approach is complemented by – and fused with – a bottom-up approach.

Given this capsule description, in this paper I explore the proactive review of legality in the global legal system *inter se* and *vis-à-vis* the reactive review of legality. Reactivity mirrors a traditional form of judicial review. However, on account of a number of reasons, either practical or political, this form of review is not always appropriate in the global arena. Thus, a proactive review reflects an attempt by global courts to reinstate legality bypassing these limits. The review is pursued through a *de facto* administrative procedure. This “shortcut” minimizes intrinsic limitations such as the lack of executive authority to compel appearance and compliance; and, all at once, maximises the delivery of effective remedial solutions. In many other respects, however, a proactive review can be time-consuming and uneconomical. Besides, its compliance and impact rates are not easily measurable because they are hinged on transient factors such as the sequential accomplishments of structural reforms at the domestic level.

In order to fully develop these assumptions, this paper is articulated in three parts. Part I is devoted to the description of the basal axioms of a proactive review. In this respect, it takes into account the phases through which the review is developed, the actors involved, and it explores the interactions between the global and the domestic level. Part II expounds the rationale of a proactive review. Of primary interest is the understanding of the motivations behind the choice of the global reviewing entities to give a proactive response while dealing with the review of legality. Part III gives some concluding comments. The section substantiates the connection between the transformation of the global legal system and the adoption of proactive strategies.

The analysis is supported by the description of few landmark cases from five global reviewing bodies.<sup>4</sup> Namely: the Compliance Advisory Ombudsman (CAO) of the International Monetary Fund (IMF) and the Multilateral Investment Guarantee Agency (MIGA); the

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<sup>4</sup> In order to avoid terminological jumbles, this paper bases on a broad definition of global judiciary. The terms “reviewing body/entity” and “global courts” are used interchangeably. The following criteria have been used in identifying the global judiciary: the permanent nature, the independence of the members, and the power to adjudicate disputes on the basis of predetermined rules of procedure

Inspection Panel (IP) of the World Bank (WB); the Compliance Committee (CC) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter “the Aarhus Convention”); and, to a minor extent, the Compliance Review Panel (CRP) of the Asiatic Development Bank (ADB); and the Independent Review Mechanism (IRM) of the African Development Bank (AfDB). As specifically for the cases, twelve complaints have been thoroughly examined. That is to say: the “Yanacocha gold mines” case; the “Guatemala Marlin” case; the “Antamina” case; and the “Allain Duhangan” case, all handled by the CAO. The “Mumbai urban transportation” case; the “Honduran land administration” case; and the “Vlora power sector” case, which were handled by the IP. The “Kazatomprom” and “Danube river” cases, both handled by the CC. The “Colombo-Matara Highway” and “Melamchi water supply” cases, both handled by the CRP. Finally, the “Bujagali Hydropower” case, handled by the IRM and the IP. The whole of data that has been harvested is summarized in a synoptic table, annexed to the paper.

## PART I

### THE BASAL AXIOMS OF PROACTIVE REVIEW

*In what follows I will reduce to a scheme the maturation of a proactive review by differentiating three stages of the process and outlining each in brief. The distinction I propose is not categorical. It provides a rough first cut of the development of a proactive strategy throughout two levels, the domestic and the global, and their constant intertwinement. In this essential draft I am going to explicate, solutions are initially suggested at the global level. Then, they are elaborated within the domestic boundaries, under the persistent vigilance of the global court. At last, the decisions are locally implemented under the auspices of the global body. Oftentimes they result in changes in the global discipline as well.*

#### 2. *Overture*

The first phase of the process is held at the global level. To put it crudely, in the *ouverture* the global entity appraises the complaint in its substance. The request is registered and, following a preliminary investigation on the site, the outlines of a strategy are traced. Successively, its accomplishment is decentralized at the domestic level.

With specific regard on the modalities of review, solutions are diversiform. Quite frequently the entirety of the process is devolved to *fora* specifically designed to deal with the actors involved. In June of 2000, for instance, following the accidental loss of toxic waste throughout the Peruvian highway connecting Lima to Choropampa, several mining companies involved in a local IMF’s financed project filed a complaint to the CAO. The complainants sought an independent investigation of the case. In particular, they pointed to the local authorities’ negligent response to the incident as the main cause of the acute poisoning suffered by the local communities. Notwithstanding the appointment of an independent commission of experts who were brought in to file a report on the event’s responsibilities, two new extensive complaints were filed to the CAO shortly afterwards. Complainants were, respectively, three neighbouring communities and a local NGO. The spectrum of allegations ranged from the shareholders’ and government’s lack of managerial competence to the environmental, social and economic unsustainability of the project. Therefore, in its 2001 final report the CAO suggested the creation of a consultative forum where a collaborative problem-solving process could take root. The forum, named «*Mesa de Dialogo y Consenso*» (MDC),

would have been composed of NGOs, representatives of local communities and government officials. The proposal suggested that a finite number of participants would join the MDC. This solution would have encouraged a more meaningful and positive dialogue and guaranteed the effectiveness of its operations. In addition to the forum's meetings, however, a number of individual consultations would have been held to guarantee the participation of the number of stakeholders not officially represented in the MDC. Eventually, the MDC was created. Between 2001 and 2003 the forum successfully operated, generating several relevant documents, and progressively remodelled the dialogue between the civil society and the shareholders involved in the project. Later, between 2005 and 2006, its activity was reviewed by an independent commission. Finally in 2006, after the publication of the CAO's exit report, the parties unanimously proposed to renew the MDC's mandate or even transform it into a conflict resolution body.

Albeit recurring at frequent intervals, the creation of *fora* for discussion is not an adamant rule. At least three other hypotheses are conceivable. On occasion, the global entity has opted for intensifying the cooperation with advisory bodies already operating locally. In January 2006, for instance, the IP dealt with a complaint related to a land administration resettlement in Honduras.<sup>5</sup> The IP initially acknowledged the complaints filed by some Honduran NGOs questioning the effectiveness of the «*Mesa Regional*» (MS), a forum where conflicting local interests were represented since the project's start-up. In the requesters' claim, the forum lacked legitimacy. In their opinion, it was created in spite of the disagreement of the local indigenous community, the *Garífuna* people, and has never represented them efficaciously. The IP considered the request eligible and in 2007 drafted an investigation report. The strategy suggested, as a first step, to bolster the MS's consistency. At such regard, the report pointed to intensifying the cooperation between the MS and the leading representative bodies of the *Garífuna*. Subsequently, the IP advised that a closer supervision of the MS and up-to-date knowledge by WB staff would have been beneficial to limit further endangering of *Garífuna*'s survival. The third step concerned the project's implementation. In short, the IP put forward the necessity to involve in future consultations the national «Inter-Sectoral Commission for Protecting Land Rights of *Garífuna* and *Misquito* Communities» (ISC). This governmental agency might have played a significant role in helping to address the concerns that have been raised and promote dialogue between local communities and the government. The fourth and last step addressed the different types of conflict resolution procedures, judicial and extra-judicial, available to solve the land conflicts. On the merits, the IP argued that a better coordination between the different procedures would have been definitive. Therefore, the arbitration procedures provided in the project should be harmonized with the local resolution procedures. The MS was indicated as the device through which harmonization could be achieved. Also, an increase in budget allocations for training conciliators and arbitrators was deemed as a further useful step.

Yet in other cases, the review has been pursued by strengthening the local framework of civil society actors. Serving as an illustration in this regard is a 2004 complaint on a WB financed urban transportation project in Mumbai. The project consisted of three components: the improvement of Mumbai's rail transport system, the improvement and extension of the road-based transport system, and the resettlement and rehabilitation of the affected communities. In total, four requests for inspections were filed to the IP.<sup>6</sup> All of them, however, pertained to similar concerns: the inadequacy in the restoration and resettlement of the affected people. Thus, the strategy designated a two step process of review. In the earliest, the

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<sup>5</sup> Request No. RQ 06/01

<sup>6</sup> Requests No. RQ 04/03 and RQ 04/04

IP opted for improving the local NGOs' credibility. According to the project design, in fact, almost all direct responsibility for field operations was delegated to two local NGOs. To strengthen their accountability, the IP targeted the sub-sequential expansion of their institutional capacity and expertise. In the latest, once an effective institutional framework had been established, the IP pointed to the conversion of the NGOs into small administrative agencies cooperating in close contact with the «Mumbai Metropolitan Regional Development Authority» (MMRDA). Furthermore, the IP suggested two additional corrective actions. As for the first, the IP insisted on promoting a well-structured grievance system to sustain the renovation of the institutional framework. In the second place, the WB was requested to increase the number of staff members on the project, improve transparency in its processes, and control closely the future project's evolution.

Ultimately, in specific events the strategy has entrusted the local government in the choice of pertinent solutions. Most notably in this regard is, for instance, a complaint recently handled by the CAO on a mining project in Guatemala. In 2003, the government of Guatemala, following a neo-liberal political program aimed at attracting capitals from abroad, issued a digging concession to exploit some gold and silver strip mines. The project was granted IFC financial support. Between January 2005 and June 2006 some local and international NGOs complained to the CAO about the negative impact of the project on the environment and the adoption of inadequate consultations with the local indigenous communities. In its assessment report, the CAO recommended that a high-level delegation from the Honduran government, the mining company and a representative of the complainants should consider engaging in dialogue to establish the acceptable next steps towards achieving the resolution of the dispute. In fact, the absence of clear government regulations on participation and disclosure had resulted in uncertainty for local people regarding the extent to which they should have been informed and consulted. Accordingly, the government of Guatemala was suggested to stimulate the participation in the manner that, under the circumstances, it considered more appropriate. On the merits, the IP's only suggestion was the indication of the mining company as the ideal interlocutor in undertaking enhanced consultations with local community groups. Following these requests, the Guatemalan government committed itself in the endeavour of ameliorating the project's governance, mainly through participation. Hence, the government established a «High Level Commission» (HLC) to review and address mining issues. This Commission consisted of members of the Catholic Church, the government, industry and NGOs. In addition, local communities were consulted through a referendum.<sup>7</sup>

There are many legitimate reasons to explain this variformity. At this stage, however, it is more important to clarify that, these variations apart, two elements recur in every proactive approach. The first is related with the standing heterogeneousness. The second is related with the actual objectives of the review.

#### a. Rules of standing

Conceptually, when adopting rules of standing courts are intended to control, and contain, the accessibility of parties to a dispute. Rules on this point may vary. At least, however, we can assume that the standing is given to a person with a personal stake in the outcome of the controversy. The mere interest as a member of the public in the restoration of legality is not enough.

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<sup>7</sup> The case is fully illustrated in S. CASSESE *et al.*, *Global Administrative Law. Cases and Materials*, New York, 2008

When moving to the observation of the global legal system, the question becomes considerably more tangled.<sup>8</sup> As a rule of thumb, a broad access to disputes is important for both the global courts and the process of review. Courts are aimed at, first, increasing their agenda and creating a virtuous circle through which build a stronger reputation, making fully cognizant of their existence a larger portion of civil society. Second, and relatedly, with a large recognition of standing rights global courts are aimed at affirming a stronger legitimacy. At the same time, a large standing is useful for the process of review. Not incidentally, by giving broad access to compliance mechanisms, the goal is to reinforce the perception of the global reviewing mechanisms as a forceful weapon of advocacy towards the domestic and global institutions.

A cursory investigation on the rules governing the access to dispute resolution procedures confirms this assumption. In all the reviewing entities considered by this paper a panoply of state and non-state actors has recognized full standing rights. The CAO responds directly to the concerns of individuals, groups of people, and organizations. The IP acknowledges requests presented by an affected party in the territory of the borrower, which is not a single individual, or by the local representative of such party. The CC considers any relevant information submitted to it, without any distinction with respect to the sources of that information. On its behalf, the IRC has the authority to receive complaints from groups of affected people, their representatives and, exceptionally, a foreign representatives acting as agents of adversely affected people. Similarly, a request for compliance can be filed to the CRP by people who are negatively affected by ADB's projects.

#### b. Objectives of the review

The second recurring element in proactive strategies is tied with its objectives. Notwithstanding the different solutions adopted, all the proactive approaches are aimed at attaining three goals. Of course, in the long-run, proactive review is aimed at an effective reinstatement of legality. In the short-term, however, the primary goal is to promote a constructive dialogue. Also, in the mid-term, proactivity encourages a stronger partnership between the global and the domestic level. While these aspects will be analyzed satisfactorily in the next paragraphs, here I would like to stress a different, although related, point. Interestingly enough, in their attempt to achieve the aforementioned goals, proactive strategies are deeply inspired by solutions well known within domestic administrative proceedings.

The creation of a forum of dialogue has a close resemblance with the French «*Commission Nationale du Débat Public*» (CNDP). As such, an independent administrative body is demanded to consult a large number of stakeholders with conflicting interests and provide a motivated decision. Whereas an advisory body already exists, the strategy reinforces its presence by increasing the number of actors involved. Besides, the vigilance of the global body is tightened. This kind of solution call to mind the «Advisory Committees» (AC) operating under the U.S. Federal Advisory Committee Act. As a matter of fact, the ACs conduct public hearings on matters of importance that come before the administration and provide independent expert advice on a range of complex scientific, technical, and policy issues. In the third case, lacking a specific body for consultations, the dialogue is reinstated by entrusting a network of civil society actors and public institutions. In its backbone, this solution evokes the rationale behind the Italian «*Conferenza di servizi*» (CDS). The CDS is created when the decision-making processes are of particular complexity, involving with

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<sup>8</sup> See B. KINGSBURY, The Concept of "Law" in Global Administrative Law, 20 *EJIL* 23 (2009)



different administrations and stakeholders. Finally, in the fourth case, the intercession of the national government substantiates in the use of domestic administrative proceedings and institutions.

While this representation is an obvious simplification, there is some truth to it, as being that of the necessity for pursuing effective solutions. Due to its relation with the reasons motivating the adoption of proactive approaches, this aspect will be discussed further in Part II of the paper.

### **3. Dialogue, didacticism, deliberation**

Once a strategy has been established, the process of review is decentralized at the domestic level. Having described the possible models of review and their shared attributes, this section will give attention to reviewing sessions' dynamics.

In their contours, the domestic reviewing sessions appear to be more conversational than adjudicative. This routine is settled upon a dual target. At the lower, the dialogue is didactic in its scope and non-hierarchical in its form. The educational purpose is aimed at bringing forth a constructive conversation among participants, disseminating valuable information, and clarifying the ambiguities. Information is beneficial to the court, which relies upon the evidence in weighting the alternatives, as well as to the parties. I found particularly demonstrative, at this last regard, the adoption of the no-dissent rule as a standard of reference in the forming of opinions. Not coincidentally, the organization is non-hierarchical. Each participant is equally entitled to put forward his position and suggest proposals. At the utmost, the dialogue is aimed at the production of a general agreement or, at the very least, at the elaboration of a circumscribed agenda of future actions.<sup>9</sup>

Three categories of participants come to attention. The first encompasses the domestic public institutions. The second and third includes civil society and judiciary, respectively.

#### **a. Public sector**

Normally, in proactive review national governments, regional and local institutions, administrative authorities and agencies of various natures are constantly involved. In rough terms, we can assume that their number is determined by the complexity of the complaint, as perceived by the global court. Thus, four interdependent variables are likely to occur. In the first place, in a number of hypotheses only a few selected government officials take part in the process of review. In reverse, on other occasions their number is larger. Additionally, and depending upon the circumstances, the total of public representatives can be increased or decreased at a particular time within the review.

In many respects, the trend is favourable to increasing rather than reducing the involvement of the public sector during the reviewing process. One may regard, for instance, the MDC as a forum where a limited and stable number of local officials have been involved from the beginning until the end of the process. By contrast, all the other cases follow a different pattern. The MS has been sided by another administrative agency, the ISC, during the course of review. Correspondingly, the network of NGOs in the Mumbai case has been supported by the MMRDA in a latter stage of the review and in the "Guatemala Marlin" case the Guatemalan government has established the HLC.

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<sup>9</sup> On the use of dialogue in international dispute resolution See T. GINSBURG, R.H. MCADAMS, *Adjudication in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 *W&MLR* 1229 (2004)

Two additional examples are explanatory. In them, both the CAO and the CC elaborate a strategy that demands a progressively closer involvement of the public sector in the review. In 2005 the CAO, following a complaint filed from Peruvian NGOs, consumers, and business associations, created a «Planning Workshop» (PW). In origin the PW was conceived as a measure to obviate the inadequacy of the initial responses given to the protests that had burst around a MIGA financed mining project. In fact, the early interactions with the local communities have been carried through the appointment of a board of scientific experts and the development of consultations at the local level. Yet this solution had turned unsuccessful. Later in time, the PW capacity was broadened. First, it was demanded to strengthen the effectiveness of another consultative body, the «Comité de Monitoreo, Vigilancia y Fiscalización Ambiental de Huarmey» (CMVFAH), operating locally. The CMVFAH included governmental institutions at the national and municipal level, businesses organizations, NGOs and one university. Second, the PW was appointed to schedule further steps purposeful in favouring the peaceful conclusion of the protests. In its conclusive report of the case, the CAO defined the PW as a decisive, although not ultimate, stage in the creation of a developed network of stakeholders and shareholders. In the CAO's opinion, in order to obtain an effective reinstatement of legality, the number of public actors should be increased to a greater extent. For instance, the network should involve the competent domestic regulatory agencies. It would possibly operate through small working groups committed to specific issues and would be superintended and coordinated by a consultative body such as the PW itself.

The second case originated in 2004, after Ukraine had begun the construction of a navigable canal between the Danube River and the Black Sea to facilitate the passage of vessels. Shortly after, two submissions were filed to the CC of the Aarhus Convention. The first complainant was a local NGO concerned with environmental and participatory matters. The second submission was filed by the Romanian government, with whom Ukraine shares the Delta. The submissions pointed to the Ukrainian lack of compliance with the Convention, addressing the untimely and partial information given to the public, particularly on environmental concerns. In its conclusive report to the Meeting of the Party (MOP), the CC recommended that Ukraine submit a strategy containing a time schedule on the Convention's transposition within the national law. In the CC's report, Ukraine was explicitly requested to set up a number of capacity-building activities directed toward the judiciary and, more specifically, the public officials involved in the environmental decision-making processes in operation.<sup>10</sup>

## b. Civil society

A second class of interests that takes an active part in the process of review is civil society at large. In fact, benefits in the global review for individuals, small corporations and NGOs are largely conditional to the fact that access is easier and almost inexpensive. Global review is seen by civil society actors as a way to accrue influence to a greater magnitude, by mobilizing support for their demands. At one time, due to the conversational and non-hierarchical structure of proactive sessions, the same actors could confide in global review as a highly effectual way of modifying the national law to their needs and expectations.

Once again, cogent evidence is given by observing factual cases. The presence of civil society is regularly recurring in all the models of proactive review. To begin, either in the case in which a forum for discussion is created, reinforced, or absent, the strategy insists on the

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<sup>10</sup> Report No. ECE/MP.PP/C.1/2005/2/Add.3

participation of affected communities and any other representative of conflicting interests. In this respect, the MDC, the MS, the ISC, the HLC and the PW are all related.

With specific regard to the assortment of civil society actors involved in the process of review, notably five categories are interested. These are: individuals or organized groups (such as NGOs), businesses, religious bodies, academicians, and experts of various proveniences.

### c. Judiciary

Finally, collaboration with domestic judiciary is present at given times. In this case, differently from the others, the involvement comes in a latter stage of the review. In fact, the role of national judiciary is condensed in the implementation of the review.

Some clarification is needed. From one perspective, it is a matter of concern that communication between global and domestic courts raises a host of procedural and political problems. Nevertheless, the potential payoffs are revelatory. *Rebus sic stantibus*, it still stretches too far to describe the two systems as a single component in a same strategy. Yet it is crucial not to lose sight of the fact that the global entities and the local judiciary are already and increasingly embedded in a mutual quest for legality. Not surprisingly, proactive review suggests with frequency the opportunity for a closer cooperation with national judges.

One may take, for instance, the Aarhus Convention's CC. Insofar I found explanatory the "Kazatomprom" case. In 2004 a Kazakh NGO submitted to the CC a communication alleging the non-compliance of the Kazakh government with the Aarhus Convention.<sup>11</sup> The communication lamented the violation of the right to information in relation with the governmental decision to import and dispose of radioactive waste. A request for information to Kazatomprom, the Kazakh national nuclear authority, has remained unanswered. Subsequent instances and appeal procedures in courts of various jurisdictions have failed. In the MOP decision following the CC report, the Kazakh government was requested to adopt a strategy, including a time schedule, for transposing the Aarhus Convention's provisions into national law. What is of particular significance here is that the MOP requested the strategy to include capacity-building activities for the judiciary, the public officials, and any other person having public responsibilities involved in the environmental decision-making. The judiciary, in particular, should have been trained on the implementation of the Convention and the compliance procedures.<sup>12</sup>

More generally, at any occasion in which proactive approaches have addressed the opportunity of an overall rethinking of the domestic institutional framework, a development of the grievance mechanisms operating at the global and national level has been suggested. In some manner, the Honduran, the Mumbai and the "Guatemala Marlin" cases are all resembling on the point.

Interestingly enough, in specific cases, the promotion of the culture of dialogue and the development of a stronger collaboration with the global entities has been implemented autonomously by national judges. A significant example is given by a complaint recently handled by the CAO. In October 2004, people living in the *Himachal Pradesh* region filed a complaint alleging that their water supplies were at stake because of the IFC's financed project for the realization of a hydroelectric power plant that required the diversion of the Duhangan River. In 2006, in its first report the CAO elaborated a strategy suggesting a number of steps to reinstate legality. The strategy postulated an increment in dialogue and meetings for composition of interests. The attempted solution, however, was unsuccessful. In early

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<sup>11</sup> Communication No. ACCC/C/2004/01

<sup>12</sup> Decision II/5a, Doc. ECE/MP.PP/2005/2/Add.7

2006, the inhabitants of the village of *Jagatzuk* sought an injunction through the Indian High Court to prevent the company from moving forward with the project. Despite the fact that the case was decided in favour of the company, the Court's decision was clearly favourable to the former CAO's orientation. The community, in fact, was encouraged to work together with the project's shareholders to resolve the issues amicably. Especially, the Deputy Commissioner was appointed to assist in the creation of a «Village Development Committee» (VDC) that could co-ordinate relations between the shareholders and locals. Successively, other follow-ups were drafted. In them the CAO, broadening the High Court's suggestions, recommended that some «Tailored Training Workshops» (TTW) would be created in the interest of the community members, the shareholders and local authorities. The TTWs would have provided guidance in structuring fair, transparent, representative and durable mechanisms to resolve conflicts. Moreover, the TTWs would have been coordinated by the CAO and the Deputy Commissioner to ensure their complementarity in the creation of the VDC.

#### 4. Implementation

The third and last phase of the review is carried out halfway between the global and the domestic level. In spite of its apparent domestic nature, in fact, the proactive processes of review demand a constant global vigilance. Albeit apparently lying in the background for the most part of the *iter*, the monitoring of the global reviewing body is palpable. The global entity has a constant control of the proceedings. In the beginning, by tailoring it to the concrete and occasional needs. In a latter stage, once the outcomes have been collected, the judges boost further steps to eradicate the cause of illegality. Further, the emission of the final decision rarely states the irrevocable termination of the affair. Habitually, instead, its subsequent administration and enforcement call for the continuing participation of the global management, the national governments, judiciary, and civil society. The «Allain Duhangan» case that I just summarized, for instance, is perfect to illustrate this idea. To support it further, it is useful to present a concise description of two additional cases, both handled by the CRP.

In June of 2004, a Joint Organization of the Affected Communities on Colombo-Matara Highway, representing the interests of local NGOs and communities, requested the ADB to activate an investigation.<sup>13</sup> The requesters pointed to the adverse effects that an expressway from Colombo to Matara, being built with the help of ADB funds, was having on communities located nearby. In question was a considerable degradation of the environment, a significant loss in the local agriculture-based economy, and the destruction of the social structure. In large part, the harm would have occurred because of the ADB's omissions in formulating, processing and implementing the project. The request was determined eligible and, in the 2005 aftermath report, the CRP recommended an overall reassessment of the project's realization. Both the ADB and the government of Sri Lanka were engaged as participants. As indicated by the ADB, the reappraisal should have committed to, first, developing additional guidance in the global terms of reference and therefore avoiding similar complaints for the future. Secondly, the ADB requested that well-staffed monitoring activities would have been established by the appointment of a national independent body. As a matter of fact, since June of 2006 the process of monitoring is ongoing. Two annual reports have already been published and a third one is in its drafting. The documents report a constant implementation activity in strengthening the effectiveness of the project, under the auspices of the CRP.

The second case is originated by a request for examination of ADB's compliance with its policies and procedures, especially with regard to information disclosure and environment,

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<sup>13</sup> Request No. 2004/1 «Southern Transport Development Project»

in a Water Supply Project located at Melamchi and Kathmandu Valleys in Nepal. On the point, it strikes me as of importance the fact that the constant implementation of review has been advised even if the complaint has been rejected. In its 2004 final report on eligibility,<sup>14</sup> the CRP has determined that the request was not eligible and therefore has invited the requesters to readdress their claims to the ADB and the competent national authorities. Nevertheless, having noted that a number of individuals from local communities have not gone through the process of consultation fully, the CRP advised the competent local authorities to satisfactorily address their requests. The report stated that new complaints could be filed at any time during the realization of the project and that would have been properly managed.

So far, in observing the evolution of proactivity, the cons of proactivity have been voluntarily ignored. Before moving to part II, however, two contrary arguments should be considered. More specifically, a proactive review is time-consuming and demanding in economic terms.

#### a. Time factor

As suggested above, fastness is strictly essential to reactivity. Alongside with securing the maintenance of the social order, a fast response is helpful in deterring future antisocial behaviours. Indeed, when an infringement is followed by a fast reaction, the perception of the appropriateness of a legal system is strengthened. In a purely hypothetical scale of measurement, a reactive approach would correspond to the upper extreme: the immediatism.

Doubtlessly the time factor is also an indispensable ingredient in any proactive strategy aimed at successful outcomes. For that reason, I would unlikely locate it at the very bottom of the aforementioned scale. Unequal to a reactive approach, however, in proactivity the time function is grounded on a complaints' management devoted to a dialogue-driven restoration of legality. This solution is inevitably time-consuming. As a consequence, the period elapsed between the lodge of a complaint and the elaboration of a solution is diluted. The review of legality is more willingly diachronic.

The assumption is amply demonstrable by facts. In all above mentioned cases, the whole process has been developed over an extended time schedule. From the registry of the inspection request to its conclusive acknowledgement, four years on average have passed. This event is even more remarkable when juxtaposed with the terms of reference and operational guidelines of the reviewing bodies. The CAO, for example, expressly commits itself to ensuring that complaints are handled in a timely and prompt manner. On its behalf, the IP sets a number of time limits in its procedures and guarantees their strict observation. Resembling provisions recur in all the other global judicial institutions. Yet, in reality the major concern is for the sequence of actions to be implemented. Only a minor interest is put on the time factor *per se*. The elaboration of rapid responses is circumstantial.<sup>15</sup>

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<sup>14</sup> Request No. 2004/2 "Melamchi Water Supply Project"

<sup>15</sup> Interestingly enough, at times a permissive reliance on the time factor has proven crucial even in the presence of a predominant reactive orientation. A revealing example is traceable in the jurisprudence of the Appellate Body of the WTO. In the famous "shrimp-turtle" case (United States – Import Prohibition of Certain Shrimps and Shrimps Products, WT/DS58/AB/R, 6 November 1998) the AB opted for a constructive dialogue with the United States on a potential reconsideration in the relationship governing trade and environment, rather than cutting the conversation off and looking for a direct solution of the case. Even if time-consuming, in the end the accommodation of environmental concerns and the compliance to the trade regime was successful

## b. Economic factor

Proactive strategies are virtually more demanding in purely economic terms. Higher costs depend in part upon the longer time schedule. Besides, a dialogue-driven rationale necessitates a higher use of human and logistic resources to evolve into successful outcomes. Costs are determined by the organizational expenses (i.e. the preparation of a meeting), by the creation of bodies of consultation, and by a number of related issues (i.e. the media coverage). It is not within the scope of this article to determine this issue in any greater detail. I will limit myself to assume that higher costs are included among the many reasons explaining the decentralization of the review. By way of delegating domestic authorities, global courts manage the bargaining costs and reserve proper attention to all cases that are submitted to them.

## PART II TOWARD PROACTIVENESS AETIOLOGY

*Thus far this paper concentrated on the observation and description of proactive strategies. Having settled at least provisionally on a working definition, the main thrust of this section is to speculate on proactiveness' aetiology. Along with the explanation of the possible reasons behind the choice of proactivity by global courts, I will substantiate the related problems.*

### 5. A triple rationale

The proactivity rationale can be clarified via a triple account. First, by defining the genetical attributes of global courts. Second, by exploring the rules of procedure in compliance. Third, by furthering the political outcomes of global courts' decisions.

#### a. Legal nature

First and foremost, the drift toward proactivity can be explained by means of the legal nature of the greater number of global reviewing entities currently in existence. At a high level of generality, many global courts resemble what we address collectively as Alternative Dispute Resolution (ADR) mechanisms. Within the domestic litigation, ADR mechanisms have been increasingly established due to their quickness, inexpensiveness and, what is more, for the higher degree of creativeness showed in problem solving with respect to the adversarial model of litigation.<sup>16</sup> I admit that circumscribing the global review of legality to a "mere" exercise of arbitration would be depreciatory in some respect. The greater elaborateness of global review is beyond question. In many other respects, however, it is safe to say that much of the time the global judicial entities work exactly as ADR mechanisms. That is to say that they operate as advisory and conciliatory bodies whose decisions are of a recommendatory value.

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<sup>16</sup> See J.I. CHARNEY, Third Party Dispute Settlement and International Law, 36 *CJTL* 65 (1997). With particular reference to ADR strategies See C. MENKEL-MEADOW, From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context, 54 *JLE* 7 (2004); When Litigation is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering, 10 *WUJL&P* 37 (2002)

Thus, I posit that the use of proactive strategies is largely (although not solely) explicable if interpreted as a method by global courts to minimize intrinsic limitations such as the lack of executive authority to compel appearance and compliance; and, all at once, maximise the delivery of effective remedial solutions. Global proactive courts, moving from a fragile jurisdictional base, are conscious of the necessity to align their jurisprudence with the needs of states as well as global institutions. In consequence, they encourage their active involvement in the effort of having their decisions jointly accepted. Via this engagement, each side involved has their needs satisfied. States preserve a moderated control in the process. Likewise, the global management develops its standards and sees its reputation with the community increased.

In my view, this assumption can be buttressed by way of addressing two additional points. The first one is delineable with a closer observation of the methods in which the global judges have been trained and selected. The second reckons on the appropriateness of adjudication in dispute settlement.

Undoubtedly, many global judges have received an extensive legal education and have a profound knowledge of the basic structures of codified legal systems. My point, however, is that the mastery of legal concepts obtained through a traditional legal background is supportive but not vital in the development of a creative strategy. Rather, global judges have to learn, if anything, how to skilfully deal with the potentialities of a “canvassing” dialogue and the use of soft-law standards.<sup>17</sup> A closer look at the rules governing the selection processes of global judges confirms this assumption. Not surprisingly, all of these processes are very similar.<sup>18</sup> Most notably here is the fact that there is no legal requirement that the judges be qualified or even to have received legal training. In practice, the majority of the persons appointed are selected on the basis of different skills. Specifically, these skills are: the ability to deal thoroughly and fairly with the requests, integrity and independence, and a recognized competence in the related fields.

For this very last reason I am in accord with the idea that, because of their background, global judges probably find it more natural to develop a strategy where the review is pursued through persuasion rather than coercion.<sup>19</sup> In this view, the mediator role is not merely ancillary to the adjudicator role, but joins, if not replaces, it as central. Under the circumstances of the cases presented in this paper, it would have been reckless of the courts to impose clear-cut solutions on the basis of a legal reasoning not shared by all the parties involved. Such an attempt would have increased the tensions inhibiting the realization of a project rather than reducing them.

#### b. Rules of compliance

The rules governing the compliance mechanisms are a second element in justifying the nurture of a proactive strategy. However, it must be emphasized that this factor is of limited significance and plays only a secondary role.

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<sup>17</sup> *Contra* R.L. HELFER, A.M. SLAUGHTER, Toward a Theory of Effective Supranational Adjudication, 107 *YLR* 273 (1997-1998)

<sup>18</sup> *See* R.O. KEOHANE, A. MORAVCSIK, A.M. SLAUGHTER, Legalized Dispute Resolution: Interstate and Transnational, 54 *IO* 457 (2000)

<sup>19</sup> On the concept of socialization in international law *See* R. GOODMAN, D. JINKS, Toward an Institutional Theory of Sovereignty, 55 *SLR* 1749 (2003); H.H. KOH, Internalization Through Socialization, 54 *DLJ* 975 (2004-2005). On reputation and compliance within international relations *See* R.O. KEHOANE, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, 1984, at 105; G.W. DOWNS, M.A. JONES, Reputation, compliance, and International Law, 31 *JLS* 95 (2002). On compliance *See also* B. KINGSBURY, Is the Proliferation of International Courts and Tribunals a Systemic Problem?, 31 *NYUJIL&P* 679 (1999)

My claim is self-explanatory: the more the rules of procedure are minute, the less a proactive approach is likely to be adopted. In the Appellate Body (AB) of the World Trade Organization (WTO), for example, the adjudicative process is governed by detailed rules of procedure. The adoption of the final decision is preceded by a discussion in the Dispute Settlement Body, the WTO's "political arm". Since its origin, then, the AB has favoured a literal approach in interpretive matters. The choice, that has supported a mainly reactive jurisprudence, has been pursued to secure its own existence and guarantee an easier acceptance by the disputing parties. Just occasionally, when the literal interpretation has shown to be inadequate and a decision has to be taken nevertheless, the introduction of moderate creativity has been used as a loophole.<sup>20</sup>

By contrast, in the CAO – that is, by all means, the most proactively oriented among the global reviewing entities analyzed in this paper – the operational guidelines are clearly inclined in the direction of open fact-finding and solutions. According to these guidelines, the CAO assist the stakeholders in breaking through the *impasses* with any suitable method. Similar peculiarities can be found in the operational rules of all the other reviewing bodies. The IP, for instance, is allowed to undertake preliminary assessment; indicate autonomously to the WB the date on which it would present its findings and recommendations; investigate thoroughly on the site; and, finally, to consider itself satisfied as to whether the WB's compliance or evidence of intention to comply is adequate, and reflect this assessment in its reporting. On the CRP's and IRM's account, the functions are of the same nature. They include the engagement with all stakeholders in the understanding of the issues; the monitoring of implementation of decisions; and, more generally, the use of every problem-solving technique, such as independent fact-finding, mediation, conciliation, dialogue facilitation and reporting. Lastly, the CC's *modus operandi* authorizes it to decide upon appropriate measures to bring about full compliance with the Convention.

### c. Political issues

A third and final reason to proactivity is linked with its political value. At first blush, both reactive and proactive strategies have an acknowledged political function. Jurists and political scientists have extensively documented courts' political behaviours when redistributing power within the legal system and the social order, allocating values in matters of particular significance to the community, or even legitimating public policies through the decisions they deliver.<sup>21</sup> In this paper, however, the subject is deepened to the only extent necessary to support the belief that global courts' existence (and therefore their approaches to review) are affected by politics on a minimum of two different occasions.

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<sup>20</sup> An illustration of the phenomenon can be found in the "completing the analysis" technique developed in the 2002's "Omnibus Appropriation Act" case (United States – Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R, 2 January 2002) or in the linkage between the General Agreement and other principles of international law (United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, May 20 1996). Other examples are traceable in the decisions accepting unsolicited *amicus curiae* briefs in appellate proceedings christened in the "Shrimps and Turtles" case, in the "Carbon Steel" case (United States – Imposition of Countervailing Duties on Certain Hot-Rolled and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R, June 7 2000) and the "Asbestos" case (European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products, WT/DS1135/AB/R, April 5 2001)

<sup>21</sup> See T. BECKER, *Comparative Judicial Politics. The Political Functioning of the Courts*, Lanham, 1987; R. WHEELER, *The Political Function of Court Systems*, 57 *Jud.* 296 (1973-1974); L.M. FRIEDMAN, *Legal Rules and the Process of Social Change*, 19 *SLR* 786 (1966-1967); J.S. MARTINEZ, *Towards an International Judicial System*, 56 *SLR* 429 (2003)



In many important respects, a direct connection between the political consensus encompassing the global institution and its advisory/compliance mechanisms exists. Thus, whether affected communities and governments would perceive the global institution as ineffective, two antithetic outcomes are possible. On the one hand, the number of complaints filed to the reviewing bodies could decrease to the benefit of different solutions (as, for instance, private arbitration). On the other hand, and inversely, the number of complaints could increase over a reasonable limit. In both cases repercussions would negatively affect the activity of the reviewing bodies undermining its role. Hence, from the standpoint of global courts a process of delegation sided by its upstream control (that roughly defines proactivity, or at least a significative portion) appears as resolatory.

At a deeper level, judicial strategies, and indeed proactivity, can be interpreted as the result of an attempt by global courts in favouring a pacific (or at least not troublesome) *cohabitation politique* with the management.<sup>22</sup> In effect, in spite of the recurring declarations of independence, a certain control by the political branch is unavoidable. Broadly speaking, the political stance of the institution has an evident interest in containing the expansion over a certain limit of the reviewing activity. Not casually, the IP members are designated by the Board for a non-renewable period of five years. In the CAO's terms of reference, it is disposed that the Ombudsman is appointed by the President of the IFC among the full-time employees at management level. Both in the ADB and AfDB (in the former upon recommendation of the President) members of compliance bodies are nominated by the Board of Directors. At last, the eight members of the CC are elected by the MOP upon the nomination of Parties, Signatories and NGOs. Therefore, the possibilities of restricting courts' activity are boundless. In terms of material rewards, the global governing bodies could reduce the costs for the reviewing process in the intent to affect the effectiveness of the court. In terms of non-material rewards, one should remember that the global management always has the last word on the implementation of the courts' recommendations.

## PART III CONCLUSIONS

*In this paper I stressed the notion of proactive judicial strategies in the review of legality at the global level. I defined the concept of a proactive strategy and explained how it is developed. In spite of these efforts, I am aware of the fact that these are only preliminary thoughts and that the knowledge of judicial strategies at the global level is still to a considerable extent intuitive and anecdotal. A lot more questions are still in need of an answer. These concluding comments contend that future fallouts of proactivity are counterpoised by a number of problems*

### 6. After words

It is widely accepted in the global administrative law doctrine that the global system is progressively shifting from an acerb into a more mature and complex system.<sup>23</sup> Global courts

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<sup>22</sup> See the theory of the "faithful agent" in W.M. LANDES, R.W. POSNER, The Independent Judiciary in an Interest-Group Perspective, 18 *JL&E* 875 (1975); T.W. MERRILL, Pluralism, The Prisoner's Dilemma, and the Behaviour of the Independent Judiciary, 88 *NULR* 1113 (1988); N.S. ZEPPPOS, Deference to Political Decisionmakers and the Preferred Scope of Judicial Review, 88 *NULR* 296 (1993)

<sup>23</sup> See R.B. STEWART, B. KINGSBURY, N. KRISCH, The Emergence of Global Administrative Law, 68 *NYUJL&P* 15 (2005); S. CASSESE, *Oltre lo Stato*, Bari, 2000

are at the forefront of this transformation. What is questionable is, first, whether there is a connection between this transformation and the adoption of proactive strategies by courts. Second, and afterwards, to what extent these strategies would affect the implementation of legality in the global legal system.

The first question may be answered affirmatively. As the previous section has indicated, the development of creative approaches in courts is partly explicable as a response to the ramification of the global legal system. As the global arena grows more complex, and multiple-party responsibility arises, the protection of procedural rights requests adequate solutions. Viewed in this context, proactivity is a way to perform in accord with this composite patchwork, moving beyond the traditional dyadic negotiation and its limited remedial taxonomy. Nevertheless, this is a difficult task to bring to realization. Handicaps are conceivable in terms of structural relationships and incisiveness.

#### a. Structural relationships

To begin with, at the global level a complete judicial system (at least in the way it is currently understood) is lacking. There is neither hierarchy of powers nor any sort of formal structural relationship among global courts. Concerns exist that the absence of a structural framework could defer, if not preclude, the uniform application of the rule of law.<sup>24</sup> Either way, one could allege that the development of principles of law is not necessarily inhibited by the absence of a formal structure.<sup>25</sup> Rather, the interests of legality could be best served by a less formal hierarchical system, adaptable to the constant changes occurring in the global patchwork.

In effect, in the global arena repeated interactions among global courts are already happening.<sup>26</sup> For example, in April 2007 the IP was addressed by a request for investigation on a project of restructuring of electric power generator in Albania.<sup>27</sup> In the request, the complainants lamented the negative impact of the project on the local environment and economy. In support, they quoted a 2005 CC decision that had found the Albanian government in non-compliance with the Convention. In its draft findings, the CC had found a violation of the rules governing public participation and disclosure and had invited the WB to comment. In the IP recommendation to initiate an official investigation, the outcomes of the CC review played an important role. Almost concomitantly, in May 2007 the IRM and the IP, having received similar requests for investigation on the Bujagali Hydropower Project, agreed to join their efforts in solving the complaints. The two bodies have signed a Memorandum of Understanding that covers the terms of sharing information and the use of specialist consultants. Instead, assessment of violations of the respective organizations will be carried out independently.

Arguably, interactions among proactive courts could become a critical factor in the pollination of commonalties. The correctness of this hypothesis, however, is open to debate. On the one hand, one can assume that proactive-driven courts that collaborate would respond more adequately to the perspective germination of the global legal system by combining

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<sup>24</sup> See S. SPELLISCY, *The Proliferation of International Tribunals: A Chink in the Armor*, 15 *CJTL* 143 (2001-2002)

<sup>25</sup> See B. KINGSBURY, *supra* note 19, at 679; S. CASSESE, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 *NYUJIL&P* 663 (2005)

<sup>26</sup> See J.S. MARTINEZ, *supra* note 21, at 436; BAUDENBACHER: *Judicial Globalization: New Development or Old Wine in New Bottles?*, 38 *TILJ* 505 (2003); A.M. SLAUGHTER, *A Global Community of Courts*, 44 *HILJ* 191 (2003). On the interjudicial co-operation at the domestic level See E. BENVENISTI, G.W. DOWNS, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 *EJIL* 29 (2009)

<sup>27</sup> Request for Inspection No. RQ07/03

multiplicity of interpretations with its harmonious growth. In such a setting, the development of a *jurisprudence constante* would provide referential steady lines without affecting the multiform nature of proactive solutions. Besides, the building of a sufficiently vast caseload would result in attracting a crescentic stream of complainants and further develop the legality in the global arena. On the other hand, at present a degree of ambiguity still beclouds the convergence in the connections between decisions. Yet, the cases presenting cross-references are still a minority.

#### b. Incisiveness

Another handicap is related with the incisiveness of proactive outcomes. To what extent are the dialogue and interactions decisive in reinstating legality?

In effect, the compliance and impact rates of proactivity are uneasily measurable. It is unclear whether the dispute has been settled or not. Proactive approaches are by nature hinged to transient factors such as, first, the achievement of successful negotiations and, second, the sequential accomplishments of reforms at the domestic level.<sup>28</sup>

Undoubtedly, these are irrefutable objections. My suggestion, however, is that they render only a partial observation of the phenomenon. If we reflect in terms of appropriateness of review, the scenario changes. A reactive oriented litigation, although it has its uses, may not be appropriate to modulate the quest for legality in agreement with the magmatic evolutions of the global administrative law. As argued elsewhere, the imposition of a western rooted rule of law collides with the ambition to globality.<sup>29</sup> Instead, proactivity's attempt to deal with the multi-jurisdictional and multi-issued global disputes by preferring diversity and pluralism. The control of the correct exercise of power in proactive courts is facilitated through the elaboration of a path of agreement.

In conclusion, the global judiciary is currently struggling on designing processes capable to cross the social, economical and cultural divides in the global arena and affirm the rule of law. This paper has suggested that creative strategies adopted by an increasing number of reviewing bodies could turn out to be the *lingua franca* in the dialogue over legality.

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<sup>28</sup> See T. GINSBURG, R.H. MCADAMS, *supra* note 9, at 1237

<sup>29</sup> See C. HARLOW, Global Administrative Law: The Quest for Principles and Values, 27 *EJIL* 187 (2006); B.S. CHIMNI, Co-optation and Resistance: Two Faces of Global Administrative Law, 37 *NYUJIL&P* 799 (2005)

# Annexes

## Synoptic Table\*

CASE	Global Reviewing Body	Solution adopted	Stakeholders involvement	Global Management	Status
Yanacocha gold mines	CAO	Creation MDC	1. Individual consultations	1. Review of MDC activity 2. Renew or transform MDC's mandate	Closed March 2006
Guatemala Marlin	CAO	Delegation to the national government	1. Creation of HLC 2. Referendum	1. Improve disclosure	Ongoing (monitoring)
Antamina	CAO	Creation of a forum for consultation	1. Collaboration with CMVFAH 2. Involvement of domestic regulatory agencies	1. Collaborate with CMVFAH 2. Identify additional funding mechanisms	Closed November 2006
Allain Duhangan	CAO	Creation of a forum for consultation	1. Creation of VDC 2. Creation of TTWs	1. Pre-meetings with complainants	Closed March 2008
Mumbai urban transportation	IP	Expansion of the local framework	1. Transformation of NGOs in administrative agencies 2. Cooperation with MMRDA	1. Promote a grievance system 2. Increase the number of staff 3. Improve transparency 4. Control the project's evolution	Closed March 2006
Honduran land administration	IP	Reinforcement of the local forum for consultation	1. Intensified cooperation between MS and indigenous community 2. Involvement of ISC 3. Coordination of conflict resolution procedures	1. Supervision of the MS 2. Improve coordination between judicial procedures	Closed October 2007
Vlora power sector	IP	-	-	1. Meeting with requesters	Ongoing (investigation)

\* As is necessarily the case with a schematic presentation of a complex phenomenon, the table has just an illustratory purpose. Each case is sided by three vectors that locate the essential common grounds of a proactive strategy

Kazatomprom	CC	Delegation to the national government	1. Capacity building activities for public officials and judiciary	1. Monitoring the process of implementation	Ongoing (April 2008 - last report on implementation)
Danube River	CC	Delegation to the national government	1. Capacity building activities for public officials and judiciary	1. Monitoring the process of implementation	Ongoing (April 2008 - last report on implementation)
Colombo-Matara Highway	CRP	Delegation to the national government	1. Appointment national independent body	1. Monitoring the process of compliance	Ongoing (monitoring)
Melamchi water supply	CRP	Delegation to the national government	1. Re-dress of public consultations	1. Monitoring the process of compliance	Closed (December 2004)
Bujagali Hydropower	IRM ; IP	-	-	1. Meeting with requesters	Ongoing (investigation)

## Acronyms and abbreviations

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ADR – Alternative Dispute Resolution  
 ADB – Asiatic Development Bank  
 AfDB – African Development Bank  
 CAO – Compliance Advisory Ombudsman  
 CC – Compliance Committee of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters  
 CMVFAH – *Comité de Monitoreo, Vigilancia y Fiscalización Ambiental de Huarney*  
 CNDP – *Commission Nationale du Débat Public*  
 CRP – Compliance Review Panel  
 DSB – Dispute Settlement Body  
 DSU – Dispute Settlement Understanding  
 HLC – High Level Commission on Mining Issues  
 IFC – International Finance Corporation  
 IP – Inspection Panel  
 IRM – Independent Review Mechanism  
 ISC – Inter-Sectoral Commission for Protecting Land Rights of *Garífuna* and *Misquito* Communities  
 MDC – *Mesa de Dialogo y Consenso*  
 Meeting of the Party (MOP)  
 MIGA – Multilateral Investment Guarantee Agency  
 MMRDA – Mumbai Metropolitan Regional Development Authority  
 MS – *Mesa Regional*  
 NGO – Non-Governmental Organization  
 PW – Planning Workshop  
 TTW – Tailored Training Workshops  
 VDC – Village Development Committee  
 WB – World Bank  
 WTO – World Trade Organization  
 AB – Appellate Body