

A common GAL: The legitimating role of the global rule of law

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A. Legitimacy in the multilevel system

Legitimacy is a topic that stands in the epicentre of every public power. The most important expression of public power is the public administration. The legitimacy of the administration is the basis of its function. Not all the forms of public power – in the form of the administration - are in the same need of being legitimated. What is necessary is a specific “niveau of legitimacy”¹.

The matters of legitimacy are differentiated on the three levels of the multilevel system. At the national level, the matters of legitimacy seem to have been solved. National administrations are constitutionally legitimated through chain delegations running from the people, through the parliament and the government to the administration. They are democratically legitimated.

At the supranational level, the matters are more complex. The european administration is also democratically legitimated with a “model of dual legitimacy”. The sources of legitimacy are the democratic states on the one hand, and the citizens – as “european citizens” – on the other.²

At the global level, the matters of legitimacy cannot be addressed in the same way as at the national or even supranational level. This layer doesn't have a state-like character. The global public administration constitutes the administrative branch of the international regulatory regimes. Global institutions and private actors are the main global players participating in the global administration and exercising power. The global public power has two characteristics: It is **fragmented** and it **stems from the international legal order**, which has originally different characteristics. It is therefore right to speak of several sectoral global administrations. The global administrations are indeed different and genuine in comparison to the national ones. Global Administrative Law (GAL) as the legal field which researches the global administrations has also therefore its own genuine character. Because of the genuine character of the GAL, genuine forms of legitimacy have to be evolved at the global level. In the global governance regimes direct electoral legitimation is typically lacking. Electoral democratic legitimacy is very weak in international governance

¹ H.H. Trute, *Die demokratische Legitimation der Verwaltung*, in Hoffmann-Riem, Schmidt-Aßmann, Voßkuhle (ed.): *Grundlagen des Verwaltungsrechts*, Band I: Methoden, Maßstäbe, Aufgaben, Organisation, 2006, § 6, pp. 316-317.

² See A. von Bogdandy, *Prinzipienlehre*, in *id.* (ed.): *Europäisches Verfassungsrecht*, 2003, 149, 171 et seq.

because of long chain delegation running from the national voters to the heads of state and the global institutions.³

In fact, though the matters of legitimacy are common for every public administration, the methods of achieving legitimacy are differentiated at the different levels of the multilayered system. Traditional legal institutions and instruments acquire a new dimension at this level. Also legitimacy “reacts” thus in a different way. It has different requirements and is achieved in different ways. Therefore, **alternative methods of legitimation** which are characteristic to the global administrations have to be sought. GAL has created **substitute forms of its missing democratic legitimacy**, which are genuine only to GAL. They are the result of its genuine character. Such forms of legitimacy are inextricably linked to its origin and current form. At first sight, they are not relevant as legitimating factors, but as the analysis is going to show they offer a great deal in legitimating the global administrations.

As every administration needs to have a connection to the persons being administered – directly or indirectly – some sort of “democratic” legitimacy has to be sought also at this level. If such a kind is lacking, then **surrogate forms of democratic legitimacy** have to be sought. Is there such a form of democracy-like legitimacy at the global level? The analysis will try to show that such forms exist and proliferate.

The paper aims at answering the question of “how can the development of a common GAL applicable to all global administrations by sector compensate the lack of a common constitutional anchorage”. Its purpose is to show how the global rule of law as a principle of the common GAL can substitute the inexistence of a constitutional anchorage and of direct democratic legitimacy of the global administrations. To the question if global administrations are legitimated, there are two possible answers: yes or no. They either are legitimate or illegitimate. As they do actually function and operate in the global and national spheres, we argue – following

³ See R. O. Keohane & J. S. Nye Jr., *Redefining Accountability for Global Governance*, in M. Kahler & D. A. Lake (ed.): *Governance in a Global Economy: Political Authority in Transition*, 2003, pp. 386, 388, 397; J. Ferejohn, *Accountability in a Global Context*, IILJ Working Paper 2007/5 (GAL Series), p. 21-24.

a pragmatic approach – that they are in fact legitimated.⁴ But they are legitimated in ways different from the traditional domestic ones.⁵

B. The emergence of a global rule of law

I. The juridification of the global legal order

As the global administrations proliferate, (global) administrative law rules grow aside with them. The administrative law rules have a double nature. They are procedural and substantive in character. As the global administrative law rules proliferate, (global) administrative law principles grow also together. They emerge from the provision of different administrative law rules in the various global regulatory regimes. They acquire through the years constitutional value, becoming constitutional principles.⁶ As legal rules and principles proliferate in the global legal order, there is a legal phenomenon to be observed: the *juridification of the global legal order*. It has a *procedural* and a *substantive* side. As a result, the rule of law emerges as a principle of the global legal order. Law does indeed rule in the global legal order.⁷ It is mostly a rule of administrative law.⁸

Juridification induced by global law is a phenomenon that appears **at two levels**: the global and the national. Juridification at the global level means the filling of the normative vacuum in the process of the *de-diploplamatization* of the global legal order on the way to its “publication”. This leads to the emergence of a *global rule of law*. Juridification at the national level means the imposition of standards adopted by the global institutions for the national administrations. These are *global rule of law standards for national administrations*.⁹

The global rule of law (*lato sensu*) has a great importance for the legitimation of the global legal order.

⁴ On the different topic of the legitimation of national authorities’ rules and decisions with global impact see S. Battini, *The Globalisation of Public Law*, European Review of Public Law, Vol. 18-No1, spring 2006, p. 43-45.

⁵ See also R. W. Grant & R. O. Keohane, *Accountability and Abuses of Power in World Politics*, IILJ Working Paper 2004/7 (GAL Series), p. 2.

⁶ To this value of those principles see S. Cassese, *Oltre lo Stato*, 2006, p. 53.

⁷ So Cassese, *id.*, pp. 36-37. See also S. Cassese, *Introduction: Regulation, Adjudication and Dispute Resolution Beyond the State*, in: Cassese et al.: *Global Administrative Law – Cases and Materials*, p. 9: “One of the most astonishing features of the global legal order is the speed with which it has developed principles in order to discipline global administrative proceedings by the rule of law”.

⁸ D. Dyzenhaus, *The Rule of (Administrative) Law in International Law*, IILJ Working Paper 2005/1 (GAL Series).

⁹ “Global standards for national administrations”: See S. Cassese, *Shrimps, Turtles, and Procedure: Global Standards for national Administrations*, IILJ Working Paper 2004/4 (GAL Series).

1. Proceduralization: The procedural side of the global rule of law

The procedural side of the juridification of the global legal order is called “*proceduralization*”. GAL has its origin in international public law. The most important evolution of the international law, taking it away from its original nature and leading it to its **mutation**¹⁰ into (global) administrative law has been its proceduralization, i.e. the creation of procedural rules determining the actions of the global bodies. Proceduralization has a threefold meaning: First, the creation of procedures, which have to be followed by the global administrations. Second, the guarantee of procedural rights to the actors involved. It is not only procedures but also procedural rights that are guaranteed. Third, in this context is also relevant the creation and proliferation of control mechanisms in the global legal order.

a) Procedures

International organizations functioned according to the political rules of diplomacy. Nowadays, the global administrations do not only act according to the political will of the states – expressed by the diplomats. They act on the basis of detailed norms and not in a legal vacuum. Their actions are now based on detailed, mostly procedural, provisions. This is very important for a legal order like the international one, which has been dominated by the diplomatic relationships. The relationships beyond the state aren’t any more a matter of the diplomats. They are much more a matter of the lawyers, the bureaucrats and the experts.¹¹ Their actions have to follow a specific procedure and not an uncontrolled political diplomatic consultation.

The **internal law** of the global organizations is one of the most important features of GAL and one little attention has been paid to. The global organizations have their foundation in *international treaties*. Their internal organization is based on them. In addition, they act according to more detailed *secondary global law*, which is mostly procedures elaborated by them. They commonly have the form of *Statutes* and *Operational Policies, Procedures* or *Guidelines*.

For example, the World Bank is bound by the law. Its organization and functioning is based on procedures. The Bank administration and staff don’t act in a

¹⁰ On the mutation from “international” to “global” see S. Battini, *Il Sistema Istituzionale Internazionale dalla Frammentazione alla Connessione*, Riv. Ital. Dir. Pubbl. Comunitario – 2002, pp. 986-990.

¹¹ C. Tietje, *Internationalisiertes Verwaltungshandeln*, 2001, p. 653, mentions that 90% of the foreign relationships of Germany are carried out by non-diplomats.

legal vacuum. It operates on the basis of various “*Operational Policies*” (*OPs*) and “*Bank Procedures*” (*BPs*). For the Board of Governors there are the “*Board’s Rules of Procedure*”. Also the independent units of the Bank such as the World Bank Inspection Panel (WBIP) and the Compliance Advisor/Ombudsman (CAO) act according to their own procedural rules.¹² These all are administrative procedure acts. This is also the case with the **projects** of the Bank. The Bank – like most other development institutions – has specific and detailed operational requirements for the projects it supports. The whole procedure concerning the projects of the Bank is described in detailed *OPs/BPs*. Examples are the “Good-Practice Principles for Designing and Negotiating Loan Conditionalities”, the “Development Policy Lending Procedures” of 2004 and the “OP/BP 4.00, Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects”. That means that also in the stage of the execution of the projects, the Bank has to comply with rules, and cannot take decisions only on political criteria.

Several other procedural rules of the various global organizations could be referred and analyzed in this section. We will examine one procedure which is not that well known and one which clearly shows the difference between international law and global administrative law and constitutes an example outside of the much cited economic law. This is the Nomination Process for the inclusion in the World Heritage List of UNESCO. First, the State Parties to the World Heritage Convention make their proposals for inscription in the list preparing the State Party’s Tentative List. Second, the State Parties prepare the Nomination File, which includes the documentation and maps of the proposed natural and cultural heritage. The nomination is submitted to the World Heritage Centre for review and to check if it is complete. Third, the Centre on its turn sends it to the appropriate Advisory Bodies for evaluation. There are three Advisory Bodies. They provide the World Heritage Committee with evaluations of the cultural and natural sites nominated. The fourth step is the one before the World Heritage Committee. This is an intergovernmental body, which makes the final decision on its inscription, after the site has been nominated and evaluated. The decision is taken after this procedure and according to criteria described in the “*Operational Guidelines for the Implementation of the World Heritage Convention*”. Until the end of 2004, World Heritage sites were selected on the basis of six cultural

¹² See the “*Panel Operating Procedures*” and the “*CAO Operational Guidelines*”.

and four natural criteria. With the adoption of the revised “Operational Guidelines”, only one set of ten criteria exists.

b) Procedural rights

The provision of procedures is coupled by the provision of procedural rights. They give the *affected parties* the right to take part in the procedure. These are traditional administrative law rights, such as the duty to give reasons, the right to be heard and access to documents.

What is very interesting is that these procedural rights have a more extensive dimension in the global context. *Sabino Cassese* has analyzed that they are not only guaranteed in favour of private parties but also in favour of the states. At the global level, they are not only citizens’ rights, but also states’ rights.¹³ In addition, they are not solely rights of the national citizens, but also rights of the citizens of the world.¹⁴ What is important for the guarantee of the procedural right is not citizenship, but *being affected* – independent of the origin of the person being affected.

The right of access to documents, though it is rather rare in the work of the World Bank – as the principle of freedom of information dominates –, can be traced in some cases. Two examples can be found in the “*World Bank Disclosure Policy*”. First, the economic analysis supporting a research project which is factual in nature and does not relate directly to the Bank’s decision making process, may be available to interested parties.¹⁵ Second, outside parties can on a case-by-case basis be guaranteed after a request with special access to historical information.¹⁶

A very nice example of a mechanism providing the affected parties the right to be heard and the opportunity to appear before the administrative apparatus of a global organization is the Inspector General’s Office of UNHCR. This investigates reports of misconduct lodged by UNHCR staff or refugees and thus guarantees refugee access to the global administration.¹⁷ It guarantees a procedural right to the affected refugees in order for the Office to investigate a violation of their rights.

¹³ Cassese, *Shrimps*, *supra* note 9, at pp. 14-15.

¹⁴ *Id.*, at p. 4.

¹⁵ Art. II par. 54 World Bank Disclosure Policy.

¹⁶ Art. II. Par. 80 World Bank Disclosure Policy.

¹⁷ See M. Pallis, *The Operation of UNHCR’s Accountability Mechanisms*, IILJ Working Paper 2005/1 (GAL Series), pp. 19-23.

c) Control mechanisms

Control mechanisms are very important for the implementation of the rule of law. They help at the realization of the rule of law – in addition to boosting accountability. Control mechanisms for rule of law compliance are the dispute settlement bodies like the World Bank Inspection Panel and the System of the WTO Dispute Settlement Understanding. The importance of control mechanisms for the implementation of the rule of law is something that the World Bank has also considered for its country-based projects. Since the mid-1990s it started launching judicial reform projects for its borrower countries.¹⁸

Legality of the actions of the global organizations and compliance with the rule of law is also achieved through *internal control mechanisms*. Law is not only a matter for the outside world of the institutions, but also for themselves. They try to stick to the rule in order to make also the ones subjected to their rules to stick to them. To this purpose they have set up internal control mechanisms. They guarantee the implementation of the rule and in that way also the policing of the application of the rule of law. There are two mechanisms of this kind. The most well known is the **Administrative Tribunal**. The World Bank Administrative Tribunal (WBAT) was established in 1980. Its purpose is to decide on applications submitted by staff members of the Bank Group alleging non-observance of their contracts of employment or terms of appointment. The Tribunal's decisions are final and binding. That is exactly the case also with the International Monetary Fund Administrative Tribunal (IMFAT), which was set up in 1992. They provide a judicial forum for the resolution of employment disputes arising between staff members challenging the legality of the actions of the institutions and the institutions. They are actually Civil Service Tribunals. Only "*members of the staff*" can find recourse to these Tribunals¹⁹ and they shall apply only the internal law of the institutions ("*staff rules*")²⁰. From a rule of law point of view, it is also very important that their members shall be completely independent, highly qualified and that they are not allowed to have any

¹⁸ See G. Barron, *The World Bank and Rule of Law Reforms*, LSE-DESTIN Working Paper Series No. 05-70, p. 27-31.

¹⁹ Art. II WBAT Statute; Art. II IMFAT Statute.

²⁰ See Art II par. 1 WBAT Statute; expressis verbis in Art. III IMFAT Statute; though Art. III IMFAT Statute includes also in the internal law "the *generally recognized principles of international administrative law* concerning judicial review of administrative acts".

other connection to the institutions in the past, present and the future²¹ – exactly as it is the case with the domestic courts.

The second internal control mechanism is the **Ombudsman**. The World Bank Ombudsman is a designated neutral placed outside of the normal management channels to help staff address workplace-related issues in a safe and confidential environment. The services are a supplement to regular channels, should a staff member feel the need to talk with someone who is independent and confidential. It is a kind of soft and informal procedure, as the Ombudsman makes only recommendations, reviews materials and/or speaks with anyone in the organization to facilitate a solution to a problem. He does not make decisions, create or change policy, nor mandate actions.²²

The World Bank has introduced a complete and comprehensive *Conflict Resolution System (CRS)*. It offers World Bank Group staff support ranging from informal counseling to formal review of concerns, in order to preserve fairness in the workplace and maintain a positive working environment for everyone. CRS services are available to staff in addressing their workplace concerns. Except for the WBAT and the Ombudsman it is also comprised of other organs and procedures. *Respectful Workplace Advisors (RWAs)* are a network of volunteer peers in Bank Group work units who provide an informal avenue of assistance to staff facing harassment, disrespectful behaviors or other sources of stress at work. The mediators of the *Mediation Services* provide a voluntary process facilitating dialog between those with a problem or conflict. The parties involved control the outcome and there is total confidentiality. The *Office of Ethics and Business Conduct* advises and trains staff and managers about actions that might constitute misconduct and on the process for handling allegations of misconduct. The *Appeals Committee Office* is available to assist Bank Group staff in submitting an appeal concerning decisions that affect their personal status.²³

²¹ See Art. IV par. 1 WBAT Statute; Art. VII, VIII IMFAT Statute; see also S. Schlemmer-Schulte, *Die Rolle der internationalen Finanzinstitutionen im Nord-Süd Konflikt*, in Meng, Magnus, Schlemmer-Schulte, Cottier, Stoll, Epiney (ed.): *Das internationale Recht im Nord-Süd-Verhältnis*, pp. 203-204.

²² More information under:

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/EXTOMBUDSMAN/0,,menuPK:64166180~pagePK:64166170~piPK:64166175~theSitePK:468444,00.html>.

²³ More information concerning the CRS under:

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/0,,menuPK:64165918~pagePK:64165931~piPK:64166031~theSitePK:465567,00.html>.

The respect of the rule of law, in the form of procedural rules, plays thus a very important role in the life of the global organizations. This is the *procedural side of the global rule of law*.

2. “Democratization”: The substantive side of the global rule of law

The substantive side of the juridification of the global legal order and of the global rule of law has to do with the proliferation of “good governance values” and the consequent engagement of the *civil society* in the work of the global institutions. That is the reason why we speak of a “*democratization*” of the global legal order.

“Good governance values” is a commonly used term of the development aid law and of GAL. They can be systematized in three categories: *transparency*, *participation* and *accountability*. No clear distinction can always be made as these categories are linked with each other. The distinction is useful for systematic reasons. The good governance values have mainly to do with the “activation of the public” (“Einschaltung der Öffentlichkeit”), i.e., keeping civil society informed and involved.

The rise of the civil society is one of the most important features of our times.²⁴ The involvement of the civil society appears at the various levels of the actions of the global institutions, i.e., at the global, regional, national and local. From a GAL point of view we can thus discern a global, regional, national and local civil society. The levels of civil society are exactly as the levels of global governance intertwined. The definition of civil society is in the process of being created.²⁵ In any case, civil society is something less than a “demos”. At the global level this “body” has to substitute the lack of a global people. This is why civil society has a vital role for GAL, for the global legal order, and for the legitimacy of the global administrations.

It is especially the development institutions, which are trying to elaborate their relationships with civil society and define civil society in the broadest way. It is very characteristic that all these institutions have a special part in their websites dedicated

²⁴ See the “Transmittal letter dated 7 June 2004 from the Chair of the Panel of Eminent Persons on United Nations–Civil Society Relations addressed to the Secretary-General”.

²⁵ See UN, *We the peoples: civil society, the United Nations and global governance-Report of the Panel of Eminent Persons on United Nations–Civil Society Relations*, 2004, p. 13: “Civil society: Refers to the associations of citizens (outside their families, friends and businesses) entered into voluntarily to advance their interests, ideas and ideologies. The term does not include profit-making activity (the private sector) or governing (the public sector)”; UNDP, *UNDP and Civil Society Organizations: A Practice Note on Engagement*, 2001, p. 1 defines civil society as a “third sector existing alongside and interacting with the state and private industry”.

to their relationships with civil society and where also their commitment to working with civil society is expressed. The World Bank is the most civil society friendly international organization. The engagement is committed through *Civil Society Organizations (CSOs)*. Several actors could be included in the term Civil Society Organizations: Non-Governmental Organizations (NGOs), peoples' movements, parliamentarians, cooperatives, trade unions, labor unions, enterprises, foundations, service organizations, community-based organizations (CBOs), indigenous peoples' organizations (IPOs), youth and women's organizations, academic institutions, policy and research networks and faith-based groups.

Civic engagement through the instruments of good governance appears at both the **policymaking phase**, when the policies and the projects are shaped, and the **operational phase**, when the policies are applied. Civil society participates in the preparation, implementation and monitoring of the projects, that have to be carried out at the operational phase. In all these stages, the engagement is realized mainly through consultation and dialogue between the institutions and the civil society. At the implementation stage, there is a participation gap of civil society.²⁶ Though, at this stage, there has been observed a very interesting evolution: the *CSO implementation of projects*. UNDP introduced the so called “**NGO execution**”. CSOs can now be directly engaged as an executing agent with overhead charges. Since the introduction of the modality in 1998, some 300 projects totalling over \$100 million have been executed in this way. The procedures are currently being reviewed for simplification and greater accessibility to a broader range of CSOs.²⁷ Some programmes of the UNCHR and of the World Bank are also executed by CSOs, especially in the field of AIDs education, prevention and treatment.

This evolution of the development aid law brings a very important evolution for GAL in general. Administrative law of the global governance was until now executed either by the global administrations themselves or, mainly, by the national administrations. We observe that GAL is now also implemented by the society itself.

²⁶ World Bank, *World Bank – Civil Society Engagement*, Review of Fiscal Years 2005 and 2006, p. 17.

²⁷ UNDP, *CSOs*, *supra* note 24, at p. 12.

a) Transparency

Transparency means “openness” of the administration. This is very well described with the common phrase “government in the sunshine”. Public meetings and widespread availability of information are its two components.

At the global level, **freedom of information** is the basic feature of transparency, as there are almost no public meetings of the institutions, due to their origin in international law. Almost all the materials, information and documentation held or generated by the global institutions are accessible to the affected parties and the general public.²⁸ Transparency is thus linked to public access to information. The exchange and circulation of information is very important in the modern legal orders. The legal matters of information are thus very important, as information can provide solutions to various subject matters, such as the legitimacy problem of the global legal order. The World Bank is the leader in the field of freedom of information. It has elaborated a “*Disclosure Policy of Information*” since 1994, which has been reviewed in 2002. Art. II par. 4. of the Disclosure Policy entails a presumption in favor of disclosure. There is thus a general rule in favor of disclosure of the World Bank documents. For example, 86% of all the Country Assistance Strategies of the World Bank are now public documents.²⁹ The UNDP has a similar “*Public information and documentation disclosure policy*” (IDP).

One more important aspect of transparency is the **internet online accessibility** of the documents of the institutions. As the policies and projects are not conceived in the places where they are executed, internet accessibility becomes the most important factor of freedom of information and transparency, as it makes the documents accessible in all over the world.

Another important aspect of transparency is factual understanding of the materials of the institutions by the peoples of the world. That is even more important concerning the global institutions, taking into account the language diversity around the world and the low level of education of the peoples of the world, especially of the persons affected by the actions of the development institutions. In order for the informational material to be in reality accessible, its **language diversity** is necessary.

²⁸ See, also, CAO, Assessment Report, *Assessment by the Office of the Compliance Advisor/Ombudsman in relation to a complaint filed against IFC's investment in ENDESA Pangue S.A.*, May 2003, p. 24, where the CAO pleads for a “comprehensive new approach to transparency and disclosure” within the framework of sustainable development.

²⁹ R. J. Leiteritz, *The World Bank. Its Legitimacy and Accountability in the Era of Globalization*, in: J-C. Merle (ed.): *Globale Gerechtigkeit - Global Justice*, p. 372.

This is something that the global institutions have considered. For example the World Bank Inspection Panel – an institution designed in order to come in contact with the civil society – has translated the panel brochure into 12 languages and has also translated some panel reports in more than one languages.³⁰

Several non-legally binding instruments significantly serve at increasing transparency of global institutions. These instruments, mostly called **reports** or **reviews**, serve at keeping the civil society informed, and in this way also involved in the actions of the institutions. That is the reason why the most of the institutions try to make these legal instruments public. The press coverage that public reports and reviews generate is very significant, giving CSOs the chance to find out more, and to raise the alarm about similar concerns elsewhere in the world. No assistance can be given to the institutions to help them solve systemic issues if the civil society is kept in the dark about things that are going wrong.³¹ The publication of the various reports, like the *World Bank's Annual Report* and the *World Development Report* and reviews of the global institutions, like the *Bank-Fund Reviews* are a step toward greater transparency. The reports include basic economic and social data on countries, such as population and income data, data on consumption and investment, data on flows of public external capital and debt and debt-service ratios. The reviews display the results of the actions and of the projects of the institutions providing thus a very important tool for transparency, as they make known the actions and the results of the actions of the institutions. These publications keep the global civil society informed about the economic and social situation of the globe, helping in that way in the creation of such a global civil society and also informed about the institutions, helping at making easier the active civil society participation in their mechanisms. They are also a way of self-control of the institutions.

b) Participation

Using the term “participation” in this context, we neither mean participation in the sense used in the context of proceduralization, nor in the sense of electoral participation. Participation in the context of the good governance values means quasi-political involvement of the civil society in the activities of the global institutions. As

³⁰ See World Bank, *CS Engagement*, *supra* note 25, at p. 13.

³¹ Pallis, *UNHCR*, *supra* note 17, at p. 21.

the global legal order is still at a nascent stage, no normative concept of participation has been completely formed.³²

The participation mechanisms vary in the different institutions. They range from informal meetings to institutionalized organs of exchange of views³³; they can be set up at an ad hoc or at a permanent basis; independent of the formality of the participation, also the participatory status of the CSOs may differ in the different organizations. Some of institutions guarantee the CSOs “full participation status”, while others guarantee them just “observer status”.

The main logic of the most of the global institutions is to create an *atmosphere of deliberation* among all involved actors. “Consultation” and “dialogue” constitute the basic means through which civil society is given the opportunity to take part in world politics. They are the key to the participation of the civil society in the work of the global institutions.³⁴ This can be explained in a twofold way. First, it is a “painless” way for the global institutions to allow the public into their work. They are not granted with electoral rights of participation but with rights to discuss the subject-matters with the competent institution. Second, it is an effective tool, because it gives the CSOs the opportunity to co-shape the activities of the organizations. Deliberation is a soft but effective instrument.

CSOs participate in debates and organize workshops, meetings and roundtables with the staff of the institutions and of the governments at all the stages of the CSO involvement. A very important example of the policymaking stage is the “World Bank-Civil Society Global Policy Forum”, during which the strategies and several projects of the Bank are being discussed and shaped.

OECD offers a very nice example of an institutionalized organ of *deliberative participation*. Since its creation the OECD has co-operated with civil society. This cooperation in form of participation has been established through the institutionalization of two advisory committees. These are the Business and Industry

³² S. Cassese, *La Partecipazione dei Privati alle Decisioni Pubbliche – Saggio di Diritto Pubblico*, Rivista Trimestriale di Diritto Pubblico, 57 (2007) 1, p. 33.

³³ The degree of formalization doesn’t necessarily have to do with the degree of the influence that civil society can play in those organizations.

³⁴ “The Bank considers **consultation** a more formal process than **dialogue** as it is generally a process rather than a single event and implies an explicit commitment by the Bank to try to consider and adopt the input received from its stakeholders. Today there is an explicit practice across the Bank that all major studies, strategies, and policies —from the global to the country levels— will undergo some sort of consultation process”: World Bank, *CS Engagement*, *supra* note 25, at p. 9; we thus observe a difference in the normative density between the two concepts.

Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC). They hold regular consultations with the OECD secretariat, committees and groups of the organization. They have full participation rights in the meetings for the elaboration of some global standards of the organization – while other non-state actors only participate as observers.³⁵

UNDP has introduced another form of CSO participation. In the year 2000 a “UNDP CSO advisory committee to the Administrator” was established. It is composed of civil society leaders from all over the world and its purpose is to provide advice to senior management on programme and policy directions, advocacy efforts and strategic CSO/UNDP initiatives and activities.³⁶ It meets once a year in New York. Also some of the country offices of UNDP have set up “national advisory committees”. A mechanism is thus provided for mutual agenda-setting, policy debate, and ease of access for exchanges between senior managers and civil society leaders on future directions for UNDP.³⁷

c) Accountability

Accountability is a still unspecified institution of the global legal order. “To be accountable means to have to answer for one’s action or inaction, and depending on the answer, to be exposed to potential sanctions, both positive and negative”³⁸. Legal accountability has a reference to civil society, as the duty to answer refers to the wider public and presupposes in most cases the implication of a neutral third party.³⁹

In this respect judicial review plays a very important role. At the global level the process of juridification is coupled by a “*process of judicialization*”, which is very innovative and radical in comparison to the traditional international legal order. There is a tendency towards a proliferation of global courts or quasi-judicial bodies. This is called “*judicial globalization*”.⁴⁰

At the global level, a very important and much cited example is that of the World Bank Inspection Panel, which gives groups of people living in a project area the right

³⁵ See J. Salzman, *Decentralized Administrative Law in the OECD*, IILJ Working Paper 2005/17 (GAL Series), p. 17.

³⁶ See UNDP, *CSOs*, *supra* note 24, at p. 7.

³⁷ *Id.*

³⁸ R. J. Oakerson, *Governance structures for enhancing accountability and responsiveness*, in J. L. Perry (ed.): *Handbook of Public Administration*, 1989, p. 114. In the context of the good governance values of relevance is only “external legal accountability”.

³⁹ Ferejohn, *Accountability*, *supra* note 3, at p. 6; see the whole text for the distinction between legal and political accountability.

⁴⁰ On the topic see Cassese, *Introduction*, *supra* note 7, pp. 10-12.

to appear before the global body. Also the WTO has set up with Art. 4 of the Agreement on Preshipment Inspection (PSI) a quasi-judicial mechanism, giving – hesitantly – the economic actors the right to appear before a global body.⁴¹

Except for the (quasi-)judicial dispute resolution, there is also a softer triadic mechanism of accountability: the **Ombudsman**. An ombudsman is a designated neutral official placed outside of the normal administrative hierarchy to help individual citizens – the public – address its complaints in a safe and confidential environment. He belongs to the administration, but he neither forms a part of the administrative hierarchy, nor is a judicial body. It combines the “administrative nature” with neutrality and impartiality –as courts do. It is thus an organ which fits very well in the global legal order. Therefore it has great dynamic, though it hasn’t found until now its place in the legal analysis of the accountability mechanisms.

The World Bank has created in 1999 such an institution: the *Compliance Advisor/Ombudsman (CAO)*. He is committed to enhancing the development impact and sustainability of International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) projects by responding quickly and effectively to complaints from affected communities and by supporting IFC and MIGA in improving the social and environmental outcomes of their work, thereby fostering a higher level of accountability. CAO is, so to say, the “brother institution” of the World Bank Inspection Panel for the private sector arm of the World Bank Group. This less known organ has three roles⁴²: *CAO Compliance*: CAO Compliance oversees project-level audits of the social and environmental performance of IFC/MIGA. The purposes of CAO auditing are to ensure compliance with policies, standards, guidelines, procedures, and conditions for IFC/MIGA involvement and thereby improve social and environmental performance. In many cases, however, it will be necessary to review also the actions of the project sponsors except for the actions of IFC/MIGA; *CAO advisory function*: The CAO's advisory role provides advice to the management of IFC and MIGA and the President of the World Bank Group on broader social and environmental issues related to policies, standards, procedures, guidelines, resources, and systems aiming to improve performance systematically and provide guidance on emerging trends and strategic issues; *CAO Ombudsman*: The

⁴¹ See S. Charnovitz, *The WTO and the Rights of the Individual*, Intereconomics, March/April 2001, available at SSRN: <http://ssrn.com/abstract=282021>, pp. 13-14.

⁴² For more information see <http://www.cao-ombudsman.org/>.

Ombudsman role is the central role of the CAO. As ombudsman, the CAO's major objective is to provide an accessible and effective mechanism for handling complaints from persons who are affected (or are likely to be affected) by the social and environmental impacts of IFC/MIGA-sponsored projects. The aim is to identify problems, recommend practical remedial actions and address systemic issues that have contributed to the problems, rather than to find fault. The complaint and complainant have to be genuine; the project in question has to be sponsored by IFC or MIGA; the complaint has to be substantive and specific.⁴³ After an assessment phase, the project team is notified and given clear guidance on the issues to which it should respond by a specified deadline. When the assessment phase has concluded, the CAO responds to the complainant with suggestions on how to move forward. The complainant may choose to accept or reject these suggestions. The whole procedure ends with a report sent to the World Bank Group president and to IFC or MIGA management and project teams.

The respect of the rule of law, in the form of good governance values, plays thus a very important role in the life of the global organizations. This is the *substantive side of the global rule of law*.

II. The emergence of a common GAL

Is there a common GAL, i.e. a GAL that is common to all the global administrations? The answer to this question can help us proceed with the matter of the legitimacy of the global institutions. There are two factors we have to consider before giving the answer whether there is a common GAL. First, administrative law of the global governance regimes is an emerging and “immature” legal field and research topic. It only exists since about 15 years. It is in the process of being created. Second, the different global regulatory regimes of the fragmented global legal order have different degrees of maturity.

In the last section we have observed several procedural and substantive rules of various global bodies. Procedural and substantive rules are proliferating through the global legislators and the global judges in the global legal order. This process of juridification leads to the emergence of a *global rule of law*. It is true that every single institution has its own procedural and substantive mechanisms. Nevertheless, their

⁴³ See the “CAO Operational Guidelines”.

normative content is the same or similar for all the global institutions. **There is a core of principles and rules that can be identified in almost all the regulatory regimes.**⁴⁴ They all of them follow the same line. There is actually only one path to be followed! The path of the well known administrative law mechanisms, adapted to the quantitative and qualitative conditions of the global legal order. As the legal field and relevant jurisprudence are at a very young age, the relevant matters have to be observed in a dynamic way. As a result, a **common GAL** is coming into being leading the global legal order from fragmentation to unity. It is the product of the global rule of law. Though we cannot speak about one global administration we can speak about one GAL. Despite the fragmentation of the global administrations, Global Administrative Law presents itself as a unity.

C. The legitimacy of the global Administrations

The legal phenomena of “Legitimacy” and “Democracy” do not have the same dimension at the international level as their domestic counterparts. The global level of governance lacks the common features of democracy and it is therefore in need of legitimation.⁴⁵ There is no global or cosmopolitan democracy for the legitimation of the global public administration. Legitimacy of *government* is traditionally achieved through democracy. The legitimacy of (global) *governance* needs to be sought in alternative methods of achieving legitimacy.

I. Legitimacy through juridification

J. H. Weiler makes the observation that Democracy and Rule of Law “have become at least since the second half of the 20th Century inextricably linked, indeed interdependent”⁴⁶. Democracy is based on the law and law must be democratically legitimated. These are actually the two sides of the same coin. The Rule of Law has thus two sides: a formal one and a substantive one.⁴⁷ This is much more the case in the global setting, where no global democracy exists. Due to the close relationship

⁴⁴ It is therefore that we speak of a constitutionalization of some administrative law principles. For a common concept of good governance see B. Rudolf, *Is “Good Governance” a Norm of International Law?*, in P.-M. Dupuy (ed.), *Common Values in International Law*, 2006, pp. 1018-1020.

⁴⁵ S. Cassese, *A Global Due Process of Law?*, Paper presented at New York University – Hauser Colloquium on Globalization and its Discontents, September 13, 2006 (unpublished), p. 65.

⁴⁶ J. H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, *ZaöRV (HJIL)* 64 (2004), p. 547.

⁴⁷ See P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, (1997) *Public Law*, p. 467; See also C. Harlow, *GAL: The Quest for Principles and Values*, *EJIL* (2006), Vol. 17 No. 1, pp. 197-198.

between democracy and rule of law, we can search in the double nature/dimension of the rule of law in order to find an alternative method to legitimate the global institutions.⁴⁸

The legitimacy of the global administrations is one of the most difficult problems of GAL. This is mostly due to the fact that its rise has been an unnoticed one.⁴⁹ GAL has been the product of a juridification in the form of proceduralization. Administrative procedures replaced gradually the political diplomatic relationships. In addition, the global legal order is not only consisted of procedural rules, but also of substantive good governance rules. Such rules are currently being evolved and proliferating. Their creation appeared after the birth of the procedural rules. They constitute the second phase of the juridification of the global legal order. They are second generation rules of GAL. For this reason the substantive side of the juridification is weaker than the procedural one.⁵⁰

Before the emergence of GAL, there has been international law in its place. The traditional answer of international public law to the legitimacy of the international institutions is that these institutions answer through the mechanisms provided by international law to the governments, which in their turn answer through the mechanisms provided by domestic public law to the citizens.⁵¹ The indirect way of legitimacy through the states is neither satisfactory nor sufficient any more for the global institutions. Global institutions have gained such autonomy, independence and power that they have a life of themselves, i.e. independent of the states that instituted them.⁵² After global institutions having taken up their own independent powers, the global public power has been swaying concerning the matter of its legitimacy. States cannot provide legitimacy to actions they cannot control. GAL is in need of an authentically own – global – legitimacy. Is this “global” legitimacy existent? Do new

⁴⁸ The proposed alternative concept of “technocratic legitimacy” is to our view an interesting but insufficient one. See M. Shapiro, “*Deliberative, “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the E. U.?*”, IILJ Working Paper 2004/5 (GAL Series). Our alternative proposal offers a much more comprehensive answer and, more or less, includes the basic features of technocratic legitimacy.

⁴⁹ See B. Kingsbury, N. Krisch & R. Stewart, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1 (GAL Series), pp. 4-6.

⁵⁰ See R. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. (Summer/Autumn 2005), p. 103.

⁵¹ Battini, *The Globalisation*, *supra* note 4, at p. 46.

⁵² On the independence and the new role of the international organizations see S. Cassese, *Lo Spazio Giuridico Globale*, *Rivista Trimestriale di Diritto Pubblico*, 2002, 2, pp. 329-330.

legitimizing mechanisms have to be evolved in order to provide legitimacy to the global administrations?

In our view, legitimacy has to be sought in the inverse process of the *de-diplomatization*, i.e. in the juridification. As the juridification replaces diplomacy, it also replaces state legitimacy. As legitimacy through state is replaced, *legitimacy through juridification* takes its place. The emergence of a common administrative law of the global sectoral administrations gives thus the answer to their legitimacy problem. The basic feature in the chase of the legitimacy of the global institutions is their dedication to law. Procedural and substantive legal instruments and institutions are used in order to achieve legitimacy. On the global plane these legal – rule of law – mechanisms play a very important role in the legitimation of the global public power.

At the global level juridification leads to legitimacy. It is *legitimacy through the rule of law*.⁵³ This has got to do with the origin of the global law, as in international law there were no rules. The rule of law serves thus as the foundation of the legitimacy of those institutions. Legitimacy has got to be traced in those rules, which transform the whole legal material from international law to (global) administrative law.

The legitimacy of the global institutions is a **top-down legitimacy**. It does not stem from a (global) demos, as it is the case with the domestic administrations, which are legitimated by people and are thus legitimated in a bottom-up way. The legitimacy of the global administrations stems from the top, i.e. it is a constructed legitimacy. It develops together with the development of the global institutions. It is on the global level that procedural rules and good governance values are being evolved. It is from the global level that these procedures and values are transmitted into the national legal orders.

The common GAL doesn't need a constitutional anchorage as it is legitimated through alternative mechanisms of legitimacy. *Procedural legitimacy* as an expression of a "procedural/formal side of the rule of law" and *substantive legitimacy* as an expression of a "substantive side of the rule of law" compensate for the lack of a

⁵³ See the similar concept of "legitimacy through law" by M. Savino, I Comitati dell' Unione Europea – La Collegialita Amministrativa negli Ordinamenti Composti, 2005, pp. 475-479, for similar legitimacy problems in the E.U. context.

common constitutional foundation and for the lack of democratic legitimacy, which can only be evolved in state or state-like structures.

II. Procedural legitimacy

Administrative procedure is a series of consecutive actions, acts or operations leading to the acquisition and processing of information, being carried out in the responsibility of a public authority⁵⁴. Administrative procedures provide the structure for the communication of the public authorities with the citizens and with each other.

Procedural rules guarantee the implementation of the substantive rules. They provide to the substantive regulation a legal way to be implemented. Extra rules are added in order for the primary rule to be achieved. (Substantive) law is thus achieved through (procedural) law (*proceduralization*).

Procedure has also a value for itself. It can serve various other functions, play other roles and other goals can be achieved through the means of procedure. Legality is promoted by procedure. Correctness of the administrative action can be boosted through the institutionalization of procedures. Also efficiency of the administrative action can be achieved in that way. Procedure is also very important in the context of legitimacy. The German sociologist *Niklas Luhmann* was the first to understand the legitimating function of procedure. In 1969 he wrote a book called “Legitimacy through procedure” (“Legitimation durch Verfahren”)⁵⁵ analyzing the role that the procedure can play in legitimating decisions.

But also from a legal point of view procedure has a strong legitimating potential. *Procedural legitimacy* or *legitimacy through procedure* is not that often discussed as a legitimating factor in the domestic context and if discussed, not as autonomous “means of legitimacy”, but “as a description of the procedural character of democracy”⁵⁶. By contrast, procedure is very important for the legitimation of the global administrations. This is something that has been recognized by many authors.⁵⁷

⁵⁴ See E. Schmidt-Aßmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, 2006, p. 305.

⁵⁵ N. Luhmann, *Legitimation durch Verfahren*, 1969.

⁵⁶ Trute, *demokratische Legitimation*, *supra* note 1, at pp. 337; 334, 337-339.

⁵⁷ See, e.g., Kingsbury, Krisch & Stewart, *The Emergence of GAL*, *supra* note 48, at p. 5: “In order to boost their legitimacy and effectiveness, a number of hybrid public-private and purely private standard setting and other regulatory bodies have also begun to adopt administrative law decision making procedures and practices”; Cassese, *Global Due Process*, *supra* note 42, at pp. 60-61: “Participation has a legitimacy-building function”; S. Cassese, *La fonction constitutionnelle des juges non nationaux. De l’espace juridique global à l’ordre juridique global*, p. 20 (unpublished): “Or, le respect de la règle de droit confère aux organismes opérant dans l’arène globale une légitimation qui supplée à un défaut de démocratisation”; E. Schmidt-Aßmann, *Internationalisation of Administrative Law: Actors, Fields*

Nonetheless, no complete theory has been evolved emphasizing on its autonomous and genuine role for the global regulatory regimes.

All the functions and especially the legitimating role of procedure are due to its relationship and proximity to the rule of law. Proceduralization means transaction of procedural law into the legal order. This goes together with the logic of the rule of law. GAL has been in the first place procedural law. As politics of international law and their legitimating function concede, procedures take their place, filling not only the normative vacuum, but also the legitimacy vacuum. At the global level, procedure is thus a substitute of democratic legitimacy.

III. Substantive legitimacy

Procedural legitimacy is not the only foundation for the legitimacy of the global institutions. The global legal order is not only consisted of procedural rules, but also of substantive ones. As these rules are now being evolved and proliferating, the substantive side is weaker than the procedural one.

Legitimizing global administrations through the means of democracy is not possible – and, probably also not necessary. As the cosmopolitan theory of a global people and of a global democracy cannot be realized, the necessary link between administration and “administered” has to be searched in other mechanisms. This link is achieved through the involvement of the civil society in world politics. A global civil society is being born.⁵⁸ Though, the global civil society is not comparable to a global demos. The legal tool for civil society involvement is the good governance values. In the absence of democracy, other forms of civic engagement needed to be introduced. That is the reason why the concept of good governance has been used.⁵⁹ CSO engagement gives legitimacy to the global organizations independent of whether

and Techniques of Internationalisation – Impact of International Law on National Administrative Law, European Review of Public Law, Vol. 18-No1, spring 2006, p. 263 (concerning mostly the informal “legislative structures” such as the Basel Committee on Banking Supervision, ISO etc.); D. Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, IILJ Working Paper 2004/6 (GAL Series), p. 4, 24 (concerning the Basel Committee); Grant & Keohane, *Accountability and Abuses*, *supra* note 5, at p. 14: “Hence claims to legitimacy at the global level depend on inclusiveness of state participation and on general norms of fairness and process”.

⁵⁸ Cassese, *Oltre lo Stato*, pp. 51-52. On models for the global civil society see F. Bignami, *Civil Society and International Organizations: A Liberal Framework for Global Governance* (available at: http://eprints.law.duke.edu/1126/1/civil_society_3_19.pdf).

⁵⁹ See Stewart, *U.S. Adm. Law*, *supra* note 46, at p. 103.

the CSOs are democratically legitimated or not, i.e. they are representative of their members or not.⁶⁰

The concept of *substantive legitimacy* or *legitimacy through good governance* is similar to what is described in the domestic setting as “deliberative democracy”.⁶¹ Deliberative democracy is the antidote to the lack of a sufficient niveau of representative democracy in large-scale states composed of many constituencies. That is the reason why the method of “notice and comment rulemaking” has been evolved in the USA which is a federal state and also why the model of “participatory democracy” has been introduced in the EU which is a supranational state-like organization.⁶² Global regulatory regimes operate at an even further remove from the regulated than the domestic ones, they involve many nations and, in many cases, non-state actors as well.⁶³ The farther from the state, the graver the matters of legitimacy appear to be.

The deliberative conception emphasizes the effective pursuit of substantive (democratic) goals over the conformity to (democratic) processes. This form of democracy focuses more on the result of the democratic procedure, than on the procedure itself. This is the reason why we also call this kind of global legitimacy, substantive legitimacy. We avoid using the term democracy at the global level. Substantive legitimacy is a broader term than deliberative democracy, not only in that it does not presuppose a state-like democratic setting, but also in that it includes all the good governance values. Substantive legitimacy does not only include *participation*, but also *transparency* and *accountability*. These two values are also of course prerequisites of deliberative democracy.

The good governance values are very interesting tools of legitimation. They contribute in the legitimation of the global administrations, as they guarantee the engagement of the regulated, i.e. the civil society. The World Bank itself calls civil

⁶⁰ See for the NGOs S. Charnovitz, *Accountability of Nongovernmental Organizations (NGOs) in Global Governance* (April 2005). GWU Law School Public Law Research Paper No. 145; GWU Legal Studies Research Paper No. 145. Available at SSRN: <http://ssrn.com/abstract=716381>, pp. 34-35.

⁶¹ See the proposal of the CSOs in a paper presented at the World Bank – Civil Society Global Policy Forum, in Washington, D.C., on April 20-22, 2005 (A Call For Participatory Decision Making): “participatory decision making”.

⁶² See Art. I-47 of the “Treaty Establishing a Constitution for Europe”. For a very nice codification of the forms of substantive legitimacy see Art. I-47, 48, 50; see also Art. 8A and 8B of the amended by the “Treaty of Lisbon” Title II of the “Treaty on European Union” and “the Treaty Establishing the European Community”.

⁶³ See R. Stewart: *U.S. Administrative Law: A Resource for Global Administrative Law?* (http://www.law.nyu.edu/kingsburyb/spring04/globalization/stewart_012604.pdf), p. 11.

society an “institution of accountability”⁶⁴. Public access to information and documentation is expressly recognized by the UNDP as a legitimacy building factor of the institution.⁶⁵ The concept is to create a mobilized public opinion, a global public that is actively involved, that participates and stays informed about the global politics and in that way also controls the global administrations (“concept of informed public”⁶⁶). All the three values – and especially transparency – are easy to be established and are effective. This is much more the case with the global legal order, as information is the major connecting tool of the world.⁶⁷ It can thus provide the tool for the legitimation of this legal order. In this respect the new technologies and the modern means of communications – like the internet – can play a very important role.⁶⁸ As the most global bodies have been institutionalized in more recent years, they are in some respects even more transparent and accountable than domestic governments, as they take advantage of the modern means of technology in order to come in contact with the public.

At the national and supranational level the forms of deliberative democracy play a complementary role, accompanying the classical forms of democratic legitimacy. At the global level they are the only existent mechanisms for achieving a democracy-like legitimacy. These alternative forms of legitimacy – the good governance values – are used at the global level as surrogates of democratic legitimacy.⁶⁹

Conclusion: procedural, substantive, global

To sum up, as a result of the (procedural and substantive) juridification of the global legal order, a *global rule of law* as a general legal principle of this order starts playing a very important role, unifying the global legal order and leading to a common GAL. It has two sides: We call the first one procedural/formal side and the second one substantive side. The first one leads to a procedural legitimacy and the second one leads to a substantive legitimacy of the global administrations. Legitimacy of the global institutions is achieved through procedure and good governance, i.e.

⁶⁴ World Bank, *CS Engagement*, *supra* note 25, at p. 3.

⁶⁵ UNDP, *CSOs*, *supra* note 24, at p. 11.

⁶⁶ “Konzept der informierten Öffentlichkeit”: Schmidt-Abmann, *Ordnungsidee*, *supra* note 49, at p. 361.

⁶⁷ See the proposal of Schmidt-Abmann, *Internationalisation*, *supra* note 52, at p. 265, for the elaboration of an “information law” of the international legal order.

⁶⁸ See also the conclusions of Grant & Keohane, *Accountability and Abuses*, *supra* note 5, at pp. 27-28.

⁶⁹ See Stewart: *U.S. Adm. Law*, *supra* note 58, at p. 11. In the same direction only for accountability see Cassese, *Oltre lo Stato*, p. 58.

through procedural and substantive rules. In the global legal order legitimacy is thus achieved through the rule of law. The global rule of law has a legitimating role.

Procedural legitimacy, on the one hand, is the one achieved through the mere existence of the (procedural) rule and through compliance to it. It is the procedure itself that provides legitimacy. Substantive legitimacy, on the other hand, is the one achieved through the involvement of the civil society in the global legal order. It is a newer legitimating factor of the global law, which has been proliferating, since – as the global governments are getting more and more powers – legitimacy through procedure seems to be insufficient. Procedural legitimacy focuses on the rule. Substantive legitimacy focuses on the result. That is the reason why the terms “procedural” for the first one and “substantive” for the second one have been chosen.

The distinction between procedural and substantive legitimacy is important, as it can provide different bases for legitimacy. The necessity to distinguish stems from the different backgrounds and goals of the two legitimating tools. The procedural side plays a much more important role at the global level in comparison to the national one, as GAL has been in the first place a product of proceduralization. The substantive side establishes the necessary link between the global administrations and the “administered”. Participation in the context of procedural legitimacy concerns the affected parties, having a mere administrative dimension, whereas participation in the context of substantive legitimacy concerns the civil society as a body, having a political dimension. The criterion of the distinction is the fact of “being affected”. Procedural legitimacy is thus politically neutral, whereas substantive legitimacy has a political “colouring”, as it concerns the civil society as a body.

In any case these are **complementary legitimacy-building mechanisms**.⁷⁰ The procedures support and boost the good governance values.⁷¹ On its part, civil society plays the role of enhancing the respect of the rule of law. Both concepts lead to **legitimacy through legality**, i.e., **legitimacy through the (global) rule of law**. Legitimacy is not achieved through the direct way of democracy, but through the indirect way of acting according to law, i.e., respecting the rule of law. The rule of law principle has a legitimating role in the global legal order.

⁷⁰ C. Möllers, *Patterns of Legitimacy in Global Administrative Law: Trade-offs between due process and democratic accountability*, paper presented to the Second GAL Seminar, Viterbo, 9-10 June 2006, calls the relationship between due process and democratic accountability a “trade-off relationship”.

⁷¹ See World Bank, *Initiatives in Legal and Judicial Reform*, 2004, p. 2: “In other countries, development experience over a longer period also showed that the rule of law promotes effective and sustainable economic development and good governance”.

Law has started playing a very important role in the global legal order. In a legal order, where law was typically lacking, its past and current juridification plays a role in mutating this order, and in that way also legitimating its institutions. It is *legitimacy through procedural and substantive juridification*. As a result, as the international public law model of legitimacy concedes or fades away, the GAL model of legitimacy through the rule of law takes its place.⁷² Procedural legitimacy provides legitimacy through the existence of procedural rules. Substantive legitimacy provides legitimacy through rules of good governance by civil society. In both cases, it is law that offers legitimacy. As a result, the global institutions are sufficiently legitimated. There is of course a lot more to be done in order to enhance their legitimacy – especially the substantive part of it –; but the legitimating pattern is existent. This legitimacy pattern is of importance not only to the global public bodies. It can also be applied to both national institutions – like national independent authorities –, and global private governance regimes – like ISO – that have evolved several procedures for their operations and mechanisms guaranteeing civil society engagement.

In the national setting, rule of law and democracy form a unity. Democracy legitimates law. In the global setting, we observe the inverse relationship. The (rule of) law provides legitimacy to the global legal order helping in the filling of the gap of the so called “democratic deficit”, i.e., in the democratization of this order. GAL not only transforms the global level of the multilevel system but also changes our view about traditional concepts of the national level, such as democracy, rule of law and legitimacy. In that sense, legitimacy is global!

⁷² This process has got to do with the partial replacement of international public law by Global Administrative Law.