

# Transparency as a Global Goal: towards an unity of principles in Global Administrative Law

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## **Abstract**

This paper will try to show how the promotion of the value of transparency permeates all international institutional structures, making it a core objective of Global Administrative Law. By showing the theoretical importance and distinctiveness of its articulation in supranational structures, transparency will emerge as one of the unifying features of a single GAL.

As a core objective of GAL, the articulation of the rights derived from transparency (procedural participation and access to information) can be seen in all international and transnational entities. The absence of a single administrative center makes it necessary to articulate transparency and other GAL institutions as principles which take many forms, but that promote the same value of governability. Although still contested, the increasing involvement of civil society in global administrative structures is becoming the main driving force in the solidification of transparency in GAL. The premise is that regardless the many institutional arrangements and different actors involved in transnational administration, principles such as transparency are unifying GAL as a distinctive body of Law. In the light of the dispute between Argentina and Uruguay in the International Court of Justice, such an analysis becomes urgent. The upcoming decision of the Court on the obligation to inform within the regime of the Uruguay River could have the effect of stressing the role of GAL and its principles.

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## Introduction

Now it is more evident than ever that the concept of good governance is not only directed to the administration of States. Whenever there is an entity administering resources or making decisions in the name of a collective, the members of the group will be granted the right to know how such administration is performed and how are decisions taken. The concept of transparency goes to the very core of the rights of the individual *vis-à-vis* the administration. No other component of global governance can be effectively performed if a basic level of transparency is not adopted in some shape or form.

Since a couple of years ago, the debate of fragmentation and unity in international law has caught up the eye of many scholars. The Global Administrative Law (GAL) project has not been outside the debate. This paper will try to respond to the rather unfair allegation that global administrative law is an artificial construction upon a myriad and incidentally related regulations and practices. By making a theoretical inquiry on the concept of transparency both at the national and international level, it will be shown that this is indeed a global goal among many types of international administrations.

The argument will depart from the fact that the principle of transparency, as understood in GAL, is much more complex than from the national perspective. By comparing the approaches that the World Bank and institutions for international cooperation promote in developing countries, with the institutional regulations of the international entities, the particular form of the principle in GAL will be revealed. This will lead to compare and contrast the practice and internal regulations of international, transnational and distributed administration entities. Once the common core of the principle is presented, it will be applied in the framework of the dispute on the regime of the Uruguay River before the International Court of Justice.

## Transparency in national systems: a suitable concept for Global Administrative Law?

Good governance, as it has been promoted by the World Bank and other international organizations working in development consist on a group of inter-related concepts that focus on the way in which public power is exercised by public officials. Although it is more than its institutional dimension,<sup>†</sup> the aspect to which this paper will refer is “the respect of citizens and the state for the

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<sup>†</sup> According to researchers of the World Bank, it also includes an economic and a political dimension.

country's institutions.”<sup>‡</sup> Evidently, a basic feature of the respect for institutions is to sustain the purposes for which they were created. Regardless the political theory used to sustain the concept of the modern State; the general assumption is that no government has as a duty the personal benefit of the public officials or the misuse of the resources of the State in detriment of the of the population. The goods of the community should be fairly shared among its members, in a fair and just manner. So in its institutional dimension, governance reflects the respect of individual for in the administration of the group's resources.

It starts by the basic concept of transparency, which is generally conceived as the group of mechanisms performed by the State to make as widely known as possible the processes and reasons that lead to its actions. Although there is no universal definition of the concept,<sup>§</sup> for the moment it'll be explained as the duty to “fostering the acquisition, analysis and dissemination of regular prompt and accurate regime-relevant information”<sup>\*\*</sup>, or in rather economical terms, the “increased flow of timely and reliable economic, social and political information, which is accessible to all relevant stakeholders.”<sup>††</sup> Transparency is always accompanied by another concept: accountability<sup>‡‡</sup>. In the most simpler terms, accountability is defined in this words: “To say that one agent, A, is accountable to another (B) is to say that A has a kind of duty (moral or legal) to B and that B has means to enforce it.”<sup>§§</sup> Those concepts are completed by public participation and review, which are the mechanisms that make transparency operative towards the accountability of public officials.<sup>\*\*\*</sup> At the national level transparency is only useful when accompanied by a strong civil society that uses the mechanisms provided, and demands accountability.<sup>†††</sup>

The existent literature in governance, particularly the working papers of the World Bank and other financial institutions, focus on the economic benefits of transparency. Multiple studies has been conducted in order to prove that markets where information flows more freely tend to produce more, and that countries with better governance grow more. Beyond economical considerations, transparency is a value in itself. Except for obvious exceptions (such as national security and public order, when well defined of course), there is no excuse for accepting secrecy in governmental matters.

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<sup>‡</sup> Daniel Kauffmann, *Myths and Realities of Governance and Corruption*, in GLOBAL COMPETITIVENESS REPORT 2005-2006: POLICIES UNDERPINNING RISING PROSPERITY (Augusto Lopez-Claros ed., 2005) <http://www.worldbank.org/wbi/governance/pubs/gcr2005.html> (last visited Sep. 12, 2008).

<sup>§</sup> Ana Bellver & Daniel Kaufmann, “Transparenting Transparency” Initial Empirics and Policy Applications 4 (September, 2005) [http://www.worldbank.org/wbi/governance/pdf/Transparenting\\_Transparency171005.pdf](http://www.worldbank.org/wbi/governance/pdf/Transparenting_Transparency171005.pdf) (last visited Sep. 12, 2008).

<sup>\*\*</sup> Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 Int'l Stud. Q. 109, 109 (1998).

<sup>††</sup> Tara Vishwanath & Daniel Kaufmann, *Towards Transparency in Finance and Governance* 3 (Sept. 6, 1999), <http://ssrn.com/abstract=258978> (last visited Sep. 12, 2008).

<sup>‡‡</sup> Bellver & Kaufmann, *supra* note § at 4.

<sup>§§</sup> John Ferejohn, *Accountability in a Global Context* 2-3 (N.Y.U. Inst. Int'l L. & Just., Global Administrative Law Working Paper No. 2007/5) <http://www.iilj.org/publications/2007-5Ferejohn.asp> (last visited Sep. 12, 2008).

<sup>\*\*\*</sup> Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 Eur. J. Int'l L. 187, 195 (2006).

<sup>†††</sup> Alta Fölscher, *Local Fiscal Discipline: Fiscal Prudence, Transparency, and Accountability*, in LOCAL BUDGETING 22 (Anwar Shah ed., 2007).

One way to look at this obligation is by framing transparency as a basic assumption of a governmental structure respectful of human rights. Indeed, there is a growing trend to translate economic-development formulas into legal terms and even in the language of rights.<sup>+++</sup> Amartya Sen has been among the leading scholars in this movement. By portraying economical development as the ultimate source of freedom, Sen only sees the possibility of self-fulfillment when there are the conditions for a meaningful choice.<sup>§§§</sup> Under this premise States do have a moral imperative to allow greater transparency, not only because it ameliorates the living standards of its citizens and residents (social and economical rights), but also because the individuals are entitled to freedom of information, right to public participation and judicial guarantees (civil and political rights) that would led them to participate in the definition of those standards.<sup>\*\*\*\*</sup>

Such a view has already been incorporated in international human rights law, thanks to the evolutive interpretation of existing human rights instruments (“Human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions”<sup>++++</sup>). A noteworthy case of such incorporation is the recent jurisprudential developments of the Inter-American Court of Human Rights. Indeed, some of the latest cases before this Court present a switch from what one could qualify as typical violation into situations that were not envisaged by the drafters of the American Convention on Human Rights. For instance, while in the year 2001 the Court was dealing with the freedom of expression as the right to seek, receive<sup>\*\*\*\*</sup> and impart<sup>§§§§</sup> information; in the *Case of Claude-Reyes et al.* of 2006 the Court decided that the failure of states officials to grant full access to public information is also a violation of the freedom of expression<sup>\*\*\*\*\*</sup>. In this case the Inter-American Court relied on many valid but not applicable instruments<sup>+++++</sup> to expand its understanding of Freedom of Expression. That is, the Court used multiple non-binding international instruments and instruments of a biding nature which do not apply to the Inter-American System in order to interpret an ‘obligation to grant access to public information’ in article 13 (freedom of expression) of the American Convention. Among those, four consecutive Resolutions of the General Assembly of the Organization of American States entitled “Access to Public

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<sup>+++</sup> Daniel Kaufmann, *Rethinking Governance: Empirical Lessons Challenge Orthodoxy* (March, 2003) [http://siteresources.worldbank.org/INTWBGIVANTCOR/Resources/rethink\\_gov\\_stanford.pdf](http://siteresources.worldbank.org/INTWBGIVANTCOR/Resources/rethink_gov_stanford.pdf) (last visited Sep. 12, 2008).

<sup>§§§</sup> Amartya Sen, *DEVELOPMENT AS FREEDOM* (1999).

<sup>\*\*\*\*</sup> Sen argues: “Political rights, including freedom of expression and discussion, are not only pivotal in inducing social responses to economic needs, they are also central to the conceptualization of economic needs themselves”; Sen, *supra* note §§§ at 154.

<sup>++++</sup> Advisory Opinion OC-16/99 on The Right to Information on Consular Assistance in the framework of the guarantees of the Due Process of Law, 1999 Inter-Am. Ct. H.R. (Ser. A) No. 16, at ¶ 114; Cf. Alastair Mowbray, “The Creativity of the European Court of Human Rights” (2005) 5 HUM. RTS. L. REV. 57 (showing the history of this doctrine, firstly formulated in 1978 by the European Court of Human Rights).

<sup>++++</sup> “The Last Temptation of Christ”, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 73, at ¶ 65-67.

<sup>§§§§</sup> Ivcher Bronstein Case, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 74 ¶ 162.

<sup>\*\*\*\*\*</sup> Case of Claude-Reyes et al., 2006 Inter-Am. Ct. H.R. (Ser. C) No. 151 ¶ 103.

<sup>+++++</sup> Cf. International Law Commission [ILC], *Report of the fifty-eight session*, fn 1012, U.N. Doc. A/61/10 (Using the language of the International Law Commission, saying that a norm is valid means that it “covers the facts if which the situation consists”, while saying that a norm is applicable means that it has “binding force in respect to the legal subjects finding themselves in the relevant situation”).

Information: Strengthening Democracy”,<sup>++++</sup> the Inter-American Democratic Charter,<sup>§§§§</sup> a Resolution of the Summit of the Americas,<sup>\*\*\*\*\*</sup> the Rio Declaration on Environment and Development,<sup>+++++</sup> several declarations and recommendations of the Council of Europe<sup>+++++</sup> and the European Union,<sup>§§§§§</sup> and the Aarhus Convention.<sup>\*\*\*\*\*</sup>

However, there is already an international instrument in which States have accorded a standard and a meaning for the concept of transparency: The United Nations Convention against Corruption. Although the spirit and content of this instrument is clearly framed *vis-à-vis* the phenomenon of corruption in public institutions, the obligation that are created there to promote transparency will be taken as the final content of the concept of transparency for the purposes of national law and national institutions. The Convention against Corruption establishes two groups of transparency mechanisms, the first related to public reporting:

[E]ach State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

- (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
- (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
- (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.<sup>+++++</sup>

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<sup>++++</sup> G.A. Res O33/1932, O.A.S. Doc. AG/RES. 1932 (XXXIII-O/03) (June 10, 2003); G.A. Res O34/ 2057, O.A.S. Doc. AG/RES. 2057 (XXXIV-O/04) (June 8, 2004); G.A. Res. O35/2121, O.A.S. Doc. AG/RES. 2121 (XXXV-O/05) (June 7, 2005); G.A. Res O36/2252, O.A.S. Doc. AG/RES. 2252 (XXXVI-O/06) (June 6, 2006).

<sup>§§§§</sup> Inter-American Democratic Charter, G.A. Res. E28/1, O.A.S. Doc. AG/RES. 1 (XXVIII-E/01), 40 I.L.M. 1289 (Sep. 11, 2001).

<sup>\*\*\*\*\*</sup> Special Summit of the Americas, Monterrey, Mex., Jan. 12-13, *Declaration of Nuevo León* (Jan. 13, 2004) [http://www.summit-americas.org/SpecialSummit/Declarations/Declaration of Nuevo Leon - final.pdf](http://www.summit-americas.org/SpecialSummit/Declarations/Declaration%20of%20Nuevo%20Leon%20-%20final.pdf) (last visited Sep. 12, 2008).

<sup>+++++</sup> U. N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1(Vol.I), A/CONF.151/RES/1, 31 I.L.M. 874 (June 14, 1992).

<sup>+++++</sup> EUR. PARL. ASS., *Mass communication media and human rights*, 18<sup>th</sup> Sess., Recommendation No. 582 (1970); EUR. PARL. ASS., *Declaration on mass communication media and Human Rights*, 18<sup>th</sup> Sess., Res. No. 428 (1970); EUR. PARL. ASS., *Access by the public to government records and freedom of information*, 24<sup>th</sup> Sess., Recommendation No. 854 (1979); Council of Europe, Committee of Ministers, *Declaration on the Freedom of Expression and Information*, Decl-29.04.82E (Apr. 29, 1982); Council of Europe, Committee of Ministers, *Recommendation on access to official documents*, Rec(2002)2E (Feb. 21, 2002)

<sup>§§§§§</sup> Parliament & Council Directive 2003/4/EC, 2003 O.J. (L41) 26.

<sup>\*\*\*\*\*</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Jun. 25, 1998, <http://www.unece.org/env/pp/documents/cep43e.pdf> (last visited Sep. 12, 2008).

<sup>+++++</sup> United Nations Convention against Corruption, art. 10, Dec. 9-11, 2003, [http://www.unodc.org/pdf/corruption/publications\\_unodc\\_convention-e.pdf](http://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf) (last visited Sep. 11, 2008).

The second group of mechanism is directed to make the previous ones operative by enhancing public participation in the public processes:

Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.

This participation should be strengthened by such measures as:

- (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
- (b) Ensuring that the public has effective access to information;
- (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;
- (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

- (i) For respect of the rights or reputations of others;

- (ii) For the protection of national security or ordre public or of public health or morals. \*\*\*\*\*

The approach taken by the UN Convention against Corruption is clearly based on rights, and even one can say human rights. Freedom of information, education, public participation and judicial guarantees are among the key features of the Convention, which seems to re-state the standards of human rights instruments, but directing them to empower individuals and grassroots organizations in the fight against corruption. It can be rightfully argued that transparency, in the national level, is a group of mechanisms closely related to particular human rights of the individual, directed to promote its participation in the public debate and guarantee his possibility of knowledge regarding the operation and the resources of the government.

Having said all of the above, it is necessary to ask whether the concept of transparency used by international development institutions and human rights can be applied to international institutions. Chesterman has recently argued that the concept of good governance is one of those national law principles that are uncritically translated to the international sphere.<sup>§§§§§§</sup> “This fails to take account of structural differences between international law and domestic law-- the horizontal organization of sovereign and quasi-sovereign entities as opposed to the vertical hierarchy of subjects under a sovereign--but also of the historical and political context within which the rule of law was developed.”<sup>\*\*\*\*\*</sup>

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\*\*\*\*\* *Id.* at art. 13.

§§§§§§ Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 358 (2008).

\*\*\*\*\* *Id.*

The question is: a rights based approach that focuses on the entitlements of the individual *vis-à-vis* the group is the most suitable concept of transparency for the purposes of Global Administrative Law?

### Transparency in Global Administrative Law

Applying national law mechanisms and standards of transparency will be just missing the point of Global Administrative Law. "The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance."<sup>++++++</sup> But that does not mean that the structures are similar or operate in the same way.

The main point of this paper is that transparency as a value and a principle is indeed a global standard. International conventions and decisions, particularly in the field of human rights, have already shown that is a right of every individual upon every government. Indeed, there is an architectural continuity in the configuration of the principle in the global context.

However, there is a striking difference in international and transnational institutions: the kind of relationship in which these organizations normally operate is not one of entity vs. individual. In the international context, organizations have a responsibility towards their constituent party (similar to the one between the individual and the State). Obviously, if GAL would only look at what organizations do in their daily relationship with States, there would be no difference from what Public International Law has been doing for decades. That is, the concept of transparency would be embedded in the old discussion about the powers of organizations as it has been widely seen by International Institutional Law (that is, turning around the concepts of decision-making, law-making, democratization and *ultra vires*).<sup>++++++</sup>

Although International Institutional Law has started to acknowledge the problems of governability, representation and participation of civil society in international and transnational institutions,<sup>§§§§§§§§</sup> the literature is mostly focused on how the individual and NGOs can reach such organizations and take advantage of transparency and participation.<sup>\*\*\*\*\*</sup> In order to explain the content of the principle of transparency for the purposes of Global Administrative Law, it would be convenient to incorporate non-state actors as another actor in the global arena. With this I do not intend to engage in the discussion of the elevation of individual, NGOs and corporations as subjects of International Law,<sup>++++++</sup> to me is clear that GAL cares more about the processes than the

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<sup>++++++</sup> Benedict Kingsbury et al., *Foreword: Global Governance as Administration-National and Transnational Approaches to Global Administrative Law* 68 LAW & CONTEMP. PROBS. 1 (2005).

<sup>++++++</sup> See C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (2nd ed. 2005); see also ATHENA DEBBIE EFRAM, SOVEREIGN (IN)EQUALITY IN INTERNATIONAL ORGANIZATIONS (2000); NIGEL D. WHITE, THE LAW OF INTERNATIONAL ORGANIZATIONS 205-216 (2nd ed. 2005) (even when speaking about accountability, International Institutional Law focuses more on the 'judicial review' of international organizations by international courts:); CHRIS DE COOKER, ED., ACCOUNTABILITY, INVESTIGATION AND DUE PROCESS IN INTERNATIONAL ORGANIZATIONS (2005) (or about the accountability of international civil servants according to codes of ethics, and as interpreted by administrative tribunals).

<sup>§§§§§§§§</sup> See JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 339-343 (2002).

<sup>\*\*\*\*\*</sup> SERGEY RIPINSKY & PETER VAN DEN BOSSCHE, NGO INVOLVEMENT IN INTERNATIONAL ORGANIZATIONS: A LEGAL ANALYSIS 9-17 (2007)

<sup>++++++</sup> See e.g. THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 314-318 (2006); Antônio Augusto Cançado Trindade, *International law for humankind: towards a new jus gentium (I) - General course on public*

subjects, and the fact that a decision of an organization might affect individuals, they should have the right to know about and participate in the processes that produces such a decision.\*\*\*\*\*

It would be convenient to start from the works of the International Law Association (hereinafter ILA) on the Accountability of International Organizations. The study group constituted for this purpose received the mandate of considering “what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international Organisations to their members and to third parties, and of members and third parties to such Organisations.”§§§§§§§§ In its final report, the ILA stressed the importance of the principle of good governance, in which included the elements of transparency (both in decision making and implementation), participatory decision-making process, access to information, among others\*\*\*\*\*.

The ILA report presents a series of recommended rules and practices in each of the aforementioned elements, in the form of principles rather than rights. Returning to the question put at the end of last section: a rights based approach that focuses on the entitlements of the individual *vis-à-vis* the group is probably of little help for the purposes of GAL. It is pretty obvious that collectivities in the global arena do have to respect the rights of individuals as they act, but given the structure of human rights obligations and the nature of international organizations speaking of formal rights (specially in the case of individuals and NGOs) would be unsustainable.

In this sense, by comparing the obligations set up in the UN Convention against corruption and the rules and practices set up in the ILA report, a common set of principles can be elaborated in the following fashion:

1. All meetings, particularly those in which decisions will be taken, should be public.
2. States, as members of administrative entities, and the administrative entity itself do have the right to temporarily restrict information when early publicity might affect the outcome of democratic processes.
3. There should be full diffusion of the decisions taken by the entity in their daily functions.
4. Entities should grant general access to the information about procedures and procurement to anyone interested.

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*international law*, in 316 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 203-334 (2005); Anne-Marie Slaughter, *International law and international relations*, in 285 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 96-151 (2000); See also Philip Marshall Brown, *The Individual and International Law*, 18 Am. J. Int'l L. 532, 533-34 (1924); Myres S. McDougal, et al, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INTL L. 188, 193-94 (1968); John H. Knox, *Horizontal Human Rights*, 102 Am. J. INT'L L. 1 (2008).

\*\*\*\*\* See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 49-50 (1994) (Judge Higgins had already suggested the notion of non-state actors as 'participants' of international processes).

§§§§§§§§ International Law Association, *Accountability of International Organizations*, in REPORT OF THE SEVENTY-FIRST CONFERENCE: BERLIN 167 (2004)

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*Id.* at 172



5. Entities should allow non-state actors to be present in deliberations in which their rights could be affected. To the extent allowed by the nature of the decisions, consultations will also be desirable.
6. Entities should create offices in charge of responding inquires non-state actors, and frequently publishing in all means possible the general information of the entity.

This is of course just a set of principles that are the minimum common group of elements applicable to national institutions according to international law and to international institutions according to the ILA report. But justly because they are the minimum core, and because the nature of the subject towards the entity is not relevant in their construction, they can be directly applied to international entities.

However, much comparative working would be needed to fill the elements with practice of international and transnational organizations, so as to build a real content of the principle of transparency and its elements. Luckily, these are interesting times for Global Administrative Law. A case in the International Court of Justice can be of great relevance in order to clarify the content of the principle and see how it relates in practice. In the next section it will be shown how the case of the Pulp Mills (Argentina v. Uruguay) deals with the substantive and procedural elements of the exchange of information between States and organizations in the regime of the Uruguay River.

#### **For future application: Transparency in the case of the Pulp Mills**

Between 2003 and 2004, the government of Uruguay authorized two international firms, ENCE and Oy Metsä-Botnia AB, the rights to construct and operate a pulp mill on its side of the Uruguay River.<sup>+++++</sup> The dispute rises because the Uruguay River marks the border between Uruguay and Argentina. Although the all border issues were settled in 1961,<sup>+++++</sup> a treaty was signed in 1975 in order to establish a joint administration of the river and clarify the rights of both States. Indeed, the Statute of the Uruguay River<sup>§§§§§§§§§§</sup> establishes a joint administration of the river trough an international commission called the 'Comisión Administrativa del Rio Uruguay' (hereinafter CARU), many substantive rights are accorded to the parties and different procedural mechanisms are set in place in order to comply with the purposes of the Statute.

Legally speaking, the essential part of the dispute is focused on the obligations under article 7 of the Statute, which says:

If one party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days weather the plan might cause significant damage to the other Party.

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<sup>+++++</sup> Maria A. del-Cerro, *Paper Battle on The River Uruguay: The International Dispute Surrounding the Construction of Pulp Mills* 20 GEO. INT'L ENVTL. L. REV. 161, 172-173 (2007).

<sup>+++++</sup> Treaty between the Argentine Republic and the Eastern Republic of Uruguay concerning the boundary constituted by the River Uruguay, Arg.-Uru., Apr. 7, 1961, 1970 UNTS 332.

<sup>§§§§§§§§§§</sup> Statute of the River Uruguay, Arg.-Uru., Feb. 26, 1975, 1295 UNTS 339.

If the Commission finds to be the case or if a decision cannot be reached in that regard, the Party concerned shall notify the other Party of the plan through the said Commission.

Such notification shall describe the main aspects of the work and, where appropriate, how is it to be carried out and shall include any other technical data (sic) that will enable the notified Party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters. \*\*\*\*\*

On its application to the International Court of Justice, Argentina argued that Uruguay has failed to comply the following obligations:

- (a) l'obligation de prendre toute mesure nécessaire a l'utilisation rationnelle et optimal du fleuve Uruguay ;
- (b) l'obligation d'informer préalablement la CARU et le gouvernement de l'Argentine au sujet de la construction de deux usines de pâte à papier sur la rive gauche du fleuve Uruguay;
- (c) l'obligation de poursuivre les procédures prévues par le chapitre II du Statut de 1975 ai ce qui concerne la réalisation de "tous ouvrages suffisamment importants pour affecter la navigation, le régime du fleuve ou la qualité des eaux" ;
- (d) l'obligation de ne pas autoriser la construction des ouvrages projetés sans avoir préalablement suivi la procédure prévue par le Statut de 1975 ;
- (e) l'obligation de préserver le milieu aquatique et d'empêcher la pollution, en adoptant les mesures appropriées, y compris en recourant aux meilleures pratiques environnementales et aux meilleures technologies disponibles, conformément aux accords internationaux applicables et en harmonie avec les directives et recommandations des organismes techniques internationaux;
- (f) l'obligation de ne pas causer de dommages environnementaux transfrontaliers sur la rive opposée et les zones d'influence du fleuve ;
- (g) l'obligation de ne pas frustrer l'utilisation du fleuve a des fins licites ; et
- (h) autres obligations découlant du droit international général, conventionnel et coutumier, tant procédurales que de fond, nécessaires à l'application du Statut de 1975. \*\*\*\*\*

This case, as almost every legal dispute, has (at least) two distinctive sides in which it can be approached. One more evident, which has become the center of attention among scholars on the fields of environmental law and sustainable development law, focuses on the tension between the three elements of sustainable development: ecological, economical and social concerns. Indeed, the Court will have to decide if Uruguay violated the aforementioned obligations (a) and (e) as spelled by Argentina on its application; \*\*\*\*\* or –as Prof. Allan Boyle puts it– if Uruguay has a right to “pursue sustainable economic development while doing everything possible to protect the

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+++++++ *Id.* at art 7.

+++++++ Application Instituting Proceedings, Pulp Mills on the River Uruguay (Arg. v. Uru.), (May 4, 2006), <http://www.icj-cij.org/docket/files/135/10779.pdf> (last visited Sep. 11, 2008).

+++++++ *Id.*

environment of the river for the benefit of present and future generations of Uruguayans and Argentines alike.”<sup>§§§§§§§§§§</sup>

However, even before that argument has to be reached, the Court will have to look at the substantive obligations under the Statute of the Uruguay River. Particularly, the duty of the parties to give “any other technical data (sic)”<sup>\*\*\*\*\*</sup> regarding the projects that might affect the navigation, quality of water, and the regime of the river. The legal obligation constructed on the Statute of the Uruguay River is one of administrative law, not of environmental law. That does not mean that environmental law cannot be used to further interpret what is the content and extent of the information to be exchanged among the parties through the use of the principle of systemic integration.<sup>+++++</sup> But the bottom line is that the obligation is one of providing information. That is, the Court will have to decide whether Uruguay provided timely, sufficient and reasonable data on the possible effects of the construction of the mills on the River. Likewise, the Court will have to decide if Argentina has a standing at contesting the means and content of the information provided. Only then the Court can actually engage in the environmental aspects of the dispute.

All of this is extremely important for the purposes of Global Administrative Law. If indeed we are talking about a discipline that is united in principles, it has to take into account what the Court will rule is enough and prudent exchange of information in a bi-national organization such as the CARU.

Moreover, it is important to keep in mind that the project developed by the Finnish enterprise Botnia, has received a guarantee by the Multilateral Investment Guarantee Agency (hereinafter MIGA), of the World Bank Group. The \$300 millions guarantee “will protect the investments against the risks of expropriation, war and civil disturbance, and breach of contract” for the next 15 years.<sup>+++++</sup> The MIGA and the International Financial Institution, also a part of the World Bank Group, “conducted 18 months of due diligence on the project before voting to approve a financing and guaranty package for the Botnia plant.”<sup>§§§§§§§§§§</sup>

This mill alone does not only constitute the largest foreign investment in Uruguay history, but is also the biggest guarantee –in terms of money– ever awarded by MIGA for a project in Latin America. Among the considerations quoted by MIGA for awarding the guarantee is:

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<sup>§§§§§§§§§§</sup> Verbatim Record of the Public sitting, Pulp Mills on the River Uruguay (Arg. v. Uru.), at 30-31 (Jun. 8, 2006), <http://www.icj-cij.org/docket/files/135/13128.pdf> (last visited Sep. 12, 2008); see also Pulp Mills on the River Uruguay (Arg. v. Uru.) (Order of Jul. 13, 2006), 45 ILM 1025, at ¶ 80, available at <http://www.icj-cij.org/docket/files/135/11235.pdf> (last visited Sep. 12, 2008).

<sup>\*\*\*\*\*</sup> Statute of the River Uruguay, *supra* note §§§§§§§§§§ at art. 7.

<sup>+++++</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, art. 57, 1155 UNTS 331, 8 ILM 679; Jean-Marc Sorel, *Article 31 – Convention de 1969*, in *LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS 1319-1323* (Olivier Corten & Pierre Klein eds., 2006); see also, Conclusions of the Study Group, *supra* note +++++ at ¶ 17-23; Campbell McLachlan, *The Principle of Systemic Integration and the Article 31 (3) (C) of the Vienna Convention*, 54 Int'l and Comp. L.Q. 279 (2005); Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INT'L AND COMP. L.Q. 281 (2006).

<sup>+++++</sup> Multilateral Investment Guarantee Agency, Project: Botnia South America S.A., [http://www.miga.org/projects/index\\_sv.cfm?pid=690](http://www.miga.org/projects/index_sv.cfm?pid=690) (last visited Sep. 12, 2008).

<sup>§§§§§§§§§§</sup> Pieter H. F. Bekker, *Introductory Note to Pulp Mills on the River Uruguay (Argentina V. Uruguay)*, *International Court of Justice, Provisional Measures Order, January 23, 2007*, 46 I.L.M. 311, 311 (2007).

Expected regional environmental improvements related to the mill include treating wastewater from the nearby town of Fray Bentos; generating electricity from mill operations that will offset 68,000 tons a year of carbon dioxide and reduce acid rain by replacing oil burned in public generating plants; treating the untreated effluent of an older, unrelated pulp mill in the nearby town of Mercedes; and producing sufficient sodium chlorate to allow local mills in Argentina and Uruguay to move to elemental chlorine-free pulp production.\*\*\*\*\*

A further question can be raised here: if IFC and MIGA considered having enough information to commit \$150 millions of their own funds and guarantee political risk up to \$300 millions, can Argentina claim that the information did not reflected a complete analysis of the environmental risk? This would also raise issues of procedural information-sharing among organizations and States, and of decision making strategies by financial institutions. In any case, the decision will be interesting for the purposes of the GAL project, not only in the issue of transparency, but in many others relating to cross organizational management.

### **Conclusion: permeability of the concept of Transparency and the unity of Global Administrative Law**

Independently of the academic alarmism that has been triggered in the last years by the International Law Commission's report on fragmentation of international law,<sup>\*\*\*\*\*</sup> this phenomenon is real and must be addressed properly. It does not mean that is the end of international law as a discipline, or that further steps must be taken to sustain the cohesion of the system. It only means that nowadays world is pluralistic and that as such it should be understood as having many ways to manifest a single principle.

Transparency is a necessity in every single administrative entity, both at the national and international level. By working in the differences on those levels, and by the work that is pending on this paper (discovering the differences between international structures), it is evident that transparency is indeed a global goal.

The continuity of principles that exist in many types of administrative entities just reinforces and invigorates the GAL Project. It was never meant to establish a single general administrative procedure among different entities; on the contrary, it is about recognizing that ideas of good governance permeate every single administrative structure. Unity is not uniformity, and the uniformity in global administrative law is in the principles it proposes.

Having said all of the above, there is a great chance to put forward the agenda of GAL in particular institutions. Not by proposing a common framework, but by using the principles and adapting them to the different necessities of different entities. The ruling of the ICJ in the Pulp Mills case will be extremely important for transnational organizations, particularly those dealing with the administration of common patrimony. Without trying to foresee the decision of the Court, the elements in which I believe it will focus is on the reliability and capacity of the information to

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\*\*\*\*\* Multilateral Investment Guarantee Agency, *supra* note \*\*\*\*\*.  
\*\*\*\*\* Conclusions of the Study Group, *supra* note +++++ at ¶ 12.

disprove the possibility of environmental damage. Setting those standards for the purposes of the Uruguay River regime and by stressing the importance of procedural aspects in information exchange, the Court will definitively endeavor in aspect which matter a lot for the GAL Project.