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The Codex Alimentarius Commission: increasing accountability through transparency

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1. Introduction.

As the «Biotech case»¹ exemplifies, international provisions are increasingly conditioning the activity of domestic administrative authorities, requiring the implementation of certain procedural mechanisms and safeguards. The rationale of this phenomenon relies on the transboundary effect of national administrative acts, which condition the legal spheres of individuals of other Countries. At the same time, lives of individuals are also affected by substantive international standards, such as the ones enacted by the Codex Alimentarius Commission (CAC). Those are detailed and specific regulations, with a quasi-binding force, that have a significant impact on legislation and administrations of Member Countries. However, in such global institutions, the mechanisms of decision do not ensure enough guarantees of democracy, impartiality and accountability. Considering the influence of the standards on national Parliaments and administrations and the discretion of the decision-makers, the CAC entails a function, which is of legislative and executive nature at the same time. As the present international community cannot be regulated through certain legal instruments, typical of national democracies, such as checks and balances or vertical, classical accountability mechanisms, the standard-setting procedure can find its legitimacy through a series

¹ EC – Measures Affecting the Approval and Marketing of Biotech Products (WT/DS/291, 292, and 293), *Interim Report of the Panel*, Geneva, 7 February 2006 (hereinafter *EC-Biotech*).

of administrative procedural rules and principles. Certain administrative requirements are already applied to Codex's activity. However, if compared to the domestic legal orders, most of them are still at a rudimentary stage. The first pillar on which Codex legitimacy should rely is transparency, intended as a full and generally extended implementation of mechanisms of openness and access to information for the public. Transparency is a legal tool to increase accountability of Codex's decision-makers: either through the visibility of their activity, or through the publicity of the procedural mechanisms (such as participation) they adopt.

2. The quasi-binding force of Codex Alimentarius Commission's standards.

In May 2006, a Dispute Settlement Panel at the World Trade Organization (WTO) issued its final report with its findings on the EC-Biotech dispute². The decision of the panel condemned the European Union, stating that the administrative implementation of the EC regulation concerning genetically modified organisms was not in compliance with WTO law and that the EU had to bring the measures "into conformity with its obligations under the SPS Agreement"³. The *rationale* of the panel's decision was related to the necessity to guarantee free global trade and that no unjustified restriction is allowed in any member State of the WTO.

In the case at stake, a regional administrative procedure enacted upon a European legislation (Directive n. 18/2001/EC⁴), and in conformity with the law of the Treaty establishing the European Community, was found illegitimate under international law (it violated articles 3, 5.1 and 8 of the Agreement on the application of Sanitary and Phytosanitary measures – SPS), and in damage of the economic interests of American, Argentinean and Canadian companies (and indirectly of the respective States). The contested regulation restricted market access as the EU did not provide sufficient scientific justifications for certain limitations and because of an undue delay occurred in several authorization procedures⁵. The latter affected other countries, damaging their economic interests and, consequently, influencing their regulatory policies on the subject.

² The Report will be made public only in September 2006. However the Panel confirmed its findings of the *interim* report, except for the fact that in the last document it stressed on the fact that the contested moratoria was not finished and EC needed to demonstrate its end. For more information check *EC-Biotech* at www.wto.org.

³ The dispute concerns the mechanism of authorization with which the EU has implemented its regulation about GMOs, alleged to constitute: 1. a *general moratoria* against new GM products (a deliberate and general denial of entrance towards GMOs.); 2. a *product specific moratoria* against certain specific GM products (it regards all the single applications for the specific products, which, according to the complainants, have been deliberately failed or unduly delayed in order to avoid the entrance of those products into the European market); 3. several national imports bans on GM products issued by some EC members (which, in accordance with article 23 of the EC Directive 18/2001, have explicitly denied the access to their market of certain specific GM products, further restricting market access.).

⁴ The contested mechanism of authorization also refers to other legal acts, directly or indirectly related to the subject: Directives 90/219/EEC (*Confined utilization of genetically modified micro-organisms*) and 90/220/EEC (*Deliberate release into the environment of genetically modified organisms*), modified in 1994 and 1998 by Directives 51 and 81 EC; Regulation 258/97/EC of the European Parliament and of the Council (*Novel foods and food ingredients*); Regulations 1829/2003 (*Genetically modified food and feed*) and 1830/2003 (*Traceability*).

National (regional) administrative regulations can have a strong external impact. They do not affect only national citizens, but indirectly also citizens of other Countries. This «butterfly effect»⁶ of the law, due to the globalization of markets and to the interdependencies of national economies⁷, has increased the need to develop common and shared global rules, either as general principles and procedural norms that national authorities must respect when they issue or implement regulations; or as harmonized standards and guidelines to be directly applied into the territories of all the States of the international community.

An example of global rules for national authorities consists of the transparency requirement of Art 7 of the SPS Agreement, as disciplined by Annex B of the same agreement: “Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them”. An international agreement demands domestic authorities to enact due process principles and, through a court-like body (the Dispute Settlement Body – DSB), a global institution can ensure States’ compliance⁸.

For what concerns global standards, instead, the creation of “global regulatory regimes”⁹, either as formal inter-state organizations, or as transnational networks or as hybrid public-private regulatory organisms, has favoured the development of substantive and specific global norms, which harmonize the various fields of regulation. Also in this case, however, the subjects empowered to draft and enact the provisions and the decision-making procedures themselves have to guarantee the respect of certain principles and procedural rules, with the aim to ensure an

⁵ “First, the Panel concluded that the general *de facto* moratorium resulted in a failure to complete individual approval procedures without undue delay, and hence gave rise to an inconsistency with Article 8 and Annex C of the SPS Agreement. Second, with regards to the applications for certain specific biotech products, the Panel found that there was undue delay in the completion of the approval procedure with respect to 24 of the 27 relevant products. Therefore, the Panel concluded that, in relation to the approval procedures concerning these 24 products, too, the EC breached its obligations under Article 8 and Annex C of the SPS Agreement. Finally, the Panel found that the nine safeguard measures taken by some EC Member States after products had been approved by the EC to be marketed EC-wide failed to meet the requirements of the SPS Agreement relating to risk assessment. The Panel concluded that Article 5.7 of the SPS Agreement (which allows members to adopt provisional SPS measures where relevant scientific evidence is insufficient) was not applicable. This conclusion was based on the finding that the evaluation and review of the products at issue by the relevant EC scientific committees proved that sufficient scientific evidence was in fact available to permit a risk assessment as required by the SPS Agreement” N. Bernasconi-Osterwalder and M.J. Oliva, Center for International Environmental Law (CIEL), *EC- Biotech: Overview and Analysis of the Panel’s Interim Report*, March 2006, 51.

⁶ “A butterfly dies in Japan and in Texas a tornado occurs”, the “butterfly effect” simplifies a scientific and philosophic theory concerning predictability and interdependencies of physical phenomena, on the subject check H. O. Peitgen, H. Jurgens and D. Saupe, *Chaos and Fractals: new frontiers of science*, New York, Springer-Verlag, 1992.

⁷ S. Battini, *L’impatto della globalizzazione sulla pubblica amministrazione e sul diritto amministrativo: quattro percorsi*, in *Giornale di diritto amministrativo*, n. 3, 340 and so forth.

⁸ “The transparency principle is imposed on individual national authorities mainly to benefit national authorities in other States”, S. Cassese, *Regulation, adjudication and Dispute Resolution beyond the State*, Draft for the Master in Public Affairs, Istitute d’Etudes Politiques, Paris, August 29, 2005, 19.

⁹ R. B. Stewart, *Global Administrative Law, Lectio Magistralis Honoris causa*, Conferimento della Laurea “*Honoris Causa*” in Giurisprudenza al Professor Richard B. Stewart, Università degli Studi di Roma “La Sapienza”, Rome 13th of June, 2005, 27.

impartial, accountable and democratic decision. In the Codex Alimentarius Commission, for instance, “The Uniform Procedure for the elaboration of Codex Standard and Related Texts”¹⁰ foresees a double mechanism of consultation of national governments, which have the possibility to contribute to the decision-making in two different steps of the procedure. As it will be stressed later in the analysis, however, participation to the standard-setting procedure is allowed to States’ delegates, which negotiate national interests, not always pursuing the general good of the public; while private party’s participation is only granted to NGOs, which act on behalf of certain sectoral stakes (most of all the interests of the industry).

In the Biotech case, an international court-like body recognizes certain procedural principles and applies them to domestic administrative procedures, but what about global institutions themselves¹¹? Do they respect the rule of law? Do they make decisions according to the principle of due process of law?

As the GMOs case demonstrates these issues are particularly relevant to food law; the development of international trade of food products created the need for harmonized and shared regulations concerning limits, quantities, and, generally, safety of such goods, even if food law has always been territory-related. To fulfil the purpose of creating a *jus commune* of food safety and quality and of free trade of food products, the Codex Alimentarius Commission (CAC) was founded in 1963.

The CAC is an intergovernmental public-private regulatory regime, created by FAO and WHO with the aims of: “protecting the health of the consumers” and “ensuring fair practices in the food trade”¹². The Commission issues food safety and quality standards, which are published in the Codex and *can* (formally they are soft law) be adopted by States for domestic regulations.

Annex A of the SPS Agreement directly recalls standards issued by the Codex Commission: when WTO member States approve trade-restrictive national regulations they have to demonstrate that they are not disguised protectionist measures. For instance, if they refuse to import an alleged unsafe substance, either they rely on an international standard, which (according to Art 3 of the SPS Agreement¹³) should guarantee an objective and shared decision about that good (e.g. setting the

¹⁰ Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Procedural Manual, Procedures for the elaboration of Codex Standards and Related Texts, Part 3: Uniform Procedure for the Elaboration of Codex Standards and related texts*, Fourteenth Edition, Rome, 2004, 22 – 25.

¹¹ For what concerns the international regulation of GM products an ad hoc Task force has been created by the CAC, aiming to reach agreement about common standard on biotechnological foods: Codex Alimentarius Commission, *Ad hoc intergovernmental Task Force on Foods derived from Biotechnology*, 1999-2003 and 2005-2009, CX/FBT, www.codexalimentarius.net.

¹² FAO/WHO, *Statutes of the Codex Alimentarius Commission*, Rome – Geneva, 1961/62, Art. 1; www.fao.org, www.who.int.

¹³ Art. 3 SPS Agreement establishes that a national (regional) sanitary or phytosanitary measure, not to violate WTO law, must be “based on” (Art 3.1), or “conform to” a Codex standard (Art 3.2) or it can be even stricter, but justified by a scientific risk assessment (Art 3.3, which recalls Art 5.1).

limits of that substance in determined food products), or they demonstrate the concrete risk of the contested product. If they do not comply with these requirements, they will result in violation of the mentioned Art 3 and they might be sued in front of the DSB, for violation of WTO law.

The decisions of the adjudicative body of the WTO, concerning economic damages suffered by the members, if not respected by the losing parties can be enforced through the application of (normally forbidden) tariffs or duties for the amount of the estimated damage (Articles 21 and 22, Dispute Settlement Understanding). This form of sanction is a strong deterrent for member States, which joined the WTO in order to enjoy such economic advantages and therefore tend to abide by DSB decisions, which, in this way “penetrate into domestic law, lifting the veil of national law”¹⁴. In addition, due to the costs and the concrete feasibility to provide an appropriate scientific justification of a SPS measure, member States of the WTO prefer to incorporate Codex standards into their legislation rather than face the expense and the risk of a stricter regulation.

Therefore Codex standards, even if formally voluntary and non-binding, have gained, through WTO law, the authoritative effect of enforceable laws within States¹⁵, following the reasoning that “even if it is not binding, what does it matter, if it is obeyed?”¹⁶.

The decision taken at the Codex level affects policies of national Governments and Parliaments and poses a direct influence on domestic legislation and administration: once a standard is approved (through the “*notification acceptance procedure*”, articles 4 – 6, *General Principles of the Codex Alimentarius*¹⁷), national authorities become recipients of it. The latter exercise a mere power of implementation in their competence’s territories, and a private company, which conforms to the standard can import its product into all the States members of the CAC, without suffering any restriction or limitation.

A regulation decided at an extra-national level gains a legislative nature, affecting generally individuals and constituting one of the legal sources to which national executive powers refer. More than that, Codex standard are also specific and detailed enough to be directly implemented by domestic authorities and applied to private citizens.

3. The standard-setting procedure inside the Codex.

¹⁴ S. Cassese, *Regulation, Adjudication*, cit., 22.

¹⁵ In the “EC – Hormones” case, for instance, the European Communities and their member states did not modify their legislation, which forbade hormones in violation of the SPS Agreement, but they had to pay a sanction for this decision, *EC – Measures Concerning Meat and Meat Products*, WTO Appellate Body Report 1998, WT/DS 48/AB/R, www.wto.org.

¹⁶ D. Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, IILJ Working Paper, 2004/6 (Global Administrative Law Series) (www.iilj.org), 38.

¹⁷ *Procedural Manual*, cit., 31 – 35.

As Codex standards have a strong influence on regional and national food policies, it is useful to focus on the way they are agreed and on the legitimacy of the procedure.

The purpose of Codex standards-setting activity, as indicated in the Preamble of the Statutes, is twofold: “protecting the health of the consumers” and “ensuring fair practices in trade”. The main function of the CAC is thus to provide global norms aimed at reaching a high level of health protection, without damaging commercial transactions. The pursuit of these aims implies an interest-balancing decision, which entails a certain degree of discretion upon the decision-makers. Despite the contribution of scientific bodies, whose evaluation of the alleged risk is not always objective and univocal, in most cases the management of the risk is an open phase, in which managers have to choose between affecting more trade or health, aware that, in some case, increasing the protection of one would diminish the protection of the other, and vice versa.

In order to provide a proper evaluation of sectoral and national interests involved, standards are issued after an eight-step procedure¹⁸, which resembles the structure of a domestic administrative process of law.

The Commission starts the procedure either *ex officio*, or on a motivated proposal coming from a Codex body or from a member State¹⁹. The initiative’s phase can have a national or extra-national origin as indeed all of the standard-setting process, which, also in the further steps, develops through the active participation and competences shared by national and extra-national authorities.

The proposal draft is then reviewed by the Executive Committee, which, together with the Secretary, embodies the figure of the «leading authority» of the process. The first one follows the *iter* guaranteeing its regularity and receiving all the comments and proposals from private subjects, which intervene in the process; the second one is charged with circulating the draft among the competent committees and the member States²⁰. The Executive Committee represents the point of reference for the participation of international private subjects at the standard-setting procedure, directly at CAC meetings. This form of hearing, however, presents two main flaws.

First, it is only eventual: “the Directors-General FAO or WHO *may* invite”²¹ observers to participate, so indeed there is no obligation to guarantee participation, which is essentially voluntary, and upon NGOs’ awareness and interests. Taking Italian administrative law as a paradigm of comparison, it is to note that Art 7 of the Italian law Statute, which lays down the general principles of administrative procedure²², requires the administrative authorities to give

¹⁸ Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Procedural Manual*, cit., 22 – 25.

¹⁹ Step 1, *Ibidem*, 22.

²⁰ Steps 2 and 3, *Ibidem*, 22.

²¹ Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Rules of procedures, Rule VI Agenda*, “Procedural Manual”, 14th Edition, 2004, 11.

²² Legge 7 agosto 1990 n. 241, *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*.

notice of the beginning of a process to the recipients of the act, to the ones that are legitimized to participate to it, and to everyone who might be prejudiced by it. In the case of the Codex, notification to the observers (NGOs and IGOs which represent interested subjects) is, in stead, merely of a voluntary nature.

Secondly, stakeholders have an observer status, they are admitted only after a selective exam, and if they satisfy certain requisites²³. However, the selection criteria foreseen by Rule VIII of Codex' Rules of procedures are mainly of a formal nature: no quotas are established in order to balance different interests that NGOs represent (with a strong majority of Business non governmental organizations – BINGOs²⁴); the international status is merely territorial, while it should consist of general representation, impartiality and protection of global common interests²⁵; activity, membership and purposes of the organisations should be made clear and conflict of interests avoided since the admission to Codex; finally, the material possibility and cost of participation should also be taken into account, as Codex meetings are held around the world and concrete participation is not affordable by any actor of the process²⁶.

The role of observers, even if not directly influential, could also increase transparency and consumers/citizens information. It is difficult for society to monitor Codex activities, either because decisions are made at an extra-national level, or due to the required technical knowledge on which standards are based; and NGOs could inform citizens and explain Codex decisions, acting as a link between decision-makers and -recipients and providing a form of mediated political accountability²⁷. However, if interests representation is not equally balanced, the accountability of

²³ If they have official relations (consultative status, specialised consultative status or liaison status) with FAO or WHO, they send a request to the Secretary of the CAC, who will decide if granting them the observer status. If they do not have any official relations with FAO/WHO besides the request, they also have to provide further requisites, such as, for instance, that they are international in structure and scope of activity, and representative of the specialised field of interest in which they operate, Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, "Procedural Manual", cit., 62 – 63.

²⁴ N. Rees and D. Watson (ed.), *International Standards for Food Safety*, Aspen Publications, Gaithersburg, Maryland, 2000, 155; If spaces left to participation are not equally distributed, some – in particular those of the consumers – result underrepresented, in this sense see S. Cassese, *Nuove vie del Costituzionalismo*, Lezione per la Facoltà di scienze politiche dell'Università di Napoli Federico II, 11 maggio 2006, 10; At the moment the NGOs participating to Codex activity are 156, among which only 9 do not belong to the industry sector, see *International Non-governmental Organisations in Observer Status with the Codex Alimentarius Commission*, Report by the Secretariat (CAC/28 INF/1), Annex I.

²⁵ "INGO observers represent the whole range of interests at Codex, but the majority of observers are industry funded", in *Ibid.*, 155.

²⁶ L. M. Wallach, *Accountable Governance in the Era of Globalization: the WTO, NAFTA and International Harmonization of Standards*, in *University of Kansas Law Review*, 2002, 7.

²⁷ "Organized civil society may play a key role by ensuring a broader public discussion of policy alternative and by bringing the concerns of citizens into the decision-making process. (...). First, civil society organizations can give a voice to the concerns of citizens, and channel them into the deliberative process of international organizations. Second, they can make internal decision-making processes of international organizations more transparent to the wider public and formulate technical issues in accessible terms", P. Nanz, *Legitimation of Transnational Governance Regimes and Foodstuff Regulation at the WTO: Comments on Alexia Herwig*, in C. Joerges, I. J. Sand and G. Teubner (ed.), *Transnational Governance and Constitutionalism*, Oxford and Portland Oregon, Hart, 2004, 230.

the global regulators would be “accountable in the wrong way”²⁸, decreasing efficiency, equality and impartiality. In addition, if impartiality and transparency are not already ensured in NGOs themselves, if their members are not accountable as well to the persons they represent, their work might have the opposite effect of providing wrong information, misleading public opinion and diminishing civil society participation. Private subjects normally act in global regulatory regimes: in particular, in the CAC they strongly contribute to the activity of decision-making, therefore they have to abide by rules and limits provided for the public bodies they influence, so that they should also ensure an effective representation of civil society, and transparent organization and activities. In one word, they should also be *accountable* to the public²⁹.

The purpose of the CAC is, as previously noted, twofold. It entails two related and often conflicting interests, namely health and trade. A balanced contribution of private subjects to administrative institutions has the effect of influencing the choice in pondering the stakes at issue. The issue of private parties’ participation, indeed, has been introduced in many domestic administrative laws in order to foster efficiency and impartiality³⁰ in the assessment of all the involved interests. That is why proper rules should be provided to regulate and structure participation at Codex’s bodies, as an unequal participation, in stead, decrease efficiency and is in conflict with the general principle of impartiality of the Administrations.

After the initial proposal there is the phase of investigation, which implies a scientific assessment, attained through a sub-proceeding managed by the Joint FAO/WHO Scientific Committees³¹: the Commission issues a call for data, requiring the expert bodies to provide a report on which the standard will be based. These committees are not composed by State delegates (they are not intergovernmental), but by experts selected and appointed by FAO/WHO following an impartial procedure and on the basis of their expertise. However, even if FAO and WHO “meet attendance costs of the scientists, they do not pay honoraria, thus giving experts an incentive to

²⁸ N. Kirsch, *The Pluralism of Global Administrative Law*, in *EJIL*, 17, 1, Feb. 2006, 250.

²⁹ Art. 22 of the Italian law Statute (n. 241/1990) which lays down general principles of administrative procedure, requires private subjects which exercise functions of public relevance to guarantee to interested citizens access to their acts.

³⁰ In the Italian legal system the issue of participation finds its rationale either in article 97, or in article 3, 2nd paragraph of the Italian Constitution, having the double goal to increase efficiency and good administration (“*principio di buon andamento*”), and impartiality and equality in the decision-making (*principio d’imparzialità e principio d’uguaglianza*). On the issue see A. Sandulli, *Il procedimento*, in S. Cassese, *Trattato di diritto amministrativo*, Milano, Giuffrè, 2004, 1076 and so forth; M. P. Chiti, *Partecipazione popolare e pubblica amministrazione*, Pisa, Pacini, 1977; S. Cassese, *Burocrazia, democrazia e partecipazione*, in *Jus*, 1985, 81 and so forth. For what concerns other legal systems, a reference must be made to the due process clause, which even if debated regarding its scope (according to some to be restricted to those regulations, which limit the personal legal sphere of the individuals), has given a strong contribute to the issue of participation as the right of individuals to defend their interests on front of administrative agencies. The clause is, for instance, included in the V and XIV amendments of the U.S. Constitution, in Art 105 of the Spanish Constitution and in Art 20 of the Greek Constitution.

³¹ Joint FAO/WHO Expert Committee on Food Additives (JECFA); Joint FAO/WHO Meeting on Pesticides Residues (JMPR); Joint FAO/WHO Expert Meetings on Microbiological Risk Assessment (JEMRA).

accept industry contributions”³², and no legal guarantee is provided to avoid lobbying and pressure from the stakeholders.

Expert committees resemble domestic «independent regulatory agencies»³³, enjoying independence from political subjects and using their technical discretion in order to provide their definitive acts³⁴: the scientific reports, on which basis policy-makers will issue the standards. The results of the committees are public and available to everyone. However, the same publicity is not guaranteed in two other relevant moments of the assessment proceeding:

a) The selection of members (based on Art VI of FAO Constitution and on section 31 of the Regulations for Expert Advisory Panels and Committees of the Basic Texts of WHO, and managed respectively by the two «parental organizations»³⁵) is not sufficiently transparent³⁶. The procedural guidelines provided by FAO and WHO, for the appointment of scientists, are only generic lists of general principles, and the selection is merely based on the evaluation of the C.V. of the applicants. The Secretariats of the «parental organizations» select the applicants without the institution of a public contest: the choice is thus quite discretionary, not public and with few safeguards of impartiality and openness;

³² A. Herwig, *Transnational Governance Regimes for Food derived from Bio-Technology and their Legitimacy*, in C. Joerges, I.-J. Sand, G. Teubner, *Transnational Governance*, cit., 220.

³³ The term of comparison would be with the European Scientific Agencies. Now, they are 24, entailing different functions and regulating several areas of interest. A useful point of reference is certainly the European Food Safety Agency (EFSA). For what concerns transparency, for instance, Art 23 of the EC Regulation n. 178 of 2002, states that the Agency has the task, *inter alia*, “to ensure that the public and interested parties receive rapid, reliable, objective and comprehensible information in the fields within its mission”. In addition, Art 30 of the same Act requires a high level of publicity, also for the diverging opinion; while Art 32 demands that the “scientific studies necessary for the performance of its (of the EFSA) mission” are “commissioned in an open and transparent fashion”. Finally, Art 38 of the mentioned regulation requires full transparency for all the activities of the Agency. On the European Agencies, check E. Chiti, *Mixed Administration: Administrative Proceedings Involving European Agencies*, in *Law and Contemporary Problems*, Winter 2004.

³⁴ For what concerns independent regulatory agencies in the Italian legal system, their main functions and characteristics check S. Cassese e C. Franchini (a cura di), *I garanti delle regole*, Bologna, Il Mulino, 1996; A. Perini, *Autorità amministrative indipendenti e tutela giurisdizionale*, in *Dir. amm.*, 1994, 71 and so forth.; F. Caringella, *La tutela giurisdizionale nei confronti degli atti delle Autorità amministrative indipendenti*, in *Società*, 2001, p. 541 and so forth.; F. Carpi (a cura di), *Regolazione e garanzia del pluralismo. Le autorità amministrative indipendenti*, Milano, Giuffrè, 1997; F. Kostoris Padoa Schioppa (a cura di), *Le autorità indipendenti e il buon funzionamento dei mercati*, Roma, ISAE – Il Sole 24 Ore, 2002; P. Lazzara, *Autorità indipendenti e discrezionalità*, Padova, Cedam, 2001.

³⁵ FAO, *Food additives and food contaminants, FAO procedural guidelines for the Joint FAO/WHO Expert Committee on Food Additives*, Rome, February 2003, 2 – 3,

http://ftp.fao.org/es/esn/jecfa/2003-0224_Food_Add_Cont_Guidelines.pdf; WHO, *Procedural guidelines for the Joint FAO/WHO Expert Committee on Food Additives*, Geneva, January 2001, 2 – 3,

http://www.who.int/ipcs/food/jecfa/en/procedural_guidelines_additives.pdf.

³⁶ “A set of criteria for the selection of experts should be identified and harmonized across different expert bodies as appropriate. The selection process should be transparent, including dealing adequately with conflicts of interest (...). Information on organizational affiliation, government service, research support, public statements and positions, financial interest and other interests (e.g. professional affiliations) should be provided. This information, as appropriate, should be available publicly before the meeting (e.g. via Internet), consistent with rules of privacy”, FAO/WHO, *Provision of Scientific Advice to Codex and Member Countries, Report of a Joint FAO/WHO Workshop*, WHO Headquarters, Geneva, Switzerland, 27 – 29 January 2004, 16, <http://ftp.fao.org/docrep/fao/007/y5388e/y5388e00.pdf>.

b) The process through which results are found is not open, as only the final document can be viewed by the public³⁷. The expert committees exercise a technical and bound discretion, therefore they need to enjoy an elevated independency and that is why they are not subject to a political or generally discretionary control by national governments; however still they should guarantee the transparency of their proceedings for the knowledge and information of the citizens. They should be structured as “houses of glass”³⁸, open to a «knowledge-control» made by the citizens, and providing complete reports indicating not only the results, but also the methods through which they have reached conclusions, and the minority reports.

In the next step the draft is sent to the competent committees³⁹ and there discussed and elaborated, starting from the scientific report, but considering also political issues (e.g. the expectations of consumers and producers/traders) and “the economic interests of the States”⁴⁰.

The investigation phase is divided into two parts: the first one is scientific and comes from a specialized body and through a parallel proceeding, the second is based on the first one, it has a political connotation, and it involves several subjects, which bargain on different issues. States’ delegations and NGOs (participating in the committees’ meetings as observers) interpret and discuss the results of the risk assessment, in accordance with their interests and with the aim to produce a food-safety draft-standard. This phase is not fully open: allowed NGOs and states’ officers participate in it but there is no general publicity of the information they obtain and of the way they use it. The information of civil society and the political accountability of decision-makers rely on their good will and the public is under risk to be excluded⁴¹.

Afterwards, the draft enters in the “decision phase”, which is articulated through various steps. A provisional version is sent to the Commission where member States’ delegates and interested organizations make their comments and suggestions; then it is sent to each member State, through

³⁷ The problem has also been noted by an Independent Expert Panel: FAO/WHO, *Report of the Evaluation of the Codex Alimentarius and Other FAO and WHO Food Standards Work*, Rome – Geneva, 15th November 2002, pp. 50 – 51. In addition, the provisions related to the publicity of the scientific reports of the expert committees, if compared with the letter (A) of § n. 552, of the Administrative Procedure Act of the U.S., (“each agency, in accordance with published rules, shall make available for public inspection and copying: (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases”) are only of a formal nature, as they merely require to give access to final document.

³⁸ The expression is to be attributed to F. Turati, but it has been used by several scholars to indicate the importance of transparency and publicity in public administration and in independent regulatory agencies, in this sense see S. Cassese, *Poteri indipendenti, Stati, relazioni ultrastatali*, in *Il foro italiano*, 1996, 12.

³⁹ Either a General Subject Committee (which develops all-embracing concepts and principles applying to foods in general or to specific groups of foods and that are used by commodity committees) or a Commodity Committee (which develops standards for specific classes of foods).

⁴⁰ Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Procedural Manual*, cit., 22.

⁴¹ This is typical of “club-like institutions”, where states delegates “negotiate(d) in secret, then report(ed) their agreements to national legislatures and publics”, in R. O. Keohane – J. S. Nye Jr., *Between Centralization and Fragmentation: the Club Model of Multilateral Cooperation and Problems of Democratic legitimacy*, John F. Kennedy School of Government, Harvard University, Faculty Research Working Papers Series, February 2001, 4, available at <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004>.

the National Codex Contact Points⁴², where proposals and comments are made; the latter are received by the Secretariat, which can amend the draft; finally, after a critical review of the Executive Committee, the standard-proposal is sent to the Commission for its adoption. If the accelerated procedure is agreed the standard is approved in this phase⁴³ and published in the Codex, otherwise with the normal procedure, the previous steps are repeated a second time until a *consensus* or, in cases this result is impossible, a simple majority is reached (Rule XI.2, Rules of Procedure⁴⁴). Further, the approval phase does not often guarantee transparency: private parties cannot intervene and either negotiation for *consensus* or majority voting can be held in secret.

The described mechanism seems to include the archetypes of a global-transnational administrative process: as an administrative process, it entails an initiative that through a series of linked acts directed to acquire knowledge, evaluate facts and balance interests, arrives at a final decision, carried out into a standard, applicable to States and ready for the implementation in their territories. The process is global and transnational because the decision-making procedure involves national governments, national or regional authorities (agencies, committees, etc.), private multinational subjects, inter-states organizations and so fourth. In addition, it responds to a multi-layer logic, foreseeing phases that are handled at the national level and phases that are dealt with at the global level, although it finally explicates its effects on the territories of national states.

As it was previously noted, the elaborated standards have a strong impact on national food laws and on consumers. They affect several interests (concerning farmers, peasants, traders, pharmaceuticals industry, consumers, and so on), which are not equally represented at the Codex level⁴⁵, and finally the standard-setting procedure entails a certain degree of discretion and political considerations either at a national, or at a global level. Therefore, as international laws require domestic authorities to respect the rule of law, as well this is demanded, e.g. by CAC's procedural manual itself⁴⁶, to global institutions, in order to justify their legitimacy through administrative principles and norms, entailing a connection with civil society.

A global regulatory regime such as Codex, which has not been created by States and includes private subjects in the standard-setting procedure, cannot be indirectly legitimized only by the

⁴² Joint FAO/WHO, *Enhancing participation in Codex activities*, Rome – Geneva, 2005, 31 and so forth, www.codexalimentarius.net

⁴³ *Ibid.*, 24.

⁴⁴ Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Procedural Manual*, cit., 15.

⁴⁵ "It is widely asserted, often with reason, that global regulatory bodies disregard or give inadequate consideration to a range of important social, economic, cultural environmental and values (...social interests) impacted by their decisions", R.B. Stewart, *Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance*, Discussion Draft, Viterbo II GAL Seminar, June 9 – 10, 2006, 4.

⁴⁶ For instance by "The Uniform Procedure for the elaboration of Codex Standard and Related Texts" which provides States' delegates participation; or by Rule VIII, which regulates participation of observers to the decision-making procedure, see Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Procedural Manual*, cited, 22 and 12 – 13.

activity of Governments' delegations, and as CAC's acts are issued after an administrative procedure, the duty to guarantee certain administrative principles and rules must be fully enforced. For instance, taking as term of comparison the U.S. or the Italian model of administrative law, the rights to be informed and to participate to the procedure should be granted to all the interested subjects. Nevertheless, who are those? Besides sectoral producers or traders, global food standards affect generally all consumers and so all citizens of the member nations: how are they represented? How can they exercise their democratic power at a global institution such as CAC? What rights and what legal instruments do citizens have to control, influence or complain against decisions made at the global level?

The «legal distance» between the governed and the governors and the absence of mechanisms of control and sanctions on behalf of the public favour a lack of accountability of the decision makers and a decrement of citizens' participation and sovereignty. The introduction of mechanisms to bear responsibility in policy-making, and to increase external and general accountability, would also increment fair governance and, more generally, the grade of democracy. At the domestic level public administrations are required to guarantee impartiality: they are accountable to the political representatives (who are accountable to the citizens), they are periodically controlled and reviewed, their decisions can be contested in front of a court, and the process by which they produce administrative acts needs to succumb to the rule of law and to general and procedural norms, which, as it was noted, are either of national or of global origin. On the contrary, global regimes, such as Codex, are not yet able to ensure all the same democratic guarantees, as they lack transparency, adequate devices for the participation of private parties, judicial review bodies and, more generally, accountability of the decision-makers.

4. The problem of administrative and political accountability of decision-makers inside the Codex.

The above described mechanism of standardization presents several problems of lack of democratic guarantees: there are no classical democratic devices, such as elections or parliamentary control, on which to base decision-making; the scientific reports cannot be relied on objective enough to merely legitimize standards by science; the moment of decision is fragmented among different levels and subjects and so is the responsibility of governors; participation and publicity are not fully implemented; the distance from the public to extra-national policymakers is quite wide⁴⁷

⁴⁷ D. Esty, *Toward Good Global Governance: the Role of Administrative Law*, Yale Law School, Draft, 23rd May 2005, 12.

and they are not administratively and/or politically accountable to any *demos*. All these issues decrease citizens' power of control or intervention, diminishing their effective representation.

The discussion about the standards is based on a scientific report. This starting point should act as a way to give legitimacy to the decision-making procedure, limiting the discretion of the administrative body and guaranteeing objectivity. However, either because of the wide uncertainty about new scientific discoveries (such as transgenic organisms), or because the experts could be easily influenced by producers, the scientific assessment does not give enough assurance of being objectively reliable. That is why the standard is only *based* on science, but then governments' delegates, who represent a new and further link in the chain of public representation, elaborate it in accordance with political and economic interests.

What the States lose in delegating decision-making power to a global authority such Codex, they try to regain reserving to themselves the main final decision-making power. As was mentioned before, national officers debate the draft in committees, and governments' delegations approve it at the final step in the Commission. That is why the CAC, despite being created and managed by two international organizations, is indeed an intergovernmental body. The mechanism is highly advanced in the field of public international law, as it entails a horizontal cooperation, which allows any interested subject the possibility to contribute to the decision in several phases of the procedure. At the same time, however, States' participation is not of an equal way (the subsidiary committees, for instance, are not plenary). In addition, States' sovereignty is not exclusive, being shared with all other members and thus subject to the prevalence of most powerful ones. In most cases, the decision will not be completely objective, and rarely absolute unanimous, being either the result of negotiations (*consensus*) or the prevalence of a group of States (majority vote). In the first case, delegates, protected by lack of transparency, are free to make package deals that are "difficult to disaggregate or even sometimes to understand"⁴⁸. In the case of a secret vote⁴⁹, instead, the impossibility of holding the voters responsible is manifest. In both cases, though, even if citizens of one Country can hold accountable their delegates, they have no influence on all the others contributing to the decision. The final agreement about a standard, which is the result of discretion and of political discussion and negotiations, does not entail a general responsibility of the decision-makers. This form of accountability, however, seems far from reach considering the lack of a global

⁴⁸ R. O. Keohane – J. S. Nye Jr., *Between Centralization*, cit., 21.

⁴⁹ Vote can be secret, as it happened at the CAC's Twenty-First Session, in July 1995, where it was approved the standard concerning the maximum levels of residues for five growth promoting hormones and for bovine *Somatropine* in meat, after a secret majority vote which consisted of 33 delegates in favor, 29 opposing and 7 abstaining, Codex Alimentarius Commission, *Report of the 21st Session, List of Standards and Related Texts Adopted by the 21st Session of the Codex Alimentarius Commission*, ALINORM 95/37 (July 8, 1995).

and homogeneous public; following the idea that as far as “there is no *demos*, there can be no democracy”⁵⁰.

As it was mentioned before, one of the main drawbacks of global regulators such as the Codex is absence or scarcity of publicity. The Commission bases its legitimacy essentially on three phases of all the standard-setting procedure: 1. the scientific risk assessment held by the Joint FAO/WHO expert committees; 2. State’s delegates’ contribution to the drafting and to the final decision in the Commission; 3. Private parties (NGOs) participation, as observers. However, in each of the mentioned devices, transparency lacks or is not fully ensured:

1. For what concerns the first one, the selection of the experts is not public, the risk assessment procedure is not entirely transparent and there are no legal mechanisms to avoid or to control possible economic and political pressure on the scientists⁵¹;

2. Regarding participation of national governments, representatives of national authorities contribute to the decision-making either in the subsidiary committees of the Codex Alimentarius Commission (where the standards are materially drafted), or in the Commission itself (where the standards are approved). However, the two moments are not entirely transparent to the public. In particular, the final phase of decision can be held in secret and can produce a standard after a simple majority vote. Therefore, it is open to package deals and it is difficult to trace responsibility of the policymakers.

3. Private parties’ participation results unbalanced, as at Codex meetings representatives of the producers are the majority. Transparency should be required also for participating NGOs, either for what concerns their internal organization, or for their activity inside the Codex. In few words it should be made clear which NGO has submitted which reports and how the decision makers have considered them.

Another controversial aspect of Codex regulation concerns the absence of an independent review of the organization’s activity: decision-makers are not submitted to the control of a higher administrative body, nor a judicial body can review their acts⁵², nor do they bear responsibility in front of the citizens⁵³. The latter, having limited political powers of influence and not having any

⁵⁰ J.H.H. Weiler, *The Constitution of Europe*, Cambridge, Cambridge University Press, 1999, 337; see also R.W. Grant and R.O. Keohane, *Accountability and Abuses of Power in World Politics*, IILJ Working Paper, 2004/7 (Global Administrative Law Series) (www.iilj.org), 12 and so forth.

⁵¹ On the issue of conflict of interests affecting experts’ independence, a meaningful term of comparison with the regional model of the EU can be found in the mechanisms provided by Art 37 of the EC Regulation n. 178 of 2002.

⁵² There is neither an independent authority of control, nor an adjudicative one for the individuals (they can only appeal to national authorities or solicit their governments to act in front of the WTO DSB, but in these cases, if States’ food-safety measures are too stringent they can be contested in front of the DSB, if they are too permissive there is no authority with such a function). See S. A. Shapiro, *International Trade Agreements, Regulatory Protection and Public Accountability*, in *Administrative Law Review*, 2002, 706 and so forth.

⁵³ The mechanism of checks and balances, which is crucial in domestic legal orders, is, at the global level, shifted in favor of the executive branch, which can act without suffering effective forms of administrative or political control over its activities.

direct remedy in case of a dysfunction of the authority, are also not made informed about the arguments, the reasoning and the criteria of decisions, so that mere transparency of formal rules is insufficient to entail a full publicity of the policy-making process.

States do not lose completely their regulatory and administrative powers, but in several sectors of law, such as food, they shift them to a global level. Therefore, they do not lose their powers, but they share them among each other, through horizontal and multinational institutions and activities⁵⁴. Is this “global administration (...) subject to those special rules – the right to a hearing, the duty to give reasons, judicial review – that we call administrative law?”⁵⁵ For what concerns food safety law the answer is partially negative: despite the complex and articulated procedure established for the standard setting, a lack of accountability and transparency and an unbalanced system of private parties’ participation can still be found.

Administrative procedural requirements are demanded of States by international treaties (as interpreted and applied by international bodies such as the DSB of the WTO), in order to justify and harmonize national measures with a global effect and to harmonize the decision-making procedures. At the same time, in parallel with this top-down enforcement of common rules, a bottom-up transfer of domestic administrative and constitutional principles to global institutions⁵⁶ is developing, in order to increase accountability and democratic decisions inside global regimes⁵⁷. Although still *in fieri* one of these principles is certainly transparency.

5. Transparency in global governance as a tool for more accountability.

Art 41 of the European Charter of Fundamental Rights, signed in Nice in December 2000 (2000/c 364/01), although not yet being binding, establishes the right to a good administration, which implies the right to be heard and to access to the documents. Section 2 of the Regulation n. 178 of 2002 of the European Community Parliament and Council, which creates the European Food Safety Agency, foresees principles of transparency in “the preparation, evaluation and revision of food law”, and articulates them in “public consultation” and “public information”⁵⁸. Paragraph n.

⁵⁴ “One aspect of globalization is the shift of the venue of policy-making from the national to the regional and the international arenas”, E. Benvenisti, *Welfare and Democracy on a Global Level: The WTO as a case study*, 04 November 2002, 1, file:///c:/puah/benvenisti_globalizationdemocracy.htm.

⁵⁵ S. Cassese, *A global due process of law?*, draft, 15 May 2006.

⁵⁶ It is to mention, however, that also a horizontal spread of general international procedural principles is developing, so that Treaties’ general provisions should be applied either to national, or to global authorities. On the issue, see B. Dalle, *The Global Aspirations of the Aarhus Convention and the Case of the World Bank*, Draft, Viterbo II GAL Seminar, June 9 – 10, 2006, 2 and so forth.

⁵⁷ R. B. Stewart, U.S. *U.S. Administrative Law: A Resource for Global Administrative Law?*, New York University, Discussion Draft, January 17 2004, 9 and so forth.

⁵⁸ *Section 2, Principles Of Transparency: Article 9, Public consultation*. “There shall be open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow it”. *Article 10, Public information*. “Without prejudice to the

552, subchapter II of the Federal Administrative Procedure Act of the United States of America, as amended by the Freedom of Information Act, requires that each agency guarantees and make available to the public, information and consultation. The mentioned above Art 7 of the SPS Agreement requires transparency and notification to the other parties for each sanitary or phytosanitary measure adopted by member Countries. The Aarhus Convention⁵⁹, signed in 1998 by 55 countries belonging to the European Area, established a very open system of access to environmental information. This allows everyone to ask, give and receive information about public authorities' activities in environmental matters, without the need to demonstrate a particular legitimacy, and with the aim "to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment" (Preamble, Aarhus Convention)⁶⁰.

The principle of transparency and openness of the administrative proceedings is in most national⁶¹ or regional legal systems a general principle of public law (publicity is the rule and secrecy is the exception⁶²), which is connected to the fundamental right of information⁶³. In addition, it is also developing in international treaties. Publicity implies transparency of the activity, citizen's right to be informed and administration's parallel duty to inform, citizen's right to access to public documents and to participate to the proceeding.

Transparency in the administrative process of law has three main purposes: a) favouring, through public «knowledge-control», impartiality and proportionality in the authorities' choice among more stakes; b) informing the citizens about activities concerning their interests, either during the process or at the end of it (access to the documents and duty to provide a reasoned decision); c) allowing private subjects to participate to administrative proceedings, also avoiding any suspect about their lobbying activity.

applicable provisions of Community and national law on access to documents, where there are reasonable grounds to suspect that a food or feed may present risk for human or animal health, then, depending on the nature, seriousness and extent of that risk, public authorities shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or feed, or type of food or feed, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk".

⁵⁹“Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters”, Aarhus, 25th of June, 1998.

⁶⁰ The norms of the Agreement are directed to national authorities, which can be «forced» to comply through an indirect procedure that involves the Meeting of the Parties and the Compliance committee, Art 15, Aarhus Convention; see also UN Economic and Social Council, Economic Commission for Europe, *Report of the first meeting of the Parties to the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, Decision 1/7, Review of Compliance*, Lucca, Italy, 21 – 23 October 2002, ECE/MP.PP/2/Add.8, 2 April 2004.

⁶¹ It is to say that transparency is not yet a universally recognized principle of public administration in the totality of western legal systems. For instance in German administrative law the principle of transparency is not explicitly stated in legal texts, neither is considered as a fundamental principle, although the issue is nowadays under debate, for the introduction of the principle in the positive law.

⁶² A. Sandulli, *Il procedimento*, cit., 1083.

⁶³ Art 11, European Convention human rights, Rome, 4th November 1950, amended by Protocol n. 11, Strasbourg 11th May 1994, entered into force the 1st of November 1998; in addition, the right to information on behalf of the consumers is guaranteed by the Treaty establishing the European Community through Art 153.

The Codex Alimentarius Commission's activity has proven a lack of political (vertical) accountability and a defective implementation of mechanisms of procedural participation and review. Ensuring more transparency (through all its different devices) in such an institution would have the effect of favouring public understanding of the policy results, of establishing a direct link between decision-makers and decision-recipients in "a context where relationship of trust are not deeply established"⁶⁴ and, more generally, it would increase horizontal accountability of policymakers.

It must be noted that global food law is increasingly based on consumers' information, as it is showed by the frequent use of label requirements about nutritional facts, traceability, GMOs presence and so forth. In such a sector the maximum transparency and openness of the procedure and full information of the consumers would both follow the same rationale. An acknowledged and informed public would make delegation legitimate⁶⁵: as far as citizens know who decided and how, they can trace responsibility and, when they are able to, reward or punish the authors.

The simple introduction, or extension, of the principle of transparency, however, if not structured and finalized in order to respect substantial and concrete differences of the recipients of the information, could have the undesired effect to decrease equality: "lacking any direct egalitarian political process on the international level, transparency will regularly have the effect of strengthening organized interests, be they represented by NGOs or by MNCs"⁶⁶. Nonetheless, the situation of the Codex is rather peculiar: here openness and information are already on behalf of certain categories of subjects (e.g. BINGOs), so that even a general and not organized increment of transparency in the standard-setting procedure would have the effect to increase equality, balancing the access of information among most of the interested subjects.

It is to mention also the trade-off between transparency and efficiency. Transparency mechanisms have often the effects to decrease the speed and the effectiveness of the administrative proceedings, and this might be the case also regarding Codex' procedure. However, three elements must be taken into account: 1. At the extra-national level there is no urgency or need for common food safety standards, as it is more convenient, for the recipients, if the competence stays at national level without a common standard, when there are strong differences among Countries; 2. The standard-setting procedure is already very long and ineffective, as now there are too many (inefficient) procedural mechanisms (which might be improved, but not increased); 3. Transparency

⁶⁴ A. Chayes and A. H. Chayes, *The New Sovereignty : Compliance with International Regulatory Agreements*, Harvard University Press paperback edition, 1998, 62.

⁶⁵ "Seeing the decision-maker in action and observing who has influenced the decision process is essential to a sense of decision-making fairness, rationality, as well as public understanding of the policy results", D. Esty, *Toward Good Global Governance*, cit., 34.

⁶⁶ C. Möllers, *Patterns of Legitimacy in Global Administrative Law: Trade-offs between due process and democratic accountability*, Viterbo II GAL Seminar, June 9 – 10, 2006, 2.

in the decision phase might help to speed-up the decision, reducing the time of negotiation in favour of the voting⁶⁷, urging states' delegates to take an «in or out» decision.

Another drawback of transparency's increment relies on the implementation of the domestic mechanism. The simple legal transplant of procedural rules applied at national level into global regimes is not always possible or auspicious. However, transparency is already required by the Procedural Manual of the Codex Alimentarius Commission, stating, "Risk management should ensure transparency and consistency in the decision-making process in all cases"⁶⁸. In addition, as it was previously noted, it is required by several international provisions (in particular Art 7 of the SPS Agreement), to domestic authorities issuing food safety regulations, analogous to Codex' standards. Therefore, the use of national mechanisms of transparency would fit into the activity of implementation of already existing international law.

Finally, transparency in itself cannot provide accountability and it would be incorrect to consider the former as a synonym of the latter⁶⁹: transparency is only one of the procedural rules that are required at the global level to reach the so-called "Habermasian (procedural) legitimacy"⁷⁰, which indeed implies also deliberation, participation and due process. Even if transparency improves the so-called "public reputational" and "market accountability"⁷¹, it still needs to be accompanied by mechanisms of review and sanction to ensure full accountability. This "implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met"⁷². In addition, principles which entails the due process of law (participation, judicial review, reasoned decision, and so forth) are all still "at a rudimentary stage of development"⁷³ in the Codex Alimentarius Commission, whose accountability cannot be likened to the one guaranteed at the national level. Nonetheless, as it was previously noted, mechanisms of transparency would not act in isolation from the other procedural devices. On the contrary, transparency would apply mainly to these mechanisms, increasing the effectiveness and impartiality of the process.

⁶⁷ Although it is to add that simple majority vote would not give guarantees of democracy, therefore also the voting system should be changed, into a qualified majority one.

⁶⁸ Art. 34, Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius, *Procedural Manual*, cited, 105.

⁶⁹ "Transparency is often used as a synonym of accountability, but real accountability requires more than monitoring. In order to hold a person or organization accountable it is necessary not only to know what they are doing but also to have some way to make him doing something else", T. N. Hale and A. M. Slaughter, *Transparency: possibilities and limitations*, Fletcher Forum of World Affairs, winter 2006, 1.

⁷⁰ D. Esty, *Toward Good Global Governance*, cited, 27.

⁷¹ In "market accountability" consumers can "exercise their influence through the market", while "the category of public reputational accountability is meant to apply to situations in which reputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms as well as in conjunction with them", in R. W. Grant and R. O. Keohane, *Accountability*, cited, 17 and 18.

⁷² *Ibid.*, 3.

⁷³ S. Cassese, *A global due process?*, cit., 61.

For what regards the CAC, political accountability of decision-makers seems far from reach, due to the lack of a global *demos* and of global parliamentary mechanisms; judicial review is not yet conceived by the Procedural Manual; participation, although guaranteed in various phases of the process (e.g. double-consultation of State delegates and NGOs participation), is still unbalanced and unequal. Therefore, increasing transparency mechanisms inside the Codex appears as the first necessary, but not sufficient, step for the implementation of the due process of law into a global institution. It is the *condicio sine qua non* to ensure the functioning of all the other procedural mechanisms of legitimacy, and of an alternative form of accountability (to the delegation model), based on administrative principles and procedural norms.

In the end, transparency cannot be limited to right to view the administrative documents, but needs to be extended to a general publicity of the organization, implying mechanism of access, information, and participation guaranteed at all the levels of the decision. This could have some costs in terms of efficiency or feasibility, or favour secret agreements; however, it would open the procedure, making it visible and acknowledgeable to its recipients, fostering more impartial, and also effective, decisions.

6. Conclusive remarks.

Food law is no more a matter belonging exclusively to States. Indeed, food safety regulations, both domestic and international, have a global effect. That is why, either at national or at global level, they need to fulfil certain procedural requirements, in order to guarantee they have been drafted and approved according to a democratic, impartial and fair procedure. Through administrative principles, the two levels of governance communicate with each other, requiring and reciprocally enforcing fair proceedings and public accountability.

The Codex Alimentarius Commission is a global regulatory regime, which produces international food standards that have a strong impact on WTO members' food policies. For the crucial role these standards have in the development of national and global food law; and if their standard-setting procedure is compared to the models provided exclusively at the domestic level (which relied on a Constitution and on a closed legal order, based on division of powers), they do not ensure enough guarantees to be issued on a full democratic and impartial process of law: decision-makers are not held accountable to any public, there is no judicial review device, transparency is scarce and participation of stakeholders is not sufficiently effective and reliable. In order to face these drawbacks, administrative principles and procedural mechanisms are taken from domestic legal orders, to create forms of deliberative and procedural democracy inside the Codex.

Among those, increasing transparency and openness of the activity of CAC's bodies would be the first step to ensure more accountability, in accordance with a democratic and fairer transformation of the legitimacy mechanisms of the organization.

In (domestic and international) food law, the issue of traceability has gained, in recent years, great attention as a device to ensure food safety and quality to the consumers. Traceability can be defined as “the ability to trace and follow a food, feed, food-producing animal or substance intended to be, or expected to be incorporated into a food or feed, through all stages of production, processing and distribution”⁷⁴. The same rationale should be followed in relation to the *law* concerning food: global consumers/citizens need to have the possibility to trace and monitor all the stages (being at national, extra-national or at a mixed level) of the production and development of such norms, as they affect so deeply the lives of all of them.

⁷⁴ Art 3, Regulation n. 178 of 2002 of the European Community Parliament and Council.

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