

## EU “PROCEDURAL” SUPRANATIONALISM: ON MODELS FOR GLOBAL ADMINISTRATIVE LAW

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### Lost in translation

On the two sides of the Atlantic, a common research is complicated by problems of translation. Common is the effort to detect regulatory paradigms upon which to develop a global administrative law, conceived as a response to accountability gaps in global governance. Different is the understanding of a set of interrelated concepts, recurrent in the debate: «public interest», «administrative discretion» and «administrative accountability».

«Public interest», in continental Europe, has been traditionally understood as a benign concept. It is conceived as a synthesis (not a mere addition) of different individual and collective interests, potentially conflicting. It is, therefore, a unifying concept, that helps reshaping particularistic needs in the vest of a common goal, and therefore claims a superior morality. This morality projects its beneficial shadow on public powers: to the legislature, the task to define public interests and to establish a hierarchy among them (legislative discretion); to the administration, the duty to promote those public interests and to balance them in concrete cases (administrative discretion); to a vigilant but sympathetic *special* judge, the task to control and even guide the administration. The legislative empowerment of the executive branch is generally understood both as a fundamental guiding principle for administrative discretion (input legitimacy) and as a satisfactory – though not exclusive – parameter for judicial review (legal accountability).

On the opposite side of the Atlantic, this seemingly ingenuous perspective meets a considerable degree of skepticism. The notion of public interest, after being temporarily reinvigorated during the New Deal era, has been nullified by rational choice disciples, that successfully pierced the veil and dismantled «public interest» as a mere fiction. For them, and for most of the US public and academic opinion, «there really is no public interest but only the special interest of whatever actor is projecting that interest onto the public».<sup>1</sup> Almost inevitably, the input legitimacy of the “administrative State” is extremely weak. Similarly to Europe, the US Congress enacts statutes by which detects the common goals to achieve and agencies are, by definition, entrusted with the duty to uphold those public interests. Still, due to the empty notion of public interest, administrative discretion amounts to a power inadequately constrained by its legislative source. Common is the complaint that administrators have a lot of discretion and that agencies are themselves lawmakers. In this view, «*controls on administrative discretion* are the best and most natural solution».<sup>2</sup> Courts aggressively constrain administrative discretion in two ways: by opening the administrative decision-making process to a wide

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<sup>1</sup> M. Shapiro, “Deliberative,” “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?, IILJ Working Paper 2004/5, at 4.

<sup>2</sup> Breyer, Stewart, Sunstein & Spitzer, ADMINISTRATIVE LAW AND REGULATORY POLICY (2006), at 14 (emphasis in the original).

range of private interests and/or by adopting a “hard look” approach. In the first case, courts favor a case by case unbundling of public interest, implicitly acknowledging it as a mere fiction. In the second, judges comply with the American dramatic conception of administrative accountability.

This problem of translation heavily affects the ongoing debate on global administrative law, leading to misunderstandings on the potential of «the other» model. Due to the radical distrust for administrative agencies, American scholars tend to favor models that put emphasis on accountability mechanisms (such as judicial review) or enhancing responsiveness mechanisms (such as non-decisional participation, transparency, the giving of reasons).<sup>3</sup> However, every reinforcement of accountability in one direction almost inevitably entails a loss in other directions, most notably policy efficacy and coherence.<sup>4</sup> The case of US regulatory process, with its problems of politicization and ossification, provides some evidence in that respect. Responsiveness of regulators through APA measures comes at the expense of cumbersome and time-consuming rulemaking procedures. The effect, particularly in a European perspective, is paradoxical: in a rapid-changing environment, regulators are slow and over-constrained, while private operators go their way fast and loose. And still, just as Europeans should not superficially judge the US regulatory system as ineffective and inadequate for the global dimension, similarly Americans should not reach the hasty conclusion that the EU regulatory system owes its efficacy to an essentially «deliberative independent technocracy».

The core claim of this paper is, in fact, that the EU regulatory system provides, in a GAL perspective, at least two lessons. First, it strikes a complex balance between policy responsiveness and efficacy, that is based on an interesting paradox. On the one hand, responsiveness is strengthened by coupling a supranational regulator (the Commission) with a transgovernmental administration (a dense network of 1500 committees).<sup>5</sup> By this peculiar mix of supranationalism and transgovernmentalism, accountability is enhanced in both directions: bottom-up, because committees composed of national officials are

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<sup>3</sup> I follow the distinction between accountability and responsive-enhancing mechanisms advanced in R.B. Stewart, *Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance*, Discussion Draft, Hauser Colloquium on Globalization and its Discontents, Sept. 20, 2006, spec. part. II.

<sup>4</sup> I refer to the Gunther Teubner’s ‘trilemma’ of institutional competing demands for responsiveness, efficacy and coherence: G. Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in *JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST, AND SOCIAL WELFARE LAW* (Gunther Teubner ed., 1987). For an updated discussion of this trilemma, see J. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, *Issues in Legal Scholarship: The Reformation of American Administrative Law* (2005) Berkeley Electronic Press No. 4, 13-15.

<sup>5</sup> A clarification of terminology is in order. By «supranational» I refer to bodies or institutions independent from national governments, such as the international secretariats and the European Commission, whose members – according to Article 213 EC Treaty – act independently, in the exclusive interest of the Community. Though often used interchangeably, strictly speaking, the terms “transgovernmental” and “transnational”, in fact point to two different concepts: “Transnational interactions necessarily involve nongovernmental actors,” while transgovernmental relations are “interactions between governmental subunits across state boundaries”: J.S. Nye and R.O. Keohane, *Transnational Relations and World Politics: A Conclusion*, 25 *INTERNATIONAL ORGANIZATION* (1971) 733; see also R.O. Keohane and J.S. Nye, *Transgovernmental Relations and International Organizations*, 27 *World Politics* (1974) 43.

established to control the Commission on behalf of the Member States; but also top-down, because the Commission itself, together with the Council and the Parliament, controls the committees, and thereby national regulators. On the other hand, that same mix has also an accountability-weakening impact: by «colluding» with national officials, the Commission gains more room for bureaucratic drift, in so far as the Council delegates its power-checking on regulation to committees; but also national officials, when called to respond to their domestic hierarchies for the way they have (or have not) uphold their mandate, can claim – at least, in certain circumstances – that the Commission has decided without taking into account their position.

The second lesson can be summarized in the label “procedural supranationalism”. The way the Commission and the national regulators interact at the European level is structured through a peculiar set of procedures, different in the various stages decision making. These procedures are, however, characterized by a common feature: they reconcile the need for preserving national interests with the need for insuring the prevalence of the common interests. This “procedural supranationalism” represents a possible way to promote and constrain regulatory power beyond the State. “Procedural supranationalism”, therefore, has the potential to give shape to administrative discretion in the global arena.

The paper is divided into two parts. In the first, I explain why the discourse of “deliberation” is not helpful for a correct understanding of the EU regulatory system; consequently, I try to re-conceptualize the EU model by using administrative categories. In the second part, I assess the potential of the EU model for global regulatory governance. I put forward a general ‘operative’ proposal, based on a mix of US APA-like model and EU-like procedural supranationalism: this mix, I argue, would complement the strengths of the two models and partially compensate their respective weaknesses. The underline realistic (not fatalistic) assumption is that administrative law should be understood at the global level just as we conceive it inside the State orders, i.e., as a perpetually unsatisfactory project of institutional design.

## **I. The EU model**

### **I.1. Preliminary step: on deliberative discourse and cognitive dissonances**

In the American literature on global governance and global administrative law, the EU regulatory system is almost invariantly associated with the discourse of “deliberation” most famously depicted by Joerges and Neyer’s “deliberative supranationalism.”<sup>6</sup> This association represents a «false start», for three different reasons.

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<sup>6</sup> Cfr. C. Joerges e J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology*, 3 EUROPEAN LAW JOURNAL (1997) 273, and, in a political perspective, *Transforming Strategic Interactions into Deliberative Problem-Solving: European Comitology in the Foodstuff Sector*, 4 JOURNAL OF EUROPEAN PUBLIC POLICY (1997) 609. See also, among the numerous restatement and rejoined, C. Joerges, “*Deliberative Supranationalism*” – *Two Defences*, 8 EUROPEAN LAW JOURNAL (2002) 146, e Id., “*Good Governance*” in the European Internal Market – *Two Competing Legal Conceptualisations of European Integration and their Synthesis*, in A. von Bogdandy,

The first is that the deliberative approach should be understood as a *normative*, rather than descriptive, project. As Joerges himself argues in a recent restatement, the label “deliberative supranationalism” is meant to point to something different from the reality he discovered. The reality is that comitology enhances problem-solving capacity and thereby softens the tension between unity and diversity in the EU. The consequent normative claim – to which “deliberative supranationalism” is specifically devoted – is «a quest for a ‘constitutionalisation’ of comitology, *i.e.*, for the improvement of a legal framework, which would stabilize the deliberative potential of comitology».<sup>7</sup> Far from asserting the democratic nature of comitology decision-making, the claim is that this problem-solving capacity needs to be preserved by establishing new legal guarantees. ‘Deliberative’, thus, is not so much the actual quality of the European regulatory model, but, rather, one of the possible ways to strengthen comitology constitutional pedigree. In spite of this normative claim, “deliberative supranationalism” has been (and still is) often understood as a descriptive or explanatory model. In part, this is due to the objective ambiguity of the terminology chosen. The phenomenon that is enthusiastically – and perhaps improperly – described as “deliberative” amounts to nothing more than the problem-solving orientation of most European committees. In part, the confusion is also due to subjective cognitive dissonances. Both the believers and the skeptics tend to superimpose the deliberative ideal to reality, with simplified but radicalizing outcomes: the former entrench themselves behind the reassuring faith in a European spontaneous mix of technocracy and democracy; the latter, by contrast, contend that «the whole paraphernalia of “deliberation” is employed as a cover for technocratic government».<sup>8</sup> The second reason of «false start» deals exactly with this unintended but frequent misunderstanding: if we use the deliberative approach as a conceptual descriptive tool, we should bear in mind that it leads not just to an over-simplification of the actual European regulatory model, but also to its mystification. The deliberative approach, in fact, is based on a very thin empirical ground. It draws its conclusions from a study (not anymore updated) of a single highly technical sector (foodstuff safety policy), where the business of the European administration is risk regulation. Here scientific committees are particularly powerful actors: once they assess the existence of a risk (and they do it, of course, by arguing on empirical evidence, rather than by bargaining, since committee members are, in this case, formally independent from national government), their assessment inevitably erodes the margin of discretion of transgovernmental committees, where national representatives seat. It is hard to imagine national officials denying the suspension of a food additive, after a scientific committee has held that, according to the available scientific evidence, it represent a threat to human health. As a consequence, it is not surprising that Joerges and Neyer discovered in this specific field a non-hierarchical system of governance, dependent upon persuasion, argument and discursive processes rather than on command, control and/or strategic action.

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P.C. Mavroidis e Y. Mény (eds.), *European Integration and International Coordination* (Kluwer, 2002), 219, at 232.

<sup>7</sup> C. Joerges, ‘*Deliberative Political Processes*’ revisited: *What have we learnt about the legitimacy of supranational decision-making*, forthcoming in *JOURNAL OF COMMON MARKET STUDIES* (2006), at 4 on file with the author.

<sup>8</sup> Shapiro, *supra* note 1, at 11.

And yet, as the following analysis will show, the deliberative approach fails short to acknowledge a fundamental functional differentiation among European transgovernmental bodies. There is no ground for asserting that, in the EU regulatory framework, arguing tends to prevail on bargaining and negotiation, or for observing a general «*shift from “power to reason”*», with the consequence that «*the motives of decision-makers become irrelevant*».<sup>9</sup>

Finally – and this is the third point – the discourse of “deliberation” could be understood in a more reasonable “modest” version, i.e., as a way to conceptualize the European regulatory orientation towards problem-solving. However, in this version, it is not helpful at all for the global administrative law agenda, since it doesn’t capture any peculiarity of the EU governance. Networks of transnational bodies, composed of national officials and experts, pervade also the global level; and there too, deliberative or problem-solving modes of decision-making often take place. We can go even further, and remind that transgovernmental regulatory networks are not a creation of European Community: when the first comitology committees were established to control the Commission regulatory power at the beginning of the 1960s, many other international organization already had created similar institutional arrangements. Problem solving through transgovernmental bodies, thus, is not a distinctive feature of the EU, but rather an imported product, a well-established and probably irreversible feature of the world order.

## **I.2. The “real” EU model**

The European Union is neither a State, nor a federation. It is, rather, a mixed or composite legal system, in which States are intended to be the major “building blocks” and the main source of legitimacy and accountability.<sup>10</sup> This helps explaining why Member States systematically enjoy (decisional) participation in all the stages the European decision-making process. Through transgovernmental bodies, national administrations are intimately involved all the different stages of the European decision-making process.

To start with, particularly significant is the intervention of transgovernmental bodies in initiative phase. According to the EC Treaty, the Commission enjoys, in this stage, an exclusive right to propose legislation. This supranational monopoly let hardly imagine how the Commission actually carries out its task. About thousand *committees of government experts*<sup>11</sup> are established (most of them by the Commission itself) to assist

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<sup>9</sup> C. Joerges e J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology*, cit., 281 s.

<sup>10</sup> S. Cassese, *La costituzione europea: elogio della precarietà*, and Id., *Che tipo di potere pubblico è l’Unione europea?*, both in Id., *LO SPAZIO GIURIDICO GLOBALE* (Laterza, 2003), respectively at 29 and 55; S. Cassese, *L’Unione europea come organizzazione pubblica composita*, in Id., *LA CRISI DELLO STATO* (Laterza, 2002) 67. See also G. della Cananea, *L’UNIONE EUROPEA. UN ORDINAMENTO COMPOSITO* (Laterza, 2003).

<sup>11</sup> Cfr. the internal Commission document, SEC(2002)868/1 of 22 July 2002, p. 2 s., which reveals that in 2002, there were 1109 active committees and groups of experts, not counting the over one hundred transnational groups of experts, to be discussed in the following section. The complete list of the committees and groups of experts is contained in the Commission document, SEC(2002) 868/2, of 22 July 2002.

the Commission's Directorate Generals in the drafting of legislative proposals. These bodies are usually chaired by the Commission (less frequently, by the Council) and are composed of expert sent to Brussels by the relevant national administrative units.<sup>12</sup> The role of these committees is three-fold. It is technical, in so far as the best national practices are discussed, and eventually combined and adjusted to the supranational dimension. It is also "pre-political", to the extent that, by consulting national governments insiders on possible initiative, the Commission upholds only those initiatives that are likely to be supported by Members States, i.e., by the Council. Finally, there is the need to avoid a conflict between Community law and domestic norms, constitutional principles and/or implementing procedures: the involvement of national administrations in the initiative phase enables them to raise these incompatibility concerns and, thus, to resolve from the outset problems that could become unsolvable later on in the implementation phase and consequently lead to non-compliance. Therefore, far from being just a "deliberative" exercise, consultation of government experts is multi-purpose. Not only it enhances the technical consistency of the European legislation. It also smoothes the European decision-making, by realizing a "pre-political" consensus. Moreover, it significantly reduces the risk of non-compliance by building a «counterpunctual law»<sup>13</sup>, i.e., a *ius commune* compatible with national *iura particularia*.

In the legislative phase, a second group of transgovernmental bodies intervenes, namely *Council preparatory committees* or *groupes de travail*. They are over hundred-fifty.<sup>14</sup> Under the coordination of the Committee of Permanent Representatives (COREPER), these auxiliary bodies prepare Council decisions. Their meetings are chaired by the Presidency of the Council (an official of the Member State currently serving as president of the Council), and are attended by both representative of the Commission and national delegations of civil servants, whose duty is to protect domestic interests and, specifically, to represent the Member States' position in relation to the Commission's proposal. Nothing, here, resembles the popular idea of arguing and deliberation, too often generically associated with the transgovernmental phenomenon. Rather, bargaining and negotiation among national interests take place. As a rule, national official receive instructions from the capitals, and give account to their superior of the positions expressed in committee meetings. Sometimes, divergent domestic positions lead to harsh clashes, followed by withdrawal of the proposal. More often, joint efforts of the Commission and the Council Presidency gradually near Member States positions and drive to consensus. In such case, the agreement achieved within the committee is double-

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<sup>12</sup> In this eterogenous category, fit also "high-level" government expert committees", whose specific job is policy formation, and other committees (the European Regulators Groups) that bring together the heads of national independent regulatory agencies.

<sup>13</sup> The expression is borrowed by M. Poiars Maduro, *Europe and the Constitution: What if this is As Good As It Gets?*, in J.H.H. Weiler e M. Wind (eds.), *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* (Cambridge University Press, 2003), 98.

<sup>14</sup> Council of the European Union, *List of Council preparatory bodies*, doc. n. 8605/06, Brussels, 24 April 2006, according to which, in April 2006, there were 161 active committees (the total rises if one considers the different forms in which many Council committees actually meet).

checked by the Coreper and merely rubber-stamped by the ministers, in their (monthly or less) Council meetings.<sup>15</sup>

Finally, in the descending (implementing or regulatory) phase, Member States participation is guaranteed by the presence of two hundred-fifty *comitology committees*.<sup>16</sup> This is the more refined and yet hotly debated version of transgovernmental power within the EU. It is worth, therefore, focusing the attention on this group of European committees, in order to detect the two most peculiar features of the EU model: “vertical transgovernmentalism”, as a *structural* way to combine “de-nationalization” and “re-nationalization”; and “procedural supranationalism”, as a *procedural* way to protect national interests and, at the same time, enhance the common interest.

#### a) “Vertical transgovernmentalism”

As this rough picture underlines, the transgovernmental paradigm has reached a very high level of development in the European system.<sup>17</sup> States participation to the EU decision making, in fact, is not only limited to rare meetings of the Council of the European Union or the European Council. It is also guaranteed – in a more systematic and pervasive way – by means of the abovementioned committee. Transgovernmentalism, in Europe, is essentially designed to “re-nationalize” those tasks that have been “de-nationalized” by delegation to the supranational institution, the Commission. One anecdote, regarding the birth of comitology, adequately illustrates this point.

On 21 December 1961, after more than two years of discussion, comitology was invented as a way out of a problem of regulatory delegation. The Council of ministers, entrusted by the EC Treaty with the power to take all the European decisions, was not able to deal with the all the measures required for the management of the emerging common agricultural policy. The decision to be taken, in fact, were too numerous and technical. Therefore, the Council, as European legislative authority, had to decide to whom and how to delegate its decision making power.

On this issue, two opposing view were confronting. The Commission had proposed to establish a network of technical agencies (so-called European Offices), to assume itself the role of coordinator and decision-maker, and to set up auxiliary committees composed

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<sup>15</sup> According to cautious observers’ evaluations, agreement on the content of legislative measures is reached in about 70-75% of the proposals before the Council committees and in another 10-15% of cases within the COREPER. In these cases, the Council limits itself to ratifying such agreements by means of the procedure known as “point A”. Therefore, over three-fourths of Council measures are consensually determined within these preparatory bodies by the Commission and national officials that participate in them.

<sup>16</sup> European Commission, *Report from the Commission on the working of committees in 2005*, 8 September 2006, COM(2006)446 final, at 10, tab. I. The number of comitology committees increased from 245 on 31 December 2004 to 250 on 31 December 2005.

<sup>17</sup> See J. Trondal, *An Institutional Perspective on EU Committee Decision Making*, Ces, WP n. 6, 2003, p. 21 ([www.hia.no/oksam/ces/](http://www.hia.no/oksam/ces/)), also in B. Reinalda and B. Verbeek (eds.), *DECISION MAKING WITHIN INTERNATIONAL ORGANIZATIONS* (Routledge, 2004), 154: “few international organizations have institutionalized a committee system that integrates external expertise and national civil servants to the same extent as the EU. Accordingly, there is greater interaction between community institutions and domestic administrations in the EU than in traditional intergovernmental organizations”.

of both governmental and non-governmental interests with a merely consultative role.<sup>18</sup> In Commission's view, this arrangement was justified by Article 155 (now 211) of the EEC Treaty, which stated that «in order to ensure the proper functioning and development of the common market, the Commission shall [...] exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter». The French government, by contrast, in its counter-proposal, had envisaged the setting up of *comités de gestion* or “management committees”. These bodies, composed of representatives of both national administrations and the Commission, should have been entrusted with an autonomous decisional power. Not the Commission then, but autonomous committees, eventually assisted by their own secretariat, should have issued detailed management measures, while the bulk of the regulatory power was intended to remain with the Council. While the Commission's proposal met the firm resistance of some Member States, the French proposal run against the institutional boundaries set up by the European Court of Justice<sup>19</sup>.

A compromise based on the principle of power sharing was finally reached: neither an exclusive regulatory power to the supranational institution (Commission's proposal), nor an exclusive regulatory power to autonomous transgovernmental bodies (French proposal), but, rather, a joint exercise of the same. In particular, committees composed of government representatives were called to analyze the content of the measures proposed by the Commission and give their opinion. In case of committee's unfavorable opinion (adopted by qualified majority voting), the Council could replace the measure of the Commission with its own.<sup>20</sup> In the EEC, thus, transgovernmental bodies have born with a genetic mission: to check supranational regulatory power, by sharing it. On the basis of this agreement, in the European Community, the delegation of regulatory powers to the Commission has been constantly coupled with the establishment of comitology committees.

This development could be seen as a natural consequence of the original (and still prevailing) principle of “indirect administration”. According to this principle, the task of implementing Community law is left to national administrations. Delegation of regulatory or implementing powers to the Commission determines a supranational intrusion into a national sphere and, consequently, it requires, first, an authorization of the Council (where State executives are represented), and, second, the adoption of a compensatory mechanism, namely comitology. By delegating supranationally, governments do not ostracize their administrations from the implementation or regulatory

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<sup>18</sup> In alternative, the Commission had also proposed to set up not only consultative committees, composed of non-government representatives, but also “directors' committees”, composed of national officials. The consultation of the latter was intended to be mandatory, in order to grant national government with greater opportunity to influence decision making.

<sup>19</sup> With the *Meroni* judgement (Case 9/56, *Meroni & Co. S.p.A. v High Authority of the ECSC* [1957-1958] ECR 133), the ECJ had severely limited the possibility to delegate power to organs other than the Community Institutions.

<sup>20</sup> On the basis of this arrangement, the first comitology committee has been provided for by Articles 25 and 26 of Council regulation 19/62, adopted on 4 Aprile 1962, concerning the progressive establishment of a common organization of the market in cereals. The most detailed account of the birth of comitology is in C.F. Bergström, *COMITOLOGY. DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM* 43-57 (Oxford Univ. Press, 2005).

sphere. Rather, following the transgovernmental design, they establish a system of structural power sharing, where national and supranational administrations are merged in “vertical government networks.”

As a result, the European institutional framework is nowadays characterized by the most impressive organizational combination of both the basic types of non-national executive power: the supranational and the transgovernmental. This fusion has also a procedural dimension, to which we turn in the following.

## **b) “Procedural supranationalism”**

«An assessment of the relevance of a public interest in relation to other specific interests», or, more analytically, *a comparative assessment of different secondary interests, both public and private, in relation to a primary interest, entrusted to the administration that has the power to decide*: this is the notion of administrative discretion elaborated by Massimo Severo Giannini in 1939, when he was a twenty-four years old student, destined to become the most prominent Italian administrative scholar in the XX century.<sup>21</sup> My attempt, here, is to “supranationalize” Giannini’s notion of administrative discretion, by adapting it to the interplay between the European Commission and the Member States’ administrations in the European decision-making process. The focus is restricted to comitology committee’s procedures, since it is through these procedures that the EU implementing and regulatory powers are shaped.

Committees’ intervention in the descending phase of the EU decision-making follows the so-called comitology decision.<sup>22</sup> Four different kinds of procedure are thereby established: advisory procedure, management procedure, regulatory procedure, and regulatory procedure with scrutiny. Each of them imposes on powers delegated to the Commission a different degree of constraint, varying according to committee’s rule of voting and to the effects of its opinion.<sup>23</sup> The procedure is chosen by the legislative

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<sup>21</sup> For the first definition quoted above, see M.S. Giannini, *IL POTERE DISCREZIONALE DELLA PUBBLICA AMMINISTRAZIONE. CONCETTI E PROBLEMI* 78 (1939), where the administrative discretion is described as «la ponderazione (del valore) dell’interesse pubblico nei confronti di altri interessi specifici» (my translation in the text). The second more analytical definition is borrowed from M.S. Giannini, *DIRITTO AMMINISTRATIVO* 49 (1993).

<sup>22</sup> Council decision 469/1999/CE, of 28 June 1999, recently amended by Council decision 2006/512/CE, of 17 July 2006.

<sup>23</sup> With the exception of the *advisory procedure* (where the committee opinion, adopted by simple majority, is a mere “advise” to the Commission, Article 3), all the other procedures give the committee’s opinion a formalized binding effect. In case the Commission’s proposal receives an unfavorable opinion of the committee, the Council may take a different decision within a short time (*management procedure*, Article 4), or reject the Commission’s proposal, leaving the Commission with the following three options: submitting to the Council an amended draft of the proposal, re-submitting its proposal or presenting a legislative proposal on the basis of the Treaty (*regulatory procedure*, Article 5). In the recently adopted *regulatory procedure with scrutiny*, similar procedural arrangements are complemented with a *direct droit de regard* of the European Parliament, that receive notice of both the favorable and unfavorable committees opinion, and may oppose the adoption of the regulatory measure «by indicating that the proposed measure exceed the implementing powers provided for in the basic instrument or are not compatible with the aim or the content of the basic instrument or do not respect the principles of subsidiarity or proportionality» (Article 5a).

authorities,<sup>24</sup> according to pre-established criteria: while advisory procedure (the least binding) applies when «it is considered to be the most appropriate», management procedures are suitable for implementing measures with budgetary implications, regulatory procedures are meant to deal with «measures of general scope designed to apply essential provisions of basic instruments», and regulatory measures with scrutiny are appropriate for «measures of general scope designed to amend non essential elements» of legislation adopted in co-decision.<sup>25</sup> This refined gradual system of control imposed on Commission's implementing and regulatory power gives the European legislator the possibility to balance the level of constraint in relation to the character of the measure.

However, questions are raised concerning the effectiveness of these procedural constraints. Statistics, in fact, reveal that Commission's implementing or regulatory measures meet unfavorable committees opinions in less than 1 % of the cases.<sup>26</sup> Game theorists have convincingly highlighted this "supranational bias" of comitology committees, showing that «relative to a situation where Commission proposals are referred directly to the Council with no intervening committees, the comitology committees move outcomes closer to the Commission's (more integrationist) preferences, and away from the Council's.»<sup>27</sup>

These evidences disclose an important accountability paradox: while strengthening the supervisory accountability of Member States on Commission's regulatory powers, comitology also promotes European integration by stretching the margins of "bureaucratic drift" available to the Commission. In other words, bodies established to "re-nationalize" the supranational regulatory power, actually reveal themselves to be a powerful mechanism of European integration. Why is that?

The most common answer point to deliberation: the shift from politics (the Council) to administration (committees) marks a parallel shift from bargaining to arguing, from the protection of national interests to the power of reason. Yet, this account neglects the hierarchical and supervisory mechanisms of accountability that hinder the shift of national officials from power to reason. The fact that domestic civil servants do not formally represent their Member States at Community level does not imply that they are free to express their own opinion. Rather, they act within a specific mandate or *munus*, not relevant externally, but internally, within the domestic administrative hierarchy. The

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<sup>24</sup> The Council of the European Union, together with the European Parliament in case of legislative co-decision (Article 251 EC Treaty).

<sup>25</sup> The criteria for the choice of the procedure are dictated by Article 2 of the comitology decision. However, the European Court of Justice has clarified that these criteria are non binding for the legislative authorities, to whom is left the final choice on the procedure and the corresponding level of regulatory constraint: see case T-378/2000, *Commission v Parliament and Council* [2003], ECR I-937.

<sup>26</sup> According to the *Report from the Commission on the working of committees in 2005*, supra note 17, at 6, a total of 11 cases of referrals to the Council were reported in 2005, i.e. 0,5 % of the total number of implementing measures adopted by the Commission under the management and regulatory procedure (2637). Out of the 11 cases of referrals, 6 were related to draft Commission decisions concerning the authorization to place genetically modified organisms on the market.

<sup>27</sup> Cfr. A. Ballman, D. Epstein e S. O'Halloran, *Delegation, Comitology and the Separation of Powers in the European Union*, 56 INTERNATIONAL ORGANIZATION (2002), 571.

infringement of the duty to represent the national interests could entail disciplinary consequences. Therefore, such accountability prevents national officials from putting aside the instructions received and their obligation as employed. There could be cases – and indeed there are – in which instructions are lacking or flexible and obligations are so generic that do not amount to a significant constraint. And there could be cases – also tangible – in which diplomatic reasons (for instance, the need for the national delegation not to act in insulation within the committees) that justify a certain margin of discretion on the delegate. But even in such cases, the decision-making logic is far from being merely deliberative.

Another possible answer is sociological: documented processes of “re-socialization” take place into the committees and lead to the gradual formation of a supranational identity or «*esprit de corps*» within the committee. However, these studies show that the new supranational identity is not built at the expenses of the national one, and therefore do not necessarily imply a conflicting “dual loyalty”.<sup>28</sup>

In my view, the most relevant explanation of the abovementioned paradox lies elsewhere, namely in the procedural dimension. Not only the “external” procedures established by the comitology decision, but also the “internal” procedures of the committees assume relevance in this respect.<sup>29</sup>

On the one hand, the structure of comitology procedures introduces significant incentives to cooperation and co-decision: when the Commission is confronted with a situation in which a consistent number of States raises objections on the draft measure, the Commission inevitably prefers to adjust its proposal to national preferences, rather than face the risk of an unfavorable opinion. Another relevant incentive to co-decision stems from the administrative character of the process: a serious national objection, grounded on a peculiar domestic problem of implementation, is usually taken into consideration by the Commission, even if the objection would not threaten the approval of the measure. Domestic compliance, in fact, is a major concern both for Member States and for the supranational institution, that does not have the resources for systematically supervising national enforcement.<sup>30</sup> Comitology decision-making is therefore highly cooperative. This explains the low number of unfavorable opinions of committees. And it explains also the non-adversarial nature of accountability by means of transgovernmental bodies: these mechanisms are not adversarial, i.e. based on a conflict of interests, but, rather, it is based on power sharing or co-decision.

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<sup>28</sup> This phenomenon was first observed by L. Lindberg, *The Political Dynamics of European Economic Integration* 77-79 (Stanford University Press, 1963). The first systematic research, in this field, is the seminal work of L. Scheinman e W. Feld, *The European Economic Community and national civil servants of the member states*, 26 INTERNATIONAL ORGANIZATION (1972), 121. For an updated assessment, see the abundant literature produced by the Oslo School: among the others, M. Egeberg, G.F. Schäfer, J. Trondal, *The Many Faces of EU Committee Governance*, 26 WEST EUROPEAN POLITICS (2003), 19; J. Trondal and F. Veggeland, *Access, voice and loyalty: the representation of domestic civil servants in EU committees*, 10 JOURNAL OF EUROPEAN PUBLIC POLICY (2003), 59.

<sup>29</sup> Each committee has the power to state its internal rule of procedures. However, a general model, functioning as guidelines, has been elaborated by the Commission: *Standard rules or procedure – Council decision 1999/468/EC – Rules of procedure for the ... committee*, OJEC 2001/C 38/03.

<sup>30</sup> According to Article 226 EC Treaty, the Commission acts as “Guardian of the Treaty”, having the duty to investigate on national failures to comply with EC law.

On the other hand, co-decision is not enough to account for the supranational orientation of comitology decision-making. It is here, then, that Giannini's notion of administrative discretion can help illustrating one of the most peculiar European features, that I label "procedural supranationalism". My claim is that the comitology decision-making is structured according to a dual goal: first, to ensure that national interests are preserved and taken into consideration; second, to avoid that the first goal lead to a "lower common denominator", i.e. that the common interest is merely shaped by States egoisms. To the sake of the first goal, transgovernmental committees are established and coupled with supranational regulatory power, according to a power-sharing system. To the sake of the second goal, the supranational institution (to whom the care of the common interests is entrusted) is empowered with a position of procedural preeminence within comitology committees. This crucial aspect deserves a more analytical assessment.

First of all, the Commission keeps intact in the descending phase the same fundamental powers it enjoys in the legislative phase. In particular, the Commission has three related exclusive procedural "rights": to draft the regulatory or implementing measure, to amend the proposal and to withdraw it. Thanks to the first right, the Commission has the chance to elaborate, on the basis of prevailing national orientation, a draft measure that will be more likely to satisfy the "common good". The second right gives the supranational representative within the committees an absolute control over every single norm of the draft measure. On this point, it is worth noting the distance from the legislative phase, where, according to Article 250 EC Treaty, the Council can amend by unanimity the proposal, even against the Commission's will. Given the third right, the Commission has the power to avoid a negative opinion (and therefore its referral to the Council), when its draft measure does not meet a sufficient consent among committee members. Therefore, these three powers render the Commission's cooperation necessary for the committee to decide and for the regulatory measure to be adopted. A second set of procedural powers let the Commission control the work of the committees. A representative of the Commission chairs the meetings. Therefore, she sets the agenda, according to its institution's priorities and strategies, and squares the ground for negotiation. All these arrangements, combined together, have the effect to secure the community interest and insure its primacy with respect to national particularistic interests.<sup>31</sup>

It is this *procedural supranationalism*, rather than deliberation based on the power of reason, that more convincingly (though not exclusively) explains both the supranational bias of comitology and the silent unflagging process of European administrative integration. Comitology, in fact, should not be understood just as a way to shift the burden of mediation among conflicting interests from politics to bureaucratic "clearing houses". It is something more and different: it is an institutionalized process where two seemingly irreconcilable demands are accommodated: the demand for "re-nationalization" of regulatory powers delegated above the State with the competing demand for the common interest to prevail over particularistic ones.

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<sup>31</sup> This view is systematically developed, with reference to the overall system of EU committees, in M. Savino, *I COMITATI DELL'UNIONE EUROPEA* (Giuffrè, 2005), especially Chapter VI.

We can even go further and recognize, here, the signs of Giannini's notion of administrative discretion. The position of the Commission strikingly resembles the position of an administration *chef de file* within Italian or French administrative procedures. Both the supranational administration (within the comitology decision-making) and the administration *chef de file* (within domestic administrative proceedings) have the power to initiate, emend, withdraw and adopt the measure. Both have to consult those administrations that take care of related public interests. Both, finally, have the duty to balance those *secondary* public interests, in order to maximize them to the extent that the care of the *primary* interest allows it.

In evident parallelism with continental administrative procedures, supranational regulatory discretion is structure through procedures in which the Community interest is given a procedural primacy, and national interests, represented by committee members, are given a secondary relevance. The balance is entrusted with the Commission that has the duty to assess to what extent the promotion of a common good can be tempered with the protection of national interests.

Moreover, a second specific similarity emerges: just like within domestic administrative proceedings, where particularly relevant secondary interests (public order, public health, protection of environment and historical or artistic goods) can prevent the adoption of the act;<sup>32</sup> similarly, within comitology decision-making, a coalition of national interests (a qualified majority, in management procedures, or a blocking minority, in regulatory procedures) can prevent the adoption of Commission's measure or subject it to the direct scrutiny of the Council and the Parliament. This safeguard, far from deny the primacy of the common interest promoted by the Commission, is meant to avoid supranational tyranny. More significantly, the comitology safeguard is there to insure that the basic requirement of every supranational regulatory power is satisfied: subsidiarity.<sup>33</sup>

Giannini's notion of administrative discretion, thus, can be adjusted to the European level by characterizing it as follows: supranational regulatory discretion is *a comparative assessment of secondary national interests, in relation to a primary common interest, entrusted to a supranational administration that has the power to decide* – note the addition – *in so far as the subsidiarity requirement is satisfied.*<sup>34</sup>

### c) Interest representation

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<sup>32</sup> See, for instance, Article 16, para. 3, of Italian law of administrative procedure (law 7 August 1990, n. 241).

<sup>33</sup> For a meaningful conceptualization of subsidiarity as a “global constitutional principle”, M. Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 *EUROP. J. OF INT'L LAW* (2004) 920-924.

<sup>34</sup> Apart from this addition, a major change concerns the nature of interests represented: in national administrative procedures, secondary public interests (for instance, economic or environmental, etc.) are qualitatively different from the primary one (for instance, the construction of a public infrastructure, implies that the primary interest entrusted to the administration *chef de file* has to be balanced with other relevant interests, qualitatively different, such as the environmental or transport ones). The same is not true for comitology, where decision are taken in a sectoral perspective, because all the national administrations involved care the same specific public interest. Therefore, constraints imposed on supranational discretion are not qualitatively, but rather nationally, diversified. This, of course, determines a significant problem of fragmentation.

In Giannini's definition of administrative discretion, private interests are mentioned, together with the public ones, among the secondary interests that the administration has to take into consideration before deciding. Yet, in the "supranationalized" notion of administrative discretion that I just put forward, there is no mention of private interests. A question, therefore, arises: shouldn't the Commission appraise this kind of interests before taking its regulatory decisions? Or, to put it more broadly: which is the space recognized to private interests within the European decision-making?

The answer to this question is three-pronged, since three are the channels for private participation to European decisions.<sup>35</sup>

The first channel is the national one. Private associations and affected groups of individuals participate to the definition of the national position in relation to the proposals of the Commission. Political representatives at the Council level and administrative representatives at committee level are required to uphold the position defined by the government, after consultation with infra-national authorities (regions or local entities) and relevant private interests. The compatibility of this option with the European decision-making has been recognized in the case *Germany v. Commission* (1998). In this judgment, a decision of the Commission has been annulled, because it was adopted in violation of internal committee rules of procedure requiring the Commission to send the draft decision (to be discussed in the next comitology meeting) to all the governments within a specific time limit. The rationale behind this decision is that «Member States should have the time necessary to study [comitology] documents, which may be particularly complex and may require considerable contact and discussion between different administrative authorities, or consultation of experts in various fields or of professional organizations.»<sup>36</sup> The European Court of Justice has, therefore, stressed the importance of domestic consultation as an integral part of the European decision-making process.

This filtered system of interest representation appears to be consistent both with the corporatist approach followed in most continental countries and with the idea of European Union as a composite «union of States». States are the basic sites of legitimacy and accountability for international organizations and supranational regulatory powers, national governments should continue to be the «gatekeepers», also with respect to interest representation. States are, in fact, the only dimension where a civil society is present, where association is conceivable, and where a public power is fully accountable to private parties, through the democratic political process.

Yet, the coherence of this approach is threatened by two pitfalls. One is intrinsic or structural: the national position, even when carefully elaborated through adequate internal consultation, is just one element of a more complex puzzle. As we have seen in the comitology process, national positions are taken into consideration, but the resulting supranational decision cannot be attributed to domestic governments, since the

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<sup>35</sup> Since the focus, here, is limited to decisions that are (formally and substantially) European, I do not consider the growing number of cases in which European norms provide for private participation to national administrative decisions.

<sup>36</sup> Case C-263/95, *Federal Republic of Germany v Commission of the European Communities* [1998], ECR 1998, I-441.

Commission shares the major part of responsibility for it.<sup>37</sup> The other pitfall is cultural or, to be optimist, contingent: not all European governments take transgovernmentalism seriously. Too often, internal consultative procedures lack essential participatory requirements. For example, according to the recent discipline of Italian participation to the European decision-making, the involvement of private parties in the internal preparatory stage amounts to nothing more than consultation of an obsolete and ineffective national board for economy and labor (Consiglio nazionale dell'economia e del lavoro – CNEL).<sup>38</sup> Whether this channel should represent the exclusive way of interest representation in the European Union is debatable. Its importance is, nonetheless, evident, even though some national legislators seem not to have realized it.

The second channel of interest representation is offered by the European system of *interest committees*. These committees have two main functions. First, they assist the Commission in formulating regulatory policies that can obtain the support of the relevant social and economic interests. Secondly, they promote the so-called European social dialogue, i.e. the dialogue between the social actors in a given policy sector. As for their composition, two categories need to be distinguished. In the first fit interest committees that have a bipartite structure: their members are representatives of rival social parties (organized at the European level) in a particular socio-economic policy area (usually workers and employers). The system of appointment vary: in the case of sectoral dialogue committees, representatives are selected on a proposal from social partner organizations;<sup>39</sup> in other cases, such us that of the European Energy and Transport Forum, the selection is based on a call for applications for the membership positions published in the Official Journal of the European Communities.<sup>40</sup> The second category includes tripartite committees. These bodies, by contrast, are composed not only of representatives of (national, not European) interest groups, but also of representatives of national governments.<sup>41</sup> Basically, the power of appointment is entrusted to national governments, individually or acting together through the EU Council.<sup>42</sup> Within this system, the consultation of interest committees is not mandatory for the Commission, with the exception of the sectoral dialogue committees (whose consultation is provided for in Article 138 EC Treaty).<sup>43</sup> This element, combined with the absence of interest

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<sup>37</sup> One could object that the Commission is politically accountable to the Council and the European Parliament. The technicalities of regulation and the delegation of supervisory powers to comitology, however, considerably reduce the effectiveness and reliability of that mechanism of political control.

<sup>38</sup> See Article 7 of Italian law 4 February 2005, n. 11.

<sup>39</sup> Article 4, Commission decision 98/500/EC. According to Article 1, social partners organisations are those representing both sides of industry and fulfilling the following criteria: «(a) they shall relate to specific sectors or categories and be organised at European level; (b) they shall consist of organisations which are themselves an integral and recognized part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States; (c) they shall have adequate structures to ensure their effective participation in the work of the Committees».

<sup>40</sup> Article 3, para. 8, Commission decision 2001/546/EC.

<sup>41</sup> See the list available at [europa.eu.int/comm/civil\\_society/coneccs/index.htm](http://europa.eu.int/comm/civil_society/coneccs/index.htm)

<sup>42</sup> See, for instance, Article 1, para. 4, Council decision 2004/223/EC, concerning the Advisory Committee on Vocational Training.

<sup>43</sup> Some interest committees, namely those dealing with matters covered by the common agricultural policy, may request the Commission to be consulted (Article 1, para. 3, Commission decision 98/235/EC).

committees in many regulatory sectors, reveals the incompleteness of this seemingly corporative solution.

The third channel is the direct participation of private interest to the European decision-making. The Commission, some European agencies and some committees has set guidelines for and sometimes resorted to mechanisms of notice and comment.<sup>44</sup> Some committees also allow for the integration of their composition with external observers, who can participate to the discussion, without right to vote.<sup>45</sup> However, this pluralist approach is far from being systematically applied by European regulatory bodies. The Commission itself has also clarified that these opportunities for participation do not create any legal right enforceable by judicial review.<sup>46</sup>

This analysis highlights the absence of a clear established system of interest representation in the EU regulatory process: it, rather, resembles a patchwork still open to divergent developments. While European sectoral norms impose on national administration the duty to hear private parties when the administrative decision is (formally or substantially) national,<sup>47</sup> the same does not happen when the decision is strictly European. Both the supranational alternatives (participation through interest committees and through notice and comment) are, at present, largely incomplete. The same is true also for interest representation filtered by national governments and administrations. One possible reason for this situation is that the European Union institutions have not yet decided whether to follow the corporatist or the pluralist approach.<sup>48</sup>

Indeed, a European decision-making inspired by a pluralist model would be surprising, given the absence of such model in national legal traditions. In most domestic orders,

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<sup>44</sup> For the Commission, see its Communication, *Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*, COM (2002) 704 final, 11 December 2002. Among the agencies, see Article 9, European Parliament and Council regulation n. 178/2002 of 28 January 2002, concerning the European Food and Safety Authority. Among the committees, see Article 5, Commission decision 2001/527/EC of 6 June 2001, regarding the Committee of European Securities.

<sup>45</sup> This possibility is stated, in general terms, in Article 8 of comitology standards rules of procedure (*supra*, note ???). A concrete example is the committee on telecommunications, established by Article 22 of European Parliament and Council directive 2002/21/EC of 7 March 2002. This comitology committees widely consults with the private sector (according to Article 23 of the abovementioned directive) and often allows for the participation of social categories' representatives to its meetings.

<sup>46</sup> Communication from the Commission, *Towards a reinforced culture of consultation and dialogue*, *supra* note 43.

<sup>47</sup> See, for instance, Article 11 of directive 2003/87/EC (providing for due consideration of private consultation in relation to Member States' decisions – formally adopted by the European Commission – concerning the implementation of the scheme for greenhouse gas emission allowance trading within the Community), and the strict interpretation of this provision in case T-178/05, *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* [2005], ECR ???.

<sup>48</sup> F. Bignami, *Three generations of participation rights before the European Commission*, 68 LAW & CONTEMP. PROBL. (2005), at 79, observes: «Paradoxically, for the Commission to choose among these [approaches] would defy rather than affirm the European idea of representation. The Commission is too removed in its institutional composition from ideals of representative democracy to choose on the behalf of Europe among these different traditions».

neither legislative provisions nor judges guarantee opportunities for interest representation comparable to those established by the US Administrative Procedure Act. When general acts are adopted, private participation is usually restricted. Two examples can illustrate this point. The first concerns French discipline of environmental regulation, that lays down a procedure of *débat public*. Consultation with the private parties, affected by the decision, is mandatory and is carried out (not by the administration that has the power to decide, but) by an *ad hoc* impartial authority. Still, this authority enjoys a wide discretion in pursuing the procedure and judicial review is explicitly prevented.<sup>49</sup> Thus, even when private participation to general decisions is provided for, this participation does not amount to a right: no judge can enforce it, because of the longstanding French constitutional tradition according to which the judge should not trouble (“troubler”) the administrative action. The second example relates to the British system and to the limits of private participation thereby established. In the British system, interest participation is based on the principle of fairness, rather than on natural justice or general statutory provisions. Participation is therefore recognized in a rather weak form. It is, in fact, constrained, in order to avoid “over-judicialization”, to respect administrative “collective knowledge”, to protect the coherence of government policy and to safeguard its accountability to the Parliament.<sup>50</sup> Different legal traditions, thus, lead to a convergent conclusion: the lack of support for a pluralist APA-like approach to interest participation.

As a consequence, interest representation does not represent a third feature of the EU model, whose building blocks are, thus, vertical transgovernmentalism and procedural supranationalism. Instead, three fundamental questions, relevant also in a global perspective, remain open:

- a) Absent a global or European “civil society”, is there really space for a consistent interest representation beyond the State? Or, rather, is there a concrete risk to deepen the present representational unbalance between powerful and less powerful actors?
- b) If States are the only legitimate sites of civil societies representation, as the composite nature of the European system lead to believe, could the thin transgovernmental channel represent a satisfying mechanism of indirect representation?
- c) If, by contrast, we believe that private participation is possible and necessary beyond the State, could the corporatist and pluralist approaches be used as complementary, in order to intercept the different national traditions (some pluralist, such as the US, and other corporatist, like most European countries)? And at what cost?

**d) To sum up: main features of the EU model**

The constituent elements of the EU model are three. The first is the delegation of regulatory power to a strong supranational institution: according to Article 202 EC

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<sup>49</sup> Article L 121-14, *Code de l'environnement*.

<sup>50</sup> For this line of reasoning, see House of Lords (Lord Diplock), *Bushell and another v Secretary of State for the Environment*, 4 February 1980, [1981] AC 75. In this part I heavily rely on S. Cassese, *La partecipazione dei privati alle decisioni pubbliche – Saggio di diritto comparato* (2006), on file with the author (comparing French, US, British, EU and global systems of private participation to general administrative decisions).

Treaty, «To ensure that the objectives set out in this Treaty are attained, the Council shall, in accordance with the provisions of this Treaty: [...] confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down». The second element is the establishment of transgovernmental bodies, as a re-nationalization tool that insures Member States' participation to the supranational regulatory process. The third element is a procedural arrangement that provides both for the protection of national interests and, at the same time, for the fostering of the common interest.

Neither the first two elements (supranationalism and transgovernmentalism), nor their combination constitute distinctive features of the European Union, at least in a qualitative sense. Some international secretariats are powerful global actors and transgovernmental networks pervade the world order. Moreover, both these kind of structures often merge in international organizations (where secretariats are assisted or controlled by subsidiary bodies), as already observed in the 1970s.<sup>51</sup> Relations between supranational and transgovernmental bodies are defined in various ways: «transbureaucratic decision-making»,<sup>52</sup> «multi-level bureaucracy»,<sup>53</sup> or «vertical governmental networks».<sup>54</sup> The third element is perhaps more peculiar to the European Union, due to the progressive establishment of refined comitology proceedings, that, as far as I know, are not present in other international organizations. In these procedures, a balanced mix can be observed between the primacy granted to the supranational institution and the guarantees devoted to insure that national interests are taken into consideration before decision. This is what I label «procedural supranationalism», to mark the distance from the common but misleading understanding of «deliberative supranationalism». However, also the originality of this procedural arrangement seems partial, due to its striking similarities with those domestic procedural models modeled on or reflected in Giannini's notion of administrative discretion.

A fourth possible element of the EU model is still far from being set up: there is a clear need for participatory democracy as a substitute (or complement) for the lacking (or very weak) European representative democracy, and yet interest representation is not adequately institutionalized. There are three embryonic mechanisms of private participation to the EU decision-making: through the States (in the preparatory stage headed for the definition of the national position), through European interest committees and through pluralist mechanisms of direct consultation from the EU Commission,

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<sup>51</sup> R.O. Keohane and J.S. Nye (eds.), *TRANSNATIONAL RELATIONS AND WORLD POLITICS* (Harvard Univ. Press, 1970), R.O. Keohane e J.S. Nye, *Transgovernmental Relations and International Organizations*, 27 *WORLD POLITICS* (1974) 39.

<sup>52</sup> Cfr. K. Kaiser, *Transnational Politics: Toward a Theory of Multinational Politics*, 25 *INTERNATIONAL ORGANIZATION* (1971), 797: «In the case of multibureaucratic decisionmaking, the decisionmaking structures of different national governmental and international bureaucracies intermesh within specific issue areas».

<sup>53</sup> S. Cassese, *Theoretical Sketch of the Cooperative and Multidimensional Nature of Community Bureaucracy*, in J. Jamar e W. Wessels (eds.), *COMMUNITY BUREAUCRACY AT THE CROSSROADS*, De Tempel, Bruges, 1985, p. 39 ss. See also, S. Cassese, *Relations between International Organizations and National Administrations*, in IISA, *PROCEEDINGS, XIXTH INTERNATIONAL CONGRESS OF ADMINISTRATIVE SCIENCES*, Berlin, 1983, p. 161 ss.

<sup>54</sup> A.M. Slaughter, *A NEW WORLD ORDER* (Princeton Uni. Press, 2004), *passim*, especially at 144-151.

agencies and committees. Their limits are evident. First, none of those three channels impose consultation as mandatory: national and supranational administrations, while involved in decision-making related to European regulation, do not have a duty to hear private parties or associations, with few exceptions. Second, the modes of consultation vary according to the different mechanisms but, absent legislative guarantees, these modes are left to the administrative discretion. Third, private consultation is not always complemented with giving reasons requirements and, in any case, judicial review is prevented.

How can this model – not particularly innovative (rather, based on the importation of different structural fragments from national and international orders) and also incomplete (due to the absence of a clear model of interest representation) – help resolving the major problems associated with GAL and global regulatory governance?

## **II. The EU model's potential for GAL**

### **II.1. “Globalized” administrative law and “global” administrative law**

Globalization erodes national regulatory autonomy in two respects. First, global dynamics enhance interdependence among States and regulatory systems, and interdependence, in turn, leads to national regulation having a trans-border impact. Therefore, the following asymmetry arises: functionally, domestic regulation produces extraterritorial effects; structurally, regulatory authorities maintain a territorial dimension. National measure affects interests beyond the State, but such interests are not represented in the internal political process. Accordingly, a problem of external accountability emerges. Here is a first task for a global (*rectius*: globalized) administrative law: to rebalance the asymmetry between functions and structure. To cope with this problem of external accountability, international regimes and judges promote negative integration by impose on domestic regulators binding rules and principles, which are typical of internal administrative law.<sup>55</sup>

Emblematic is the case of the SPS Agreement, concerning food safety. This agreement imposes on domestic regulation both procedural and substantive constraints. Procedurally, national regulators are bound: a) to give notice and opportunity for comments to foreign governments; b) to apply principles of transparency, participation and due process to internal implementing procedures, in order to guarantee opportunity of involvement not just to State citizens, but also to out-of-State private parties. The global legislator also provides a more intrusive set of substantive limits. The SPS Agreement circumscribes the domestic right to regulate by submitting it to a triple test: congruence (with international scientific standards), necessity (national measures are acceptable to the extent that they are no less restrictive measure to achieve health protection) and proportionality (balancing benefits expected in terms of health protection

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<sup>55</sup> I borrow from F. Scharpf, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* (Oxford Univ. Press, 1999), the well-known “categorical thinking” based on the binomial tension between «positive» and «negative» integration, here understood, respectively, as harmonization and deregulation.

and costs deriving for other competing interests). This way, a first path emerges: a “globalized” administrative law establishes procedural and substantive constraints, derived from the domestic administrative toolbox, on national regulators. Their autonomy is thereby recognized, but significantly limited.

There is also a second way by which State regulatory autonomy is threatened by globalization. If national measures become ineffective, because the goal they want to achieve is beyond their capacity; if domestic regulators engage in international treaties laying down a global public good – say, free circulation of goods – to be pursued by reducing market fragmentation (and hence national fragmenting regulations); if “globalized” administrative law cannot properly work without a minimum degree of harmonization by standardization. In such hypothesis, truly global decision-making or standard-setting systems are required.

This is why, for instance, a dense network of standard setting bodies has emerged in the financial sector. The interoperability of different banking systems cannot be achieved by means of domestic measures, because one would inevitably differ from the other. The Basel Committee provide for an interesting solution. It sets non-binding standards that would facilitate bank stability and, thereby, enhance the overall credibility of a domestic financial system. States are free to adopt those standards, but those who refuse them are subject to comparative discrimination from foreign investors, who will tend to favor safer systems. As a consequence of these market pressures, non-binding decisions become widespread accepted by national regulators and banks. The overall result is soft harmonization. In so far as it advances, national regulatory autonomy is not just circumvented (as in the previous case), but also progressively eroded, to the benefit of international authorities.

This second path – positive integration – poses a more difficult problem: if the regulatory power is detracted from domestic authorities and shifted at the global level, it eludes all the national constraints and accountability mechanisms deriving from domestic administrative law. How can these constraints and mechanisms be restored beyond the State?

This is where a truly global administrative law can be helpful. In particular, a path can be noted according to which global regulatory powers receive the need to legitimize its decision by submitting themselves to the essential requirements of transparency, notice-and-comment, and duty to state reasons. In some States, this top-down trend is complemented by a bottom-up approach: domestic regulators involved in global decision-making are themselves bound to comply with similar requirements, in the national preparatory phase. The underlying tradition that inspires such global administrative law is often understood to be the US one. Due to the rich and detailed system of accountability set up by the Administrative Procedure Act (APA), the American administrative toolbox seems to be very promising in enhancing the responsiveness of global decision-makers.<sup>56</sup>

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<sup>56</sup> See R.B. Stewart, *U.S. Administrative Law: A model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBL. (2005), 63.

To sum up, while the first issue – the (external) accountability of national regulation – is dealt with by an emerging “globalized” administrative law, the second issue – the (internal) accountability of global regulation – is addressed by a similarly developing “global” administrative law. Needless to say, “globalized” and “global” administrative laws are two faces of the same GAL coin, whose material is offered by domestic administrative law and whose shape is designed by globalizing forces.<sup>57</sup>

## **II.2. GAL’s shortcomings and EU model’s potential: A Coordinated Interdependence Approach**

National regulatory autonomy deserves deference for the very simple fact that it is the outcome of a democratic political process. The rationale behind this approach – labeled coordinated interdependence approach – lies in «a logical extension of a well-established constitutional principle: that sovereignty entails responsibility [...] This concept, applied to the external side of sovereignty in an interdependent world, entails some constitutional responsibility also for people living outside the polity»<sup>58</sup>. By applying this approach to the description of the two paths of negative and positive integration, above illustrated, the following dilemma emerges: in a globalizing world, «[t]he risk inherent in State regulations is that it will be *biased* by an institutional environment that often neglects, or simply cannot in practical terms take into account, the interests of national or other members. In contrast, positive harmonization measures [...] may be required for the purpose of uniformity, but may suffer from the opposite *bias* of being decided in a institutional environment which tends to neglect the interests of consumers and producers in a minority of Member States»<sup>59</sup>. Building on this premise, the question that I want to discuss is the following: how and to what extent do the two twin-brothers – globalized administrative law and global administrative law – help rebalancing the respective bias they confront?

The discussion is articulated into two parts. First, I discuss the problem of judicial empowerment stemming from application of GAL to the problem of national regulator’s external accountability. Later, I examine GAL’s partial failure to cope with the problem of global regulator’s accountability to less powerful States and private interests.

### **a) Negative integration: judicially driven?**

Globalized administrative law, as we have seen, confronts the bias of out-of-State interests by means of procedural and substantive constraints imposed on domestic regulation. The duty to supervise the respect of these constraints is entrusted, wherever

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<sup>57</sup> For this stylized account, I largely draw on S. Battini, *L’impatto della globalizzazione sulla pubblica amministrazione e sul diritto amministrativo: quattro percorsi*, *GIORNALE DI DIRITTO AMMINISTRATIVO* (2006), 339-343.

<sup>58</sup> A. von Bogdandy, *Law ad Politics in WTO – Strategies to Cope with a Deficient Relationship*, 5 *MAX PLANCK YEARBOOK OF UNITED NATIONS LAW* (2001) 609, at 673

<sup>59</sup> M. Poiares Maduro, *WE, THE COURT* (Hart Publishing, 1998), 172.

possible, to global judges. The first problem I want to stress is that the role of global judicial review is not problematic if referred to procedural constraints, while the opposite is true when judges are called to apply substantive limits.

Two examples, both borrowed from the WTO jurisprudence, can help assess the qualitative difference of the two types of review.

In the first – the *US-Shrimp Turtle* case – the WTO dispute settlement bodies strikes down a US regulatory measure on the ground that the internal regulatory process did not grant notice and opportunity for comments to other States, whose economic interests were clearly at stake in the national decision. Having regard to Article XIX, para. 2, of GATT, the Appellate Body of the WTO has declared a US measure regulating a procedure of certification to be against the spirit and the letter of the Gatt. In the legislative discipline of the procedure, in fact, «*there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance ore rejection, is rendered on applications for either type of certification*»<sup>60</sup>. This decision, in other words, fosters the rational behind Article XIX of Gatt, that is to find procedural remedies to the over-representation of internal interests in State political processes.

The second example is based on the *Hormones* case. Article 2, para. 2, of the SPS Agreement states that «Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence [...]». On the basis of this provision, a European ban on the import of meat products from animals to which hormones have been administered, does not amount to a discriminatory measure and yet it represents an illegitimate obstacle to the free trade. The Appellate body hold that, since the European ban is not based on an adequate risk assessment, it violates the SPS Agreement. In other words, a global substantive constraint, explicitly provided for in an international agreement (and therefore subscribed by all member states), has received a strict application by a global judge. Fair enough. And yet a problem arises. A political choice inspired by diffuse social European aversion towards hormones is declared untenable, but neither on the value-free ground that the measure is somehow discriminatory or protectionist, nor on procedural grounds. Rather, the key argument of the global judge revolves around the need of scientific evidence on the risk for human health as the only sound basis for such decisions. The main criticism to the

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<sup>60</sup> WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (AB-1998-4) (WT/DS58/AB/R) 12 October 1998, n. 180. On this case, S. Cassese, *Shrimps, Turtles and Procedure: Global Standards for National Administrations*, 68 *LAW & CONTEMP. PROBL.* (2005), Id., *A Global Due Process of Law?* (2005); G. della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 *EUROPEAN PUBLIC LAW* (2003), 574.

case is based on the unwillingness of WTO Appellate body to accept that values other than those relating to life/health can justify a regulation<sup>61</sup>.

The consequence of similar decisions is, once the value-free procedural land is left, the legitimacy of judicial review becomes questionable, even if it is based on the seemingly neutral scientific value.<sup>62</sup> As it has been very convincingly argued, if State regulatory autonomy has to be preserved to the maximum extent, global judges «should not second-guess national regulatory choices, but should instead ensure that there is no under-representation of the interest of national of other members States in the national political process».<sup>63</sup> The first corollary is that global judicial review should concentrate on application of procedural standards intended to give voice to “foreign” affected interests into domestic regulatory process: this kind of review rebalance the national bias and is value-free. The second corollary is, by contrast, that judicial review based on substantial standards (proportionality, necessity and alike) leads to balancing different values and collective interests that global judges are not entitled to represent: if we take the embedded interdependence model seriously, then it is hard to accept courts’ “majoritarian activism”, i.e. the idea of a global judge overruling a “political” choice resulting from a national democratic process.<sup>64</sup>

If judicial review on national decision should be limited to procedural aspects, and if, however, substantive (not just procedural) constraints on State regulatory autonomy are necessary to promote global interests (as established in international agreements), a question – particularly relevant in the GAL perspective – remains open: who should administer these substantive constraints, i.e. the substantive part of the emerging “globalized” administrative law?

It is here – I argue – that the EU model expresses its first global potential. What I imagine is the establishment of transgovernmental committees chaired by a supranational officials, on the model of European comitology, but with adjudicatory (rather than rule-making) functions. In such global *fora*, supranational officials would put forward their assessment concerning the compatibility of a national measure with the basic treaty or agreement. On this backdrop, supranational and national representatives would engage in a joint evaluation of the measure in relation to the relevant substantive requirements: scientific consistency, necessity and/or proportionality of the measure. The final adjudicatory decision should be retained by the supranational institution (an international secretariat or a similar administrative body), in order to avoid the notorious joint decision

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<sup>61</sup> J. Scott, *On Kith and Kine (and Crustaceans): Trade and Environment in the EU and the WTO*, in J. Weiler (ed.), *THE EU, THE WTO AND THE NAFTA. TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* (Oxford Univ. Press, 2000), 125-167, especially at 159-160.

<sup>62</sup> As Bogdandy, *op. cit.*, at 643, ironically observe, «it is an old maxim that the “scientification” of politics leads to the politicization of science

<sup>63</sup> M. Poiares Maduro, *op. cit.*, 173. Here I adapt to global Courts Maduro’s claim, conceived in relation to the European Court of Justice.

<sup>64</sup> The risk deriving from the *Hormones* judgment and the deformation produced by a judicial-driven process of economic integration, both in the past European Community and in the present WTO, is illustrated by J.H.H. Weiler, *Epilogue: Towards a Common Law of International Trade*, in *THE EU, THE WTO AND THE NAFTA*, *cit.*, 202-231.

trap, but member States' representatives should be given the right to block the decision by majority or qualified majority, in order to enjoy an effective co-decision power. The supranational decision subverted by the committee could be replaced by an intergovernmental body, composed of Member States' political representatives, within a limited period, after which the decision, emended or not, becomes effective. This combination of vertical transgovernmentalism and procedural supranationalism, modeled on the European comitology, might solve three specific problems raised by the alternative judicial "majoritarian activism". The first is a problem of "political hypocrisy": if a supranational common good has to be pursued, it is better not to hide it behind the misleading neutral face of a judge, but to entrust it to an openly political supranational institution. Second, the problem of supranational empowerment: the intervention of a supranational entity would not be unconstrained (as in the case of judicial review); it would be, rather, rebalanced by the control of a transgovernmental body. Third, the problem of maximizing the protection of national regulatory autonomy: if national regulatory autonomy should be preserved to the maximum possible extent, even during the phase of global scrutiny and adjudication, the solution proposed guarantee the (decisional) participation of all the directly and indirectly affected parties. This solution, therefore, comes out from a combination of political transparency, internal accountability through power sharing (to be complemented with a appropriate mechanisms of external transparency), and multilateralism as a way to manage the unavoidable trend towards the erosion of the State regulatory autonomy.<sup>65</sup>

In the case of WTO, a significant number of transgovernmental bodies has been already established. Their task, however, is limited to assist sectoral Councils in administering the different agreements. In The WTO, in fact, a proper legislative power is lacking and all the adjudicatory decisions (both value free and politically sensitive) are left to the dispute settlement bodies. If Councils' and committees' tasks would embrace – as I suggest – the power to adjudicate and apply the substantive limits imposed on domestic regulation, this institutional reform would probably help rebalancing the present judicial empowerment, unconstrained by the absence of legislative power.<sup>66</sup> Some might probably argue that such a step would probably remedy some institutional unbalances but might damage one of the most effective mechanisms of market integration. Some other might also argue that the adoption of the EU model would probably soften but not erase the problem of legitimacy and accountability deriving from the global constraint of State regulatory autonomy. They might be right, but they shouldn't forget that we don't leave in a perfect world; that also State democracy (where there is one) is not a heaven where administrations and regulators are absolutely legitimate and accountable; that, in any

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<sup>65</sup> On the legitimizing potential of multilateralism, R. Keohane and S. Macedo, *Democracy – Enhancing Multilateralism*, paper presented at New York University, Global Administrative Law Colloquium on Globalization and its discontent, November 1, 2006.

<sup>66</sup> Cfr. Bogdandy, *op. cit.*, at 624, stressing in general terms the «need of an adjudicative body to have a political counterpart when developing a body of law through the reasoned dispute settlement decisions». Bogdandy also points to the need of rethinking the role of the numerous WTO committees as a possible alternative to cope with some major institutional weaknesses (especially at 632 and 672-673).

case, «an institution is inefficient only when it functions less perfectly than an alternative available solution».<sup>67</sup>

**b) Positive integration: first worlders-driven?**

Negative integration or deregulation allows for diversity and is affected by the «national bias» of domestic regulation, usually adopted without taking into consideration foreign interests. Positive integration or harmonization, by contrast, implies uniformity and faces «the opposite *bias* of being decided in an institutional environment which tends to neglect the interests of consumers and producers in a minority of Member States»<sup>68</sup>. This starting point deserves to be emphasized: the general claim that global regulatory bodies are unaccountable needs, in fact, is at least in part ill-founded. As Richard Stewart acknowledges, «the problem is often not that these [global] bodies lack accountability. Rather, they are often all too accountable to the States and other entities that constitute and support them and to powerful economic actors, to the detriment of more diffuse societal interests».<sup>69</sup> More analytically, I would say that the major accountability problem posed by global regulation is the lack of responsiveness towards developing countries and powerless or diffuse private interests.

One example is in order. The Basel Committee on Banking Supervision is one of the most influent transgovernmental networks. Established in 1974, it has played a leading role in standardizing bank regulations across jurisdictions. The Basel Committee's does not have legislative authority, but participant countries are implicitly bound to implement its recommendations and all the other countries are free to adopt the same. Despite the widespread influence and implementation of its standards, the composition of the body is restricted to the representatives from central banks and regulatory authorities of twelve countries: the eleven countries members of the G-10 (Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States) and Luxemburg. In 1988, the Basel Committee proposed a set of minimal capital requirements for banks. This initiative – known as 1988 Basel Accord – has been, so far, the most successful for the Committee: the requirements set in the Accord became law in G-10 countries in 1992, with Japanese banks permitted an extended transition period. As scholars have noted, this Accord was heavily conditioned by the US banking regulators. Their aim was to use the Basel Committee to set standards that had encountered internal opposition, but that, once approved by the Committee, US banks would have been forced to adopt. In short, this transgovernmental network was “captured” by American regulators, that, by using it, were able to successfully resolve an internal struggle with their bank.<sup>70</sup> Another unwelcome side effect should be noted. The

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<sup>67</sup> Komesar, *In search of a general approach to legal analysis: a comparative institutional alternative*, 79 MICHIGAN LAW REVIEW (1981), 1350, at 1359.

<sup>68</sup> M. Poiars Maduro, op. cit., at 172.

<sup>69</sup> Stewart 2006, cit., at 2.

<sup>70</sup> For more detailed accounts, T. Porter, STATES, MARKETS, AND REGIMES IN GLOBAL FINANCE (1993), at 70; W.P. Cooke, *International Convergence of Capital Adequacy Measurement and Standards*, in THE FUTURE OF FINANCIAL SYSTEMS AND SERVICES: ESSAYS IN HONOUR OF JACK REVELL 310, 325 (Edward P. M. Gardener ed., 1990), and D. Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, IILJ Working Paper 2004/6, Global Administrative Law Series, at 21-24.

implementation of the Accord produced quite disproportionate costs of implementation in the different national banking sectors: while American banks had to add \$10 to \$15 billion to their capital reserves, French banks had to add \$13 billion, and Japanese banks \$26 to \$50 billion. Interestingly enough, it has been hypothesized that «the 1988 Basle Accord forced Japanese banks to raise so much cash that the country's domestic markets were flooded with assets that depressed prices and the value of collateral, forcing more sales, and creating a "vicious circle" that contributed to that country's recession of the 1990s».<sup>71</sup>

What has been the response of the Basel Committee to the various complaints of unaccountability shrilled in the following years? The main improvement has been adopted along the prevailing patterns of "global" administrative law: transparency has been enhanced and notice and opportunity for comments have been provided for and considerably expanded. The second accord, know as Basel II, has received 250 comments on the first draft, 148 and 200 on the following. Banks, self-regulatory organizations, and other regulators were among the commentators.<sup>72</sup>

The trend towards a global administrative law informed to the basic provisions of the US APA seems, thus, confirmed. However, despite this development, questions have been raised concerning the effectiveness of such APA-like reforms.<sup>73</sup> In principle, one should not understate the crucial importance, for an ill-equipped global administrative law, of APA-like measures (transparency, notice and comment, giving reasons requirement) as means of responsibility-enhancing and, when judicial review is available, of legal accountability.<sup>74</sup> In practice, however, the effectiveness of such tools should be tested against the fundamental bias of unaccountability to developing countries and weaker societal interests. The relevant question is: to what extent a global administrative law inspired to the US model can help solving this problem of disregard?

According to Richard Stewart, «an interest representation model of administrative law is in many respect well adapted to meeting the problem of disregard and fostering elements of democracy in global regulatory governance. Even where review mechanisms are absent, its procedural elements provide important rights to representatives of affected social, environmental and economic represents to learn about proposed decisions, obtain background information, present their views and evidence, and obtain reasons and justifications for decisions. The information obtained through exercise of these rights can be used by NGOs and other entities to promote public awareness of and debate over the policies and decisions of global regulatory bodies, and thereby trigger responsiveness-promoting influences. These various rights, which may be supplemented in time with rights of access to independent review, are important tools for promoting responsiveness. They foster decisional processes that are open, competitive, and contestatory. Standing to

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<sup>71</sup> D. Zaring, op. cit., at 21, reporting the opinion of Kristen Nordhaug, *The Political Economy Of The Dollar And The Yen In East Asia*, J. CONTEMP. ASIA (2002), 517.

<sup>72</sup> D. Zaring, op. cit., at 24. This evolution has been signaled also by A.M. Slaughter, *Global Government Networks, Global Information Agencies, And Disaggregated Democracy*, 24 MICH. J. INT'L L. (2003), 1041, at 1052.

<sup>73</sup> According to D. Zaring, op. cit., at 26, «it isn't clear that the development of procedural niceties by the Basle Committee should assuage those concerned with its substantive work».

<sup>74</sup> Stewart 2006, cit., especially p. 18-24.

obtain information, submit views and evidence, demand reasons and, where available, obtain review is broadly available to representatives of almost any affected interest. These characteristics fit the fluid, dynamic character of global regulatory issues and interests. The interest representation model creates a public forum within global regulatory bodies for debate and engagement on regulatory policies and the norms that should appropriately govern them. This forum provides a foundation for stimulating wider public awareness of and debate over the policies and decisions of global regulatory bodies. In the absence of some system of direct or indirect electoral representation, such processes of participatory transnational governance arguably serve as the most feasible proximate means of promoting democratic values in global regulatory governance». <sup>75</sup> And yet, Stewart himself recognizes that this model of global interest representation has potentially significant limitations.

First, it is important to recall that, in most of the global sectoral regimes, one fundamental element of the US model is lacking, namely judicial review. Consequently, one of the major functions of APA-like measures – to reinforce legal accountability, by providing courts with penetrating instruments of review – vanishes. Secondly, a merely procedural global administrative law, «without a right to independent review, the administrative law model falls short of guaranteeing accountability». Thirdly, and most importantly in the perspective adopted, «its ability to stimulate greater responsiveness to disregarded interests is correspondingly limited»: part of the problem lies in the difficulty to provide adequate resources for effective participation. Fourthly, «beyond these concrete problems is the lurking fear that use of US models will bring with it the excesses of US adversary legalism». <sup>76</sup> As for the opportunity of a bottom-up approach, i.e., for the opportunity to generalize the adoption of APA measures at the domestic level, this would also be an important achievement. Perhaps, time has come to recognize that the need for judicial deference to the executive in foreign affairs is at least partially outdated: it is not possible anymore to include all the State trans-boundary relations in that old-fashioned category. US courts, in fact, have begun to apply the administrative law machinery to internal decision-making linked to the approval or implementation of global decisions. <sup>77</sup>

In my view, if assessed in the perspective of coordinated interdependent model, both top-down and bottom-up APA-like approaches are necessary to promote responsiveness of global regulation to societal interests. Yet, these same approaches are, at the same time, insufficient and potentially counterproductive.

As for the top-down approach, it is insufficient to enhance responsiveness to disregarded or powerless societal interests because of the problem of resources. If, in the US order, the problem is essentially tackled (with mixed results) by recurring to “civil society traditions” and government tax incentives <sup>78</sup>, it is difficult to imagine what remedies would be available at the global level, where there is no “civil society” at all. Not only this approach is not able to significantly rebalance the present unequal distribution of

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<sup>75</sup> Stewart 2006, cit., at 37-38.

<sup>76</sup> Stewart 2006, cit., at 38.

<sup>77</sup> Stewart 2005, cit., at 78-88.

<sup>78</sup> Stewart 2006, cit., at 35.

participatory opportunities. It is also, precisely in this respect, potentially counterproductive: as a tool typical of the US and western tradition, it would almost inevitably entail comparative advantages (at least initially) to US and western societal interests, in relation to other already disregarded State societies. The same approach is insufficient also in another respect, namely accountability to States in general, and developing countries in particular. This is probably the weakest aspect of GAL in the US modeled version. The global order clearly is far from resembling a State order. It is rather a “global arena” where private parties compete with the structural and still predominant democratic components of the global composite system: the States. How can APA reinforce supranational accountability or responsiveness not only to private parties but also to States? At global level, this question is even more pressing if APA-like solutions are implemented, since it is highly likely that powerful western societies’ representatives capture supranational or transgovernmental institutions.

As far as the bottom-up approach is concerned, the main insufficiency stems from the very simple fact that, whatever mechanism it is adopted, it is at least partially misplaced: the regulatory power to be checked is not exercised anymore at national level, but at the global. Here too, there are consistent reasons to fear potential counterproductive effects: if a US administration involved in global decision-making has to adopt the usual cumbersome procedures in order to define its position, two evident problems emerge: first, the slower the domestic preparatory stage, the slower the global decision-making, resulting in unacceptable regulatory delays; secondly, the harder the constraints imposed on the domestic administration, the harder to find margins of negotiations within the global bodies, due to the stifling of national positions.

Again, moving from a dispassionate recognition of present GAL shortcomings, we can assess the potential of the EU model. How can it cope with the bias of global regulation towards the «first worlders»? It seems to me that the EU model can contribute essentially in two ways. As for the accountability to powerless States, the European formula could be understood, on the one hand, as requiring plenary transgovernmental bodies, open to the (decisional) participation of all the countries, rather than just elite groups (as in the case of the Basel Committee); on the other, as providing for a decision making process supranationally-oriented, where all national interests are, by definition, secondary and, thus, standing on a leveled playing field, with a supranational institution acting as a “mediator” in the name of a common superior interest. The European case well illustrates how the presence of a strong supranational institution is perceived as a partial remedy to the unbalances between “big” and “small” countries. This, of course, would imply, in cases such as the Basel Committee, a shift from a merely horizontal to a vertically integrated government network: sometimes, political and social benefits cannot be achieved without incurring in corresponding institutional costs.

The second potential contribution of the EU model is related to the problem of responsiveness to diffuse societal interest. The contribution is, in this case, indirect, but very important. Due to the absence of an adequate European system of interest representation, the most satisfactory interest representation model for the moment available is the US model. Yet, this model has the general counterproductive effect of

significantly affecting the balance accountability-efficiency, with detriment to the latter. In particular, if APA-like measure are adopted at national level, they induce a stifling of national positions that would exacerbate the common problem of joint decision trap and, therefore, threaten the overall outcome legitimacy of global regulation. The EU formula, far from being “magic”, can nonetheless be used as compensation. Injecting in the global decision-making a supranational “mediator” or “facilitator” might prevent the risk of joint decision trap. The European procedural supranationalism, in fact, happily combines the capacity to circumscribe the global regulatory power by promoting multilateralism, with the capacity to enhance regulation efficacy, by speeding up decision-making and facilitating implementation. Within the limits mentioned, the EU model could contribute to the adoption of the US model by softening the trade-off between accountability and regulatory efficacy. The resulting mix of US APA-like model and EU-like procedural supranationalism is a way to complement the strengths of the two models and partially compensate their respective weaknesses. It is, in any case, a rough ‘operational’ proposal, that would need to be patiently refined in relation to the functional and structural differentiation of global regulatory regimes.