MARIANGELA BENEDETTI
PhD Candidate in Administrative Law
Faculty of Law, University of Rome "La Sapienza"

Global judicial review: a remedy against fragmentation?

SUMMARY: 1. Introduction. – 2. Case studies. – 3. The fragmentation of law-making. – 4. The fragmentation of judicial power. – 5. The decisions. – 6. How judges contribute to overcome the fragmentation problem. – 6. Conclusion.

1. *Introduction*

The global space is composed of a group of self-contained regulatory regimes[1]; it is not born of a unique and cohesive system in which common values are applied, organized according to fixed constitutional reference models and in which developed specific principals can be applied – as analogies – to other sectors. In fact, the rules that uphold the global arena are always "special"[2] because they are applicable to one, but not another regime. This means that if rights are guaranteed in one of these regulatory spheres, such as defense or in the participation of administrative procedure, these rights are not directly applied to other spheres.[3]

The "fragmented"[4] nature of the global space has not impeded the elaboration of guarantees in favor of the private entities, nor in the forecasting mechanisms of the legitimization of the public administrations that work within it. In fact, the duty to formulate

---

1 A. LINDROOS AND M. MEHLING, *Dispelling the Chimera of "Self-Contained Regimes". International Law and the WTO,* in *European Journal of International Law*, vol. 16, 2005, p. 857 ss.

2 S. CASSESE, *Globalizzazione e «rule of law». Esiste uno «Stato di diritto» oltre lo Stato*? in *Oltre lo Stato*, Roma-Bari, LaTerza, 2006.

3 S. CASSESE, *La funzione costituzionale dei giudici non statali. Dallo spazio giuridico globale all'ordine giuridico globale*, (Report obtained (in original French) from the French Court of Cassation, at the series of conferences on European Rights organized for the occasion of the fiftieth anniversary of the Treaty of Rome, Paris, June 11, 2007), in *Rivista trimestrale di diritto pubblico*, vol. 3, 2007, p. 609 ss.

4 On the fragmentation of international rights in particular, see M. KOSKENNIEMI, *Outline of the Chairman of the ILC Study Group on Fragmentation of International Law: the Function and Scope of the Lex specialis Rule and the Question of "Self contained Regimes*", in http://www.un.org/law/ilc/session/55fragmentation_outline.pdf; UNITED NATION INTERNATIONAL LAW COMMISSION, *Fragmentation of international Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13 April 2006.

substantial standards and procedures to follow to every subject whose actions might touch individual rights or interests, which represent one aspect of the *rule of law* principle, is present within this context as well.[5]

In spite of this, fragmentation can represent a critical element for the private persons. The problem is that the guarantees available for the individuals, reflecting the sectorization of the system, are asymmetric in themselves.

One must keep in mind, for example, that in the absence of traditional political controls, each regulatory regime has devised instruments that consent to bear on the realization of public power in its being (that's means before the measure is taken). Such disciplines, which assure the "voice" and the "vision" of the private persons in the decision-making process, are not homogeneous. They present a diversification in the substance of their contents; this is both because of the differentiation of the rule-makers who adopt them, as well as the specificity of the regime under which they are developed.

The consistency of different regulations, elaborated in different subjects and applied in distinct sectors, produces an imbalance in the protection available to private persons. The individual, in fact, is offered a distinct *corpus* of guarantees based on the particular ultra-state regulatory regime with which they come in contact.

Next to procedural guarantees, in which the protection of interests takes on a preventative nature, the global judicial space recognizes the right to react when faced with an illegitimate exercise of power. In other words, the global arena have imported the common philosophy of public action in which power must exist alongside responsibility; in fact only in this way it's possible to ascribe consequences when the exercise of power is both illegitimate and absent.

This protection concerns the subsequent moment to the accomplishment of the discretion power. It has judicial power because it is carried out in front of specific bodies, which have the power to review the legitimacy of the measure, or the behavior, taken by the public administration.[6]

---

5 See L.H. TRIBE, *Structural Due Process*, in *Harvard Civil Rights and Civil Liberties Law Review*, vol. 10, 1975, p. 269 ss.

6 Within the sector of global judges, which are 107 according to a *Project on International Courts and Tribunals* census, those bodies of dispute resolution were selected that, even if of different declination, would make evident the administrative nature of the relationship of the dispute that would establish it as an object of analysis. In order to identify this particular *genus* within the wide scope of judges, tribunals and courts that currently crowd the ultra-state panorama, a restrictive and functional approach was used. The adopted criteria is of a "double level" since it considers both the type of discipline applied by the judge and the object of review. Through this technique, those bodies of dispute resolution were selected to which an individual (and

The presence of such bodies contributes to the fragmentation of the global space for at least three reasons. The first is that each regulatory regime decides on the establishment of these bodies; even though within the global arena, regimes with a judge co-exist whit regimes that, on the contrary, have not put this form of protection into action. The second is that when these bodies are foreseen, they can present a different type and degree of maturation and effectiveness. Finally, the third reason is that because of the coexistence of different regulatory regimes, which deal with the same sector,[7] it is possible that a dispute could be subject to the decision of different dispute settlement bodies.

Within this context, protection of the private parties could result weakened and inefficient. First of all, the people affected in his own rights or interests (by a global administration) may not have the possibility to refer to a judge. Secondly, when this possibility does exist, his interests could be safeguarded by different bodies and by heterogeneous guarantees. In other words, the interested persons could receive different solutions to a conflict based on the particular body to which it refers.

---

even a State) could turn to obtain a review of a decision taken by an ultra-state (or national) body operating within a global discipline This has an administrative nature in as much as it conditions, through procedural obligations, the implementation of public power. In so doing it's possible to select at least twelve dispute settlement resolution: the World Bank Inspection Panel, the Independent Review Mechanism of the African Development Bank, the Inspection Function of the Asian Development Bank, the Independent Recourse Mechanism of the European Bank for Reconstruction and Development, the Compliance Advisor Ombudsman (CAO) the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), the Citizen Submissions on Enforcement Matters mechanism of the Commission for Environmental Cooperation (CEC), the Compliance Committee of the Aarhus Convention, the Revision Committee of the Icann, the International Centre for Settlement of Investment Disputes (ICSID) regarding investments, the International Tribunal for the Law of the Sea (ITLOS) regarding prompt release, the Dispute Settlement Body (DSB) of the WTO, the Binational panel of the North American Free Trade Agreement (NAFTA).

7 In many sectors the regulators are more than one, with different points of competency. Concerned with the sea are the "International Maritime Organization - IMO" (1958) and the "International Seabed Authority - ISA" (1994), as well as the "International Tribunal for the Law of the Sea - ITLOS" (1994). For the environment: the "World Meteorological Organization - WMO" (1950), the "United Nations Convention on Climate Change – Clean Development Mechanism - UNFCC-CDM" (1992) and the "Global Environmental Facility - GEF" (1991), with their relative fulfilment bodies ("United Nations Environment Programme", "United Nations Development Programme", "World Bank"). In the economic and finance sphere there are many active bodies: "International Monetary Fund - IMF" (1945), "World Bank" (1944), "Basel Committee on Banking Supervision" (1974), "Financial Stability Forum – FSF" (1999), "Financial Stability Institute - FSI" (1999), "Committee on Payment and Settlement Systems", "Egmont Group" (1995), "Financial Action Task Force on Money Laundering - FATF" (1989), "International Organization of Securities Commissioners - IOSCO" (1983), "International Association of Insurance Supervisors – IAIS" (1994), "International Accounting Standard Board – IASB" (1973). The need for coordination between these organizations leads to the institution of further bodies, common too many organizations like the "Joint Forum" instituted in 1996 between IOSCO and IAIS, under the auspice of "Basel Committee".

In short, therefore, the fragmentation of the global legal order leads to asymmetries and aporias that can evaporate the effectiveness of individual protection.[8]

In the face of such a problem the global arena has elaborated techniques that consent the connection between the distinct regulatory regimes of which it is composed. These techniques have usually involved procedural and functional aspects, namely the administrative or executive phases of public functions.

The purpose of this paper is to demonstrate that at present a new form of convergence is developing amongst regulatory regimes. This convergence is carried out by judges through the law-making affirmation of a *minimum* of guarantees that must be insured to all private entities, apart from the regulatory regime with which such individuals come into contact. The measure of control of this hypothesis is represented in the way the judge performs. This paper uses three jurisprudential cases to demonstrate that, though operating in different regimes, judges can resolve the disputes presented to them by elaborating the same principles on the behavior of public action.

1. *Case studies*

We will examine the following cases.

a) *The Allain Duhangan Project Case (Compliance Advisor Ombudsman)*

In October of 2004 the inhabitants of the Indian region of Himachal Pradesh filed a complaint to the Compliance, Advisor and Ombudsam (CAO). The object of the dispute was the construction of a hydroelectric power plant, and specifically the necessary infrastructure to implement the construction, which had been financed by the Multilateral Investment guarantee Agency (MIGA). In support of their request, 63 people likely to be impacted by the development of the Allain Duhangan Project in the Indian Himalaya form an association. They sustain that water supplies would dry up due to the project's diversion of the Duhangan River, with negative consequence on agriculture, tourism, and overall

[8] See UNITED NATION INTERNATIONAL LAW COMMISSION, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, A/CN.4/L.682, 13 April 2006, par.9.

quality of life. Complainants also stated that the Environmental and Social Impact Assessment (ESIA) documents prepared by the sponsor[9] neither adequately considered the legitimate concerns of the villagers nor provided a sufficient basis for informed consultation on key project impacts.

The CAO performed their own investigation, directly with individuals registered on the complaint, visiting the villages that would be most affected by the infrastructure of the project, meeting with external observers such as members of the South Asia Network on Dams, Rivers and People and, finally, by holding meetings with the sponsor's management.

In March of 2005, at the end of the investigation, the Ombudsman finds that the sponsor has carried out insufficient public consultation. In addition it finds that the IFC'management presents to the Board an inadequate project of environmental and social impact assessment (ESIA): the language and process by which the ESIA has been managed was confused because IFC'management has sought approval based on the production of a 'draft' report produced in May 2004, combined with the September Addendum.

In light of these results, the CAO issues a report[10] in which it advises the Indian group to adopt a more formal approach of consultation. In fact the formal approach would better safeguard the interests of "effective due process" and could strengthen the communicative procedures within the community.

b) *The Juno Trader Case (The International Tribunal for the Law of the Sea)*

In September of 2004 the refrigerated cargo vessel Juno Trader, flying the flag of Saint Vincent and the Grenadines, receives a transhipment in Mauritanian waters from its sister ship, the Juno Warrior, a trawler operating under Mauritanian licence in the exclusive economic zone. After having completed the transfer the *Juno Trader* leaves Mauritania to reach the port of Ghana. During the passage in the waters of Guinea Bissau the local

[9] The project sponsor was the Malana Power Company, whose stock portfolio is held exclusively by an Indian group composed of 11 operating enterprises, diversified in textiles, iron, technology and energy.

[10] International Finance Corporation/ Multilateral Investment Guarantee Agency, Office of the Compliance Advisor/Ombudsman, Assessment Report, *Complaint regarding Allain Duhangan Hydropower Project Himachal Pradesh*, India, 23 March 2004, p.11: "in the interests of effective due process, the Cao believe that it would have been more forthright to have presented a final report to the Board and public […] the Cao believes that the transparency of process of developing the scope and content of the Esia could be improved, particularly with regard to Ifc demonstrating that its own due diligence has been met and that concern that are material to progressing the project have been prevented or mitigated".

authorities send a *zodiac* to verify and investigate the catch aboard the ship. Because of a lack of understanding regarding the signals sent from the *zodiac* to the *Juno Trader*, the crew of the ship of State of Saint Vincent and the Grenadines believe to be under pirate attack and consequentially open fire.[11] After the shooting, officers of the Fisheries Inspection Service of Guinea-Bissau boarded the Juno Trader; the master and the crew of the *Juno Trader* were arrested and the Guinea Bissau port authorities confiscated the ship.

Coinciding with the appeals made to national bodies,[12] the Commissioner of Maritime Affairs of Saint Vincent and the Grenadines filed a request to the International Tribunal of the Law of the Sea. The Tribunal, in accordance with Art. 292 of the Montego Bay Convention, has compulsory jurisdiction concerning prompt release. That's means that it is able to verify the legitimacy and the reasonableness of the measures imposed by the Guinean authorities for the release of the vessel, its crew and the transported load.

The Tribunal decides on the release of the ship and its crew because the authorities of Guinea Bissau did not respect the principles of fairness and due process. The decision is based on two reasons. The first is that the parag. 2 of Art. 73 of the Convention has been violated because the bond is disproportionate and onerous; the second is that the detention power has been illegitimately exercised by Guinean authorities because it did not guarantee the expectation of due process (for example, by not allowing the right to a hearing for those arrested).[13] In fact, the Tribunal considers that parag. 2 of Art. 73 must be read in the context of article 73 as a whole. In so doing, the obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The

---

11 INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, *The Juno Trader Case* (*Saint Vincent and the Grenadines v. Guinea-Bissau*), 18 December 2004, par. 39.

12 The activation of the infringement procedures foreseen by national legislation is managed by the *National Fisheries Inspection and Control Service* (FISCAP) while the informative phase is entrusted to a group of experts from the *Center for Applied Fisheries Researcher*. The report that concludes the investigation states that the fish found aboard the Juno Trader, with the exception of a few species, is the same as that found in the territorial waters of Guinea Bissau. It is thus plausible, according to experts, that the fish was caught illegally. Following these results, the FISCAP recognizes the breach of the law by the *Juno Trader* regarding national fishing legislation and arranges to fine the vessel's captain because he did not collaborate during the inspection, imposes a fine for the infraction and in the end confiscated the entire load. Moreover, the *Juno Refees Ltd* appeals in front of the Bissau Regional Court to ask for the suspension of the implementation of the provisions adopted by the FISCAP. The Court decides on November 23 to accept the grounds of the plaintiff. Consequentially it gives the order to immediately cancel (or annul) the procedures to sell the vessel's load; the crew member's passports were immediately given back and, finally, the payment of the fines was suspended.

13 For an analysis of the case See the Institute for International Law and Justice, Global Administrative Law Cases, Materials, Issues, Second Edition, edited by S. Cassese, B. Carotti, L. Casini, M. Macchia, E. MacDonald, M. Savino, Rome-New York, 2008 at http://www.iilj.org/GAL/documents/GALCasebook2008.pdf.

requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision.

c)*The Bystroye Canal (the Compliance Committee of the Aarhus Convention)*

The Danube delta extends over a surface of 799,000 hectares, 679,000 of which belong to Romania while the rest are located in the Ukraine. The delta includes 12 different ecosystems, with thousands of classified species of flora and fauna, among which is found 70% of the world's population of white pelicans and half of the world's population of pigmy sea crows. For these reasons the Danubio delta is, since 1991, on the UNESCO World Heritage list as a biosphere reserve.

In 2004 the Government of Ukraine has begun construction of a navigable canal to allow passage of vessels from the Danube River to the Black Sea through the Ukrainian part of the Danube Delta. On May 5 of the same year *Ecopravo-Lviv*, a non-governmental organization (Ngo) based on Ukraine, submitted a communication[14] to the Compliance Committee of the UN ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter "the Convention"). The request regards the legitimacy of the national authorization issued by the Ministry of Environment of Ukraine, which permit development of a canal in the core area of the Danube Biosphere Reserve. In support of its own communication, the Ngo holds that in taking its decision the Ministry of Environment ignored its obligations under the Aarhus Convention (Art. 6) and violated their right to participation in the environmental decision-making. More specifically, the Ngo sustains that the building permission was given by the Ministry only on the basis of positive conclusions of a "state environmental expertiza", according to Ukrainian legislation. The Government did not guarantee adequate participation by interested parties during the decision-making process, or the right to access relevant documents regarding the evaluation process of the project's environmental impact. In fact, a number of environmental organizations in Ukraine and other parts of Europe, including EPL, tried to influence the decision taken by the Ministry of Environment of Ukraine but they did not allow for the possibility to express their opinion.

14 UNECE, Compliance Committee, Communication ACCC/C/2004/3.

On June 7, 2004, the Romanian government, on the other side of the Danube, also filed a submission to the Compliance Committee.[15] This submission sustains the lack of compliance on the part of the Ukraine for not having furnished information in a timely manner to the interested "public" about studies concerning the impact that the *Bystroye* canal project would have on the ecosystem of the Danube delta. As such, the Ukrainian government did not offer guarantees of participation to the non-governmental environmental organizations that are particularly sensitive to the habitat protection of the area.

Despite the local jurisdictional bodies sustained that Ukrainian legislation did not oblige public authorities to secure the rights of participation in the decision-making process,[16] among which is included the evaluation of environmental impacts of transnational projects, the Compliance Committee found the Ukrainian government to be in breach of the obligations assumed in the Aarhus Convention. In fact, based on the nature of the project and on the interests involved in the protection of the delta, the government should have guaranteed communication by informing the public, both through the mass media as well as individually.

The Romanian government, with whom the Ukraine shares the delta, as well as both Ukrainian and Romanian environmental agencies that operate in the protection of the area's ecosystem, should have been informed. Based on these considerations the Committee recommended at the Meeting of the Party (MOP) of the Aarhus Convention to request the Government of Ukraine to submit to the Compliance Committee, not later than the end of 2005, a strategy, including a time schedule, for transposing the Convention's provisions into national law and developing practical mechanisms and implementing legislation that sets out clear procedures for their implementation. The strategy might also include capacity-building activities, in particular for the judiciary and public officials involved in environmental decision-making.[17]

---

15 UNECE, Compliance Committee, Submission ACCC/S/2004/01.

16 UNECE, Compliance Committee, Communication ACCC/C/2004/03, *Additional Information*, par. 6: "On October 21, 2004, the High Commercial Court of Ukraine took a decision on our second appeal regarding the environmental expertiza of the TEG of the canal Danube-Black Sea. In our complaint we challenged the decision of the Kyiv Appeal Court, which on February 25, 2004, held that the Ministry of Environment had no obligation to ensure public participation in environmental expertiza".

17 UNECE, Report on the Seventh Meeting, ECE/MP.PP/C.1/2005/2/Add.3, *Finding and Recommendation* with regard to compliance by Ukraine with the obligations under the Aarhus Convention in the

3. *The fragmentation of the legislator*

The above illustrated cases are developed within operating regulatory regimes in distinct disciplinary areas: financial and technical assistance to developing countries around the world, the use of maritime patrimony and, finally, environmental protection.

Each of these regimes arranged for the elaboration of their own rules and disciplines that, between the others, have subject the behavior of administration in exercising public functions. In the first (*Allain Duhangan Project*) and last (*Bystroye* canal) cases, this is evident in the construction of a public work, while in the second case (*Juno Trader*) in the application of sanctions.

In the case of the *Allain Duhangan Project*, the normative global reference is given by policy and procedures drawn up by the International Finance Corporation (IFC).[18] With the objective of promoting sustainable development,[19] the IFC establishes that in the procedure of financing the Bank must consider the observance of some procedural burdens that, amongst others, require participation in decision-making and access to information on the part of interested parties. Specifically, the Guidelines propose to charge the sponsor with the responsibility of organizing meetings with local communities in order to offer information and explanations regarding proposed projects;[20] to commit to use the local language of interested parties as much as possible;[21] to trust in the experience of those

---

case of Bystre deep-water navigation canal construction (submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine)), 14 March 2005, par. 41.

[18] International Finance Corporation, *Policy on Social and Environmental Sustainability*, April 30, 2006; International Finance Corporation, *Environment and Social Review Procedure*, July 31, 2007; International Finance Corporation, *Policy on Disclosure of Information*, April 30, 2006.

[19] International Finance Corporation, *Policy on Social and Environmental Sustainability***,** April 30, 2006, par. 7: "in order to accomplish its mission, IFC seeks to base partnerships with clients on the understanding that the pursuit of social and environmental opportunities is an integral part of good business. Socially and environmentally responsible businesses can enhance clients' competitive advantage and create value for all parties involved. IFC believes that this approach also helps to promote the long-term profitability of investments in emerging markets and to enable IFC to fulfil its development mandate and strengthen the public's trust in IFC".

[20] International Finance Corporation, *Operational Guidelines*, p. 7: "Meeting with local communities or their representatives, upon request, to provide information about the CAO's operations, including how to file a complaint".

[21] International Finance Corporation, *Operational Guidelines*, p. 8: "Communicating in the language of the communities affected by projects, when possible".

knowledgeable about the activity and culture of the interested areas;[22] and, finally, to adopt a proactive attitude towards the needs and problems of the interested communities.[23]

The regulation of the International Finance Corporation is not detailed; in fact, no specification is provided for regarding timeliness and forms under which the right of participation must be guaranteed. This means that the IFC does not define standards that unequivocally condition the behavior of sponsors. On the contrary, the International Finance Corporation allows sponsors the discretion to choose the most opportune forms depending on each individual case. In other words, observance of public consultation and information disclosure is actually guaranteed based on the difficulty of the project.[24]

In the *Juno Trader* case the referent discipline is the Montego Bay Convention. This Convention provides for the counterbalance of member States' police powers exercised within the maritime patrimony protection (for example: the power to board a vessel, to carry out inspections, of arrest) through two guarantees. The first, assured by the second parag. of Art. 73,[25] provides that the set bound for the release of a vessel and its crew be reasonable. The second guarantee, adopted in the fourth paragraph,[26] stipulates that the sanctions applied by the coastal State should not include imprisonment (save a pact between the parties) or any corporal punishment. The discipline, limited to one sole institution that is the bound for the release of the vessel, decrees that the measure must comply with the principle of reasonableness. In this case, therefore, the discipline recognizes a standard with which the judge can verify the legitimacy of measure further than bound.

Finally, in the third case – that of the *Bystroye* canal – the referent discipline is the Aarhus Convention. This Convention imposes on the signatory States the recognition of procedural rights (both of access and participation) for environmental information, let alone instruments to guarantee observance. The discipline is very detailed since it is fixes – in both

---

22 International Finance Corporation, Operational Guidelines, p. 8: "Seeking advice of those with expert knowledge within countries and gathering local knowledge as a basis for interventions".

23 International Finance Corporation, Operational Guidelines, p. 8: "Being responsive to locally specific factors affecting communities' abilities to participate in problem solving and to communicate openly".

24 In 2007 the international finance society elaborated a more precise discipline regarding environmental and social evaluation. See International Finance Corporation, Ifc E&S Review Procedures, Version 2.0 July 31, 2007.

25 Montego Bay Convention, art. 73, c. 2: "Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security".

26 Montego Bay Convention, art. 73, c. 4: "In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed".

terminology and methods – the minimal procedural guarantees that must be secured in environmental informational material by all signatory States to the Agreement. Specific indications are also given with regards to information that may be made public.

The above-illustrated cases indicate that the segmentation of regulatory regimes that make up the global judicial space brings about an asymmetry in the internally produced normative. The instruments of procedural protection in the three regimes noted here, in fact, are doted of completeness and of a detailed and rigorous discipline in the Aarhus Convention while they are milder in the elaborated discipline of the International Finance Corporation in that established by the Montego Bay Convention.

4. *The fragmentation of judicial power*

The illustrated cases show that each regulatory regime considered has arranged to institute a body with a judicial or quasi-judicial nature.

These bodies present some differences that can be concerned both the way in which they come in to existence as well as the way in which they are distinguished among one other.

As far as the first aspect, we underline that in the *Allain Dehangan Project* case, judicial power has been carried out by the internal office of the International Finance Corporation,[27] namely the *Compliance Advisor Ombudsman* (CAO). This was instituted through an administrative measure taken by the President of the World Bank; therefore it would seem to qualify as a standard office of an internal body belonging to the administration. CAO is composed by a single person who, in carrying out his own operations, also makes use of a specific administrative office.[28]

---

[27] The International Finance Society – established in 1956 – is a member of the World Bank. It promotes financing in the private sector of developing countries, directly assuming the investment, since it does not subordinate its own intervention to the guarantees made by local governments. See International Finance Corporation, *Policies on Information Disclosure, Environmental Assessment, Natural Habitats, Pest Management, Forestry and projects on international waterway. Policy on Indigenous peoples, involuntary resettlement, cultural property and safety of dams,* in http://www.ifc.org/enviro/index.html.

[28] Compliance Advisor Ombudsman, *Operational Guidelines*, par. 1.3: "the Cao reports directly to the President of the World Bank Group and is not part of the line management structure of either Ifc or MIGA. Staff of the Office of the Cao is recruited by the Cao. Staff is independent of the management structure of Ifc and Miga. The Office of the Cao is physically located in a secure area, and only Cao staff has direct access. The Cao Vice President and her or his staff exercise caution in becoming involved in internal processes within IFC and Miga, which might compromise the neutrality of the position. This caution needs to be balanced against the requirements of the advisory role. Cao professional staff contracts restrict professional staff members from

In the *Juno Trader* case, instead, the judicial activity is carried out by a judicial body pre-established by a conventional act, namely, the United Nations Convention of the Law of the Sea of December 10, 1982. The Tribunal is made up of 21 members, chosen from recognized experts in the field of maritime rights.[29]

In the *Bystroye* canal case the judicial review is exercised by an institutional body, with the decision undertaken by the Meeting of the Parties (MOP),[30] charged with guaranteeing the fulfillment of the Aarhus Convention.[31] The committee, even though provided for directly by the Aarhus Convention, operates as an auxiliary body of the MOP. The Committee is composed of nine members,[32] chosen on the basis of specific environmental competencies, of both judicial and non-judicial nature, keeping in mind their geographic provenance. The members are elected "by consensus or, should consensus not work, by secret ballot" by the MOP. However, NGOs – equal to the member States – that promote environmental

---

obtaining employment with Ifc or Miga for a period of two years after they end their engagement with the Cao".

[29] International Tribunal for the Law of the Sea, *Statute*, art. 2: "the tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and recognized competence in the field of the law of the sea. In the Tribunal as a whole representation of the principal legal systems of the world and equitable geographical distribution shall be assured".

[30] The Meeting of the Parties is the main governing body of the Convention. It comprises all Parties to the Convention. It its meetings, other Signatories and other States as well as intergovernmental and non-governmental organizations participates as observers. The mandate of the Meeting of the Parties is to keep under continuous review the implementation of the Convention and take the necessary measures required to achieve the purposes of the Convention.

[31] The Aarhus Convention, stipulated in Denmark on June 25, 1998, imposes on the signatory States the obligation to guarantee the right of access to environmental information, participation in the decision-making process, in other words, access to justice. The convention is based on the idea that private entities involvement – both that of persons as well as that of non-governmental organizations (NGOs) – intensifies environmental protection from the moment that these people are directly interested in the environment surrounding them. This involvement is insured in three ways. First of all, people have the legally recognized right to access environmental information in possession of the government, that includes a great variety of matters (such as air and water quality, biological diversity, energy and sound pollution, political and development plans) and their effects on health, safety, and the environment. Secondly, the Convention encourages private persons to take part in politics and decisional proceedings related to the environment and invites public organizations to adopt measures that allow citizens to be heard, throughout the decisional proceedings of adjudication such as the construction of industrial plants, railway lines, highways and airports. The institutions have the responsibility to provide timely information adequate to the decision to be made, to consent to the dispatch of comments and opinions, keeping them in mind and informing interested people about the decision taken and the motivations behind it. The third element, finally, allows private entities to make an appeal to the tribunal or any other competent body if they feel that their right to access information or their right to participation was somehow injured. Even in the case of other violations of environmental legislation private can ask to review the provision in question. This arrangement was put into effect at the first meeting of member States with the adoption of decision I/7 and with the subsequent Constitution of the Compliance Committee.

[32] Report of the Second Meeting of the Parties, Decision II/5, General Issues of Compliance, para. 12, Doc. ECE/MP.PP/2005/2/Add.6.

protection and that have been admitted into the MOP's activities have the right to nominate candidates who will then be elected by the MOP in the capacity of observers.

The ways in which the dispute settlement bodies come in to existence contribute to shape their features and their activities, such as the level of their independence.

As to the first profile, we underline that when the dispute settlement body has been established by a conventional act the "subjective aspect" of judicial power proves to be more extensive. The "subjective aspect" indicates the number and the nature of the subjects whose measures and behaviors are verified by the dispute settlement body. In this case the aspect is wide because, as shown by IITLOS and Compliance Committee cases, the bodies of resolution are called upon to declare an opinion on the behavior carried out by a variety of administrative agents (including the States). In this circumstance the relationship between the subject who controls and the body submitted to scrutiny can be defined as "one to a hundred": the first is only one while the second is multiple. On the contrary, if the way in which the disputes settlement bodies come in to existence is by an internal administrative measure (CAO), the bodies of resolution are able to verify only the activity put through by the same organization that established them. In these cases, the relationship between controller and controlled is one-to-one – the controller examines the behavior of the one singular agent.

As far as the level of independence is concerned, it is possible to observe that when the judicial body is born of a conventional act and is configured as an autonomous subject (ITLOS) the independence from influence of the national powers is insured by the "appointed disciplines". [33] These disciplines guarantee a fair distance between the judging subject and the concerned parties, being judged chosen through a mechanism of separation of nationality. If, instead, the judicial body has relative or absolute dependence from the administrative agent because it represents a breach of the administration, the requirement for independence assumes a greater complexity. In fact, the nationality of the single judge does

[33] International Tribunal for the Law of the Sea, *Statute*, art. 3 : "No two members of the Tribunal may be nationals of the same State. A person who for the purposes of membership in the Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations" .

not seem sufficient to guarantee risk protection from political interferences, which, in these cases, are identifiable in the interest of the board director of administrative agent.[34]

Based on these considerations, therefore, it is possible to point out that the dispute settlement bodies established by the three regulatory regimes considered here present a number of points of difference. While the CAO is configured within the terms of a mediator (*Ombudsman*), and the ITLOS within the international tribunal, the Compliance Committee is an independent body of a quasi-judicial nature.

5. *The decisions*

Now we move to analyze how the dispute settlement bodies assure the compliance of the procedural rights.

In the Allain Duhangan Project case, the Ombudsman is called upon to verify if the sponsor has complied with the obligations regarding the communication of environmental information. The respect of these policies assures that the Multilateral Bank of Investment finance only the projects those are environmentally and socially sustainable.

In the Bystrole-case, the CAO analysis the procedure used in order to guarantee the involvement of the interested local communities in the construction of the dam, the transparency of the documents presented to these communities and the timing of the consultations. Following these analyses, the Ombudsman holds that the sponsor did not guarantee sufficient "informed-communication", that is, communication that can explain to the interested subjects the implications of the projected initiative. In fact, the local community expressed their approval not on the basis of an evaluation of the environmental impact but on a draft report containing information both undefined and not exhaustive.

[34] Compliance Advisor Ombudsman, *Operational Guidelines*, par. 1.3: "the Cao reports directly to the President of the World Bank Group and is not part of the line management structure of either IFC or MIGA. Staff of the Office of the Cao is recruited by the Cao. Staff is independent of the management structure of Ifc and Miga. The Office of the Cao is physically located in a secure area, and only Cao staff has direct access. The Cao Vice President and her or his staff exercise caution in becoming involved in internal processes within Ifc and Miga, which might compromise the neutrality of the position. This caution needs to be balanced against the requirements of the advisory role. Cao professional staff contracts restrict professional staff members from obtaining employment with Ifc or Miga for a period of two years after they end their engagement with the Cao".

Moreover, the language used in the documents shown to the stakeholders, which did not in local Hindi, caused confusion and weakened participatory rights.

The CAO holds that when a subject is asked to respect procedural rights, like those of participation and communication of information, the application of these rights implicates the fulfillment of further burdens, which can be qualified as necessary consequences of the respect of the due process of law.[35] Aside from the literal tenor of the provision, in fact, respect the due process of law also implies a conditioning of the way in which it must be applied to procedural rights. This means that the right to receive information cannot be left at the discretion of the administrative agent because doing so it could be reduce its effectiveness. Based on these considerations, therefore, the CAO retains that the informal approach – mainly based on telephone contact – is not sufficient to make known the state of progress and the implications of the financed project. In its place a formal strategy must be adopted that would involve stakeholders in a systematic and procedural way.[36]

In the *Juno Trader* case, the Tribunal is called upon to verify the compliance to the principle of reasonableness on the part of the Guinea Bissau administration according to parag. 2 of Art. 73 of the Montego Bay Convention, which statue the reasonableness of the bail for the release of a vessel's captain and crew.

The Tribunal retains that the application of reasonableness principle must be based on the due process of law. This means that the bound fixed must be proportional to the gravity

---

35 Compliance Advise Ombudsman, *Compliance Report*, Complaint regarding Allain Duhangan Hydropower Project Himachal Pradesh, India, March 23, 2004, p. 14: "The Sponsor acknowledges that its approach to community relations has so far not been commensurate with the challenges it has experienced. For example, informal channels for communication have been relied upon, but there is less evidence of formal processes of negotiation with communities. Engagement with affected communities could be more professional. It seems that both the IFC and its client have underestimated the level of local as well as national interest in this project. As a result, they were not appropriately resourced at the earliest stages to manage demand for open and constructive dialogue, nor to meet local as well as national criticism. These early weaknesses, despite actions for redress, have now translated into a soured relationship between the project developer and part of its host community.

36 Compliance Advise Ombudsman, Progress Report, *Complaint regarding the Allain Duhangan Hydropower Project Himachal Pradesh*, India**,** August 28, 2006, p. 11: "The company has worked hard to establish informal interaction with the Jagat Sukh community. At the same time, CAO recommends establishing more formal mechanisms for representation and documentation of community concerns and grievances, and of company responses to them. As the foundation of all other aspects of social performance, company stakeholder engagement should be handled in a systematic and professional manner — with a clear understanding of *why* it is being done, who is represented, and *how* it will affect the community and the project. If not, stakeholder consultation becomes anexpensive, time consuming, and unwieldy process divorced from core business activity that more often creates public expectations that the project cannot deliver".

of the committed violation and the pecuniary fine for the release of captain and crew.[37] Based on this interpretation, the Tribunal decides, on the one hand, that the bail levied is unreasonable, on the other hand, that the Guinean authorities acted illegitimately during the sequester proceedings. In fact, since passports were not returned to six of the crew members, the *Juno Trader* could not leave the Guinea Bissau coast.

In this case the judge, in the exercise of his own judicial function, has used two interpretative approaches. The first is the decomposition of the principle of reasonableness: the Tribunal makes use of due process of law to clarify that the compliance to reasonableness of bound implicates the necessary compliance to proportionality.[38] The second is the extension of the application of the principle of reasonableness. In fact, the use of due process as a key to the reading of the discipline on bail consents the Tribunal to push ahead of the literal content of the disposition. Just process is indeed a composite and complex principle – to be satisfied it cannot simply deal with bound but it must be applied to the entire national (sanctions) administrative process.

Finally, in the *Bystroye* canal case, the Compliance Committee[39] sustains that the fulfillment by a State of obligations assumed in the signing of the convention do not imply the mere compliance to the publicizing of the environmental impact evaluation inherent in the project. On the contrary, in order for the recognition of procedural rights to be effective, the State is obliged to respect further fulfillments that strengthen their implementation (for example, the communication of timeliness to present observations, in other words, indications regarding the modality under which the observations can be presented). In this

---

37 Itlos, Statute, par. 89: "It is by reference to the penalties imposed or imposable under the law of the detaining State that the Tribunal may evaluate the gravity of the alleged offences, taking into account the circumstances of the case and the need to avoid disproportion between the gravity of the alleged offences and the amount of the bond".

38 International Tribunal for the law of the Sea, Juno Trader, par. 77; regarding this also see the separate opinion of Judge Treves, in parag. 3: "Seen together in light of parag. 1, parag. 2, 3 and 4 show clear concern for what has been called the human rights consequences of expanding the bases of jurisdiction. As the judgment correctly states, the requirement that the guarantee must be reasonable is a further indication that a concern for fairness is one of the purposes of these provisions".

39 Unece, Compliance Committe, Report on the Seventh Meeting, Findings and Recommendations, ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, par. 40: "The Committee also finds that the lack of clarity with regard to public participation requirements in EIA and environmental decision-making procedures for projects, such as time frames and modalities of a public consultation process, requirements to take its outcome into account, and obligations with regard to making available information in the context of article 6, indicates the absence of a clear, transparent and consistent framework for the implementation of the Convention and constitutes non-compliance with article 3, parag. 1, of the Convention".

case, as well, the formality of some of the requirements works to guarantee the fulfillment of the principle.

6. *How judges contribute to overcome the problem of fragmentation.*

The illustrated cases demonstrate that in the resolution of the respective disputes, global judges adopt an analogous approach: they exercise their own function by applying due process of law as the systematic approach.

This seems possible for two reasons. The first is that judges share many common values that they apply when carrying out their function. Such values have reference to the same "meta-principle" of the *rule of law*, which becomes the framework for each judicial system in leading back to the correct exercise of power. For this purpose, global judges identify in the *rule of law* a common container upon which to attach the legitimate behaviors of global public administrations. Doing so, judicial power achieves a connection as it elaborates pathways that, however parallel to one another, define a *minimum* body and shared guarantees that must be applied in all administrative procedures initiated within the global legal order.

In the above cases, for example, the connection is noticeable in the prevision to extend to other institutions principles which the legislator foresaw only for a few, and in the imposition onto the administration of the application of those principles that, even though not expressly provided for, are corollary to the institution of due process of law (for example the proportionality principle, the reasonableness of decisions principle, the right to be heard, the right of access to documentation, and the obligation of motivation for the acts produced).

Actually, the use of these common principles in the exercise of judicial function is not new, if we consider that Art. 38[40] of the statute of the International Court of Justice refer to "general principles of rights" amongst the criteria that may be adopted by the Court in the

[40] International Court of Justice, Statute, art. 38: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto".

decision of the disputes submitted. With regards to what occurs on the international level, the activity of the global judge nevertheless differentiates itself by both the unpublished dimension assumed by the "use" of these common values as well as the content of the principles, which form the recalled object.

The motivation behind this differentiation is twofold. The first is that in reality it is unthinkable to resolve a conflict, of a commercial nature for example, refusing to consider all the problems that are closely tied to it, such as those inherent to environmental protection or human rights. These inevitable interactions, to best be managed, require the development of a system that favors if not a unitary system, at least a coherence of parts. To this end, all the subjects involved in a proceeding, from the rule maker to the judicial body, must exercise their relative functions with the objective of coherence. The second motivation is that the absence of elective global institutions and constitutional documents has lead to a greater attention on the guarantees of the *rule of law*, particularly those rules concerning the procedural participation of global administrative rights. Such attention has produced the centralization of the principle of due process to the point of pushing judges to comply with the principle not only where explicitly established, but also to export it where not yet foreseen.

The second reason that allows judges to exercise their own functions applying principle of due process of law in a systematic way is that, regardless of the verifiable differences in their natures and characters, they adopt the same procedure of evaluation, that is, the judicial review. This procedure implies that judgment has as its object not the opportunity of measure, but rather the way in which the measure was taken.[41] This means that when control involves a measure issued in the exercise of public power, it must verify the same things, namely : that no law has been violated, that all relevant factors have been considered in its assumption, that procedural conditions fixed by law as well as the general principles of natural justice and procedural fairness were observed, that the measure was adopted for a

[41] See Lord Brightman, *Chief Constable of the North Wales Police v Evans*: judicial review as the words imply, is not an appeal from a court decision, but a review of the manner in which the decision was made. It is concerned not whit the decision but with the decision making process. Unless that restriction on the power of the court is observed, the court will, in my view, under the guise of preventing the abuse of power be itself guilty of usurping power".

purpose either expressed or implicitly authorized by regulations and, finally, that its adoption is reasonable.[42]

The adoption of the same procedure by global judges creates the conditions in which principles regulating implementation become more homogeneous, just as the trial institutions that guarantee their fulfillment.[43] Both aspects guarantee that the judicial function is carried out in an independent yet constrained way; independent because it is exercised within one's own competency and based on the exclusive rules fixed by the legislator of the regulatory regime that saw to establish them; constrained because brought back to the framework of those shared values belonging to the rule of law.

7. *Conclusions*

This paper had as its objective to verify the role carried out by global dispute settlement bodies in the process of connecting distinct regulatory regimes that compose the global arena. The sphere of the work was represented by the actual implementation of the judicial function.

The analysis illustrated three cases in which bodies, in the resolution of respective disputes, used principles that, though not expressively recognized in ultra-national legislation, are considered common and shared at the national level. The connecting technique used is not that of deferment to decisions expressed by other bodies of resolution

---

[42] These characteristics distinguish judicial review from appeal: while the latter is a means to verify a court decision, the former allows us to analyse only the way in which the particular decision was made. For this, see V. M. SUPPERSTONE, J. GOUDIE, *Judicial Review*, First Edition, London, Butterworths Law; 1992, p. 24: "judicial review, as the words imply, .is not an appeal from a [court] decision, but a review of the manner in which the decision was made. [It] is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, in my view under the guise of preventing the abuse of power, be itself guilty of usurping power"; I. MCLEOD, *Judicial Review*, London, Barry Rose Law Publishers, 1993, p. 1: "[…] One major practical consequence of the distinction is that in the case of an appeal, the appellate body is not only being asked to say whether the decision was right or wrong, but can also generally substitute its own decision. Whereas in the context of judicial review, the supervisory body is not called upon to say whether it agrees with the merit of decision, and therefore, even if it upholds the challenge it cannot substitute its own decision, compel it to be re-made in a lawful fashion, and make an order prohibiting future illegality".

[43] In the global framework, therefore, we can observe a tendency towards the recognition of a minimum statute of protection rules for the recognition of private rights. In fact, the execution of the judicial function is always more subject to common rules that collide with key procedural profiles, such as the modality of judicial introduction, the realization of contradictory guarantees, and the relationship between judges and those involved in the proceedings.

of disputes, which would nonetheless make for an interesting response to the problem of fragmentation and which has attracted the attention of a number of scholars in the field.[44] On the contrary, in the illustrated cases the judges do not seem to dialogue whatsoever amongst each other. In fact, there exists an implicit form of communication that levers on the sharing of a set of values matured at a national level that makes up the background of each judge exercising the judicial function.

This implicit technique of communication has been favored above the explicit kind for at least two reasons. The first is that the explicit approach can be more rigid in nature in as much as it is favored – if not conditioned – by the affinity of the sphere in which the decisions are articulated, let alone the degree of "global sensitivity" of the judge;[45] the implicit technique is more flexible since it is more adaptable to different regulatory contexts in which the disputes arise, as well as to the exclusive implementation of jurisdiction of the competent body. The second reason, instead, is that the recourse to common principles allows the highlighting of the systematic – not the sector-based – approach, which distinguishes the activity of global judges. In fact, while the expressed deferment ties two regulatory regimes within the limits of one single specific case; the "mute dialogue" allows for judges to develop, within their own exclusive jurisdiction, a set of values and guarantees that, having the same content can be applied repeatedly to all interested private parties in different regulatory regime.

In so doing the global judge imports value e principles developed in national legal order to the global arena and guarantees the same answer when private's rights or interests have been, or are likely to be, adversely affected by a global authority.

Thanks to the use of this technique, the global judge adopts behaviors analogous to those assumed by other administrative judges with some national experience in the tradition of civil law, or those adopted by the European Justice Court in the individualization of the general principles of rights.

---

44 On the topic of the dialogue between global judges See A.M. SLAUGHTER, *Judicial Globalization*, in *Virginia Journal of International Law*, vol. 40, 2000, p. 1103 ss.; J.S. MARTINEZ, *Towards an International Judicial System*, in *Stan. L. Rev.*, vol. 56, (2003-2004), p. 429 ss.; Y. SHANY, T*he Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press, 2000; J.I. CHARNEY, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, in N.Y.U. J. Intl L. & Pol., vol. 31, 1998-1999, p. 697 ss.

45 The use of the deferment technique to verdicts delivered by other juridical bodies is mostly found in spheres of affinity, such as in those courts established within the human rights sector or those that offer protection to regional economic organizations (The Court of Justice of the Andean Community; The Caribbean Court of Justice; Court Of Justice Of The Common Market For Eastern And Southern Africa).

In particular, as the national judge has performed a judge-making activity choosing common principles that could be applied transversally to all proceedings predisposed by the legislator, the global judge "sews" the fragmentation by applying and exporting from one sector to another a set of values and guarantees that represent the application of the "meta-principle" of the *rule of law*.

Through such activity, judges end up expanding their own role, since they determine the *passerelle*[46] that consent the recourse to analogy, to the diffusion of common values and to the progressive acceptance of a common model of fair execution of public power. These *passerelle* contribute to the reduction of fragmentation since they produce a homogenizing effect on the asymmetries that characterize the different regulatory regimes, guaranteeing an open course with which private parties can avail themselves of their own rights.

46 This term has been coined by Sabino Cassese, See S. Cassese, *La funzione costituzione dei giudici*, cit.