12. Global food safety regulation and the interplay between global standards and WTO law: how to close the legitimacy gap?

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1. INTRODUCTION

In a globalised world, the food supply chain is often very long and articulated: food is produced, processed, traded and consumed all over the planet and – as with any other good – it needs to be moved with as few limits and barriers as possible.[1] Nonetheless, food is not a normal good: there is the need to ensure that it is safe, that it is sufficient, that it satisfies consumers' needs, that it corresponds to the way it is presented and, last but not least, that it does not come into conflict with the cultural and geographical traditions connected to it.

In order to pursue all these objectives, a system of public food regulation is needed, but this faces a crucial problem related to food globalisation and to the unavoidable worldwide harmonisation of the regulatory approaches: cultural, political, strategic and economic perspectives change from country to country (and many times also locally), influencing regulatory decisions. This produces a significant fragmentation, which conflicts with the aim of having common rules for common problems and needs. This issue is particularly evident and delicate as regards the specific sector of food safety.

[1] The scientific literature on 'food globalisation' and 'food trade' is rich. Among others, see Michele Graziadei, 'Modernization and Risk Regulation in the Italian Food Sector' in Matthew Dyson (ed), *Regulating Risk through Private Law* (Intersentia 2018) 350–1; Bernd van der Meulen and Menno van der Velde, *European Food Law Handbook* (Wageningen Academic Publishers 2014) *passim*; Alberto Alemanno, *Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO* (Cameron May 2007); Dario Bevilacqua, *Introduction to Global Food Safety Law and Regulation* (Europa Law Publishing 2015) 11 ff.

In order to tackle this challenge, a global food safety regulation has been developed over recent decades. In such a system, the process of standardisation has a crucial and central role, as it harmonises specific and detailed domestic regulation, affecting its content with a significant quasi-binding force.[2] In food safety standardsetting policies and their implementation, two sets of institutions are specifically relevant in the extranational legal space, corresponding to the two main values/interests involved: the World Trade Organization (WTO) and several standardsetting bodies (the main one being the Codex Alimentarius Commission (CAC)[3]). The former deals with the rules of (food) trade and the requirements for measures which exceptionally restrict the market, while the latter has to do with health protection and regulatory harmonisation in this sector.

This chapter focuses on the legitimacy concerns surrounding the regulatory framework of global food safety standards. To this end, it proceeds as follows. In Section 2, the WTO case *India – Agricultural Products* will be presented. This decision is interesting because it embodies the crucial problems concerning standardisation in food safety matters. Then, Section 3 will explain the peculiar linkage between the WTO and international standardsetters. It will be shown how, through the application of WTO law, this global food safety system of standardisation has considerable effectiveness and binding force on domestic regulation. Section 4 will continue the explanation of the legal framework by discussing the relevance of global food safety standards in the EU legal system. Subsequently, in light of the legal force of these international standards in domestic legal systems, Section 5 will proceed to discuss the legitimacy concerns surrounding this system of global governance.[4] The

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[2] On the effectiveness of standards, suffice to mention, among many, Stavros Gadinis, 'Three Pathways to Global Standards: Private, Regulator, and Ministry Networks' (2015) The American Journal of International Law 109(1): 6.

[3] The other relevant ones, as regards health protection, are the International Office of Epizootics (IOE) and the Commission of International Plant Convention (IPPC). The first sets standards for animal health and zoonoses, the second for plant health. See www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/basic_text/A_BasicTexts_part_1.pdf and IPPC, *Procedural Manual*, Rome 2011, FAO, at www.ippc.int/static/media/files/publications/en/2013/06/03/1317375412_ippcproceduremanual_2011-09-30_o_201304232112en.pdf.

[4] The concept of global governance is relatively new. On this issue, the literature is wide and varied. Among others, see in particular Dan Esty, 'Toward Good Global Governance: The Role of Administrative Law', Yale Law School, Draft, 23 May 2005; Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) European Journal of International Law 17(1): 1; Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) Law and Contemporary Problems 68(3–4): 15; Sabino Cassese, 'Administrative Law Without the State? The

chapter will conclude that, if the aim is to enhance global regulators' legitimacy, a useful tool can be found in the development of common principles, procedural guarantees and approaches. Such procedural harmonisation should, however, leave a considerable margin of discretion to domestic regulators, who are called on to comply with global harmonised procedures and general principles. This, it will be argued, has positive results in terms of legitimacy and accountability and, at the same time, is more successful in lessening conflicting interests.

2. *INDIA – AGRICULTURAL PRODUCTS*: THE POWER OF GLOBAL STANDARDS AND THE CHALLENGES OF FOOD SAFETY GLOBAL GOVERNANCE

In order to introduce the main problematic issues concerning standardisation in food safety regulation, it is useful to start from a decision of the Dispute Settlement Body (DSB) of the WTO: India – Measures concerning the importation of certain agricultural products (hereinafter, *India – Agricultural products*).[5] On 6 March 2012, the United States requested consultations with India with respect to the prohibitions imposed by the latter on the importation of various agricultural products from the United States, purportedly because of concerns related to avian influenza (bird flu).

The United States claimed that the measures appeared to be inconsistent with several articles of the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter SPS Agreement).[6]

First, India's measures were considered inconsistent with the SPS Agreement because they were not based on a risk assessment: being more trade restrictive than an international standard, they needed to be justified by a scientific demonstration of the likelihood of risk. This demonstration was not produced by the resisting country.[7] Second, India's measures were deemed inconsistent with the SPS Agreement as they were not 'based on' the relevant international standard (Chapter 10.4 of the Terrestrial Code of the International Office of

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Challenge of Global Regulation' (2005) New York University Journal of International Law and Politics 37: 663–94.

5 DSB of the WTO, *India – Measures concerning the importation of certain agricultural products* - Recourse to Art. 22.6 of the DSU by India, 23 January 2019, available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds430_e.htm.

6 www.wto.org/english/docs_e/legal_e/15sps_01_e.htm.

7 *India – Agricultural Products*, §§ 5.1–5.40.

Epizootics). Furthermore, India's measures did not 'conform to' the relevant international standard, within the meaning of the SPS Agreement.[8]

In this case, a State decided to ban certain products as deemed dangerous for animal (and indirectly also for human) health. However, the SPS measure adopted by India did not conform to – nor was it based on – an international standard recognised by the WTO, that is, an international standard adopted by an international organisation with functions of standardsetting (the International Office of Epizootics), which considers the same kinds of products safe. In addition, as scientific demonstrations on these issues are quite complicated, India was not able to demonstrate a scientific probability of risk, which would have justified its measure. Therefore, the Indian measure was considered a trade restrictive measure in violation of WTO norms.

This case, which is quite similar to the *EC – Hormones* case, the cornerstone of global food safety regulation,[9] is exemplary of the peculiar setup of the international regulation of food safety, which is based on a combination of standards and WTO rules.

One of the main features of global administrative law is its sectoralisation, as extranational regulation develops in different ways according to the sectors of intervention.[10] As far as food safety regulation is concerned, a peculiar

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[8] Ibid, §§ 5.55–5.74.

[9] *EC – Measures Concerning Meat and Meat Products*, WTO Appellate Body Report 1998, WT/DS 48/AB/R (hereinafter EC – Hormones). The analysis of this decision is crucial to understanding the functioning of global food safety regulation. The literature on the case is very extensive. Among others, see Vern R Walter, 'Keeping the WTO from Becoming the World Trans-Science Organisation: Scientific Uncertainty, Science Policy and Factfinding in the Growth Hormones Dispute' (1998) Cornell International Law Journal 31(2): 251–320; George H Rountree, 'Raging Hormones: A Discussion of the World Trade Organization's Decision in the European Union-United States Beef Dispute' (1999) The Georgia Journal of International and Comparative Law 27: 607–34; Ryan D Thomas, 'Where's the Beef? Mad Cows and the Blight of the SPS Agreement' (1999) Vanderbilt Journal of Transnational Law 32(2): 487–517; Robert L Buchanan, 'The Development of Science-Based Food Safety Regulations in the United States' (2000) Irish Journal of Agricultural and Food Research, Special Issue on Food Safety 39(2): 331–42; Robert Howse, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization' (2000) Michigan Law Review 98(7): 2329–57; Regine Neugebauer, 'Fine-Tuning WTO Jurisprudence and the SPS Agreement: Lessons from the Beef Hormone Case' (2000) Law and Policy in International Business 31(4): 1255–84.

[10] Lorenzo Casini, 'Global Administrative Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press 2019), also available at: www.irpa.eu/global-administrative-law-uno-scritto-di-lorenzo-casini/, 6. See also Stefano Battini, 'The Proliferation of Global Regulatory Regimes' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar 2016) 45–64, and Francesco Bignami and David

organisational mechanism is used, which tries to overcome such sectoralisation, by linking together standardsetting bodies and the WTO. The standards of the relevant international organisations – the Codex Alimentarius Commission (CAC), the World Organisation for Animal Health (OIE) and the International Plant Convention Commission (IPPC) – are indeed specifically mentioned in Article 3 of the SPS Agreement. Furthermore, where a state wants to derogate from the applicable WTO rules by adopting trade restricting measures in order to protect health, the latter are presumed to be legitimate according to WTO law only if they are 'based on' or 'conform to' the relevant international standard.[11] As we will see later, this gives an important legal value to the mentioned standards, as abiding by them allows a country to easily justify a national trade restricting measure as being in conformity with WTO law. On the other hand, diverging from the standards requires a more profound justification based on a scientific demonstration of risk probability, which proves to be neither very simple nor uncontroversial.[12] As will be shown below, through this linkage, the standards, which would normally be merely voluntary, acquire binding force.

3. FOOD SAFETY STANDARDS AND THE PRESUMPTION OF CONFORMITY WITH WTO RULES

In the WTO dispute *US/Canada – Continued Suspension*, the Appellate Body stated:

> As the preamble of the SPS Agreement recognizes, one of the primary objectives of the SPS Agreement is to 'further the use of harmonized sanitary and phytosanitary

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Zaring (eds), *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar 2016).

[11] 'Article 3.2 provides that SPS measures which conform to international standards shall be deemed necessary to protect human, animal or plant life or health, and shall be presumed to be consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994. This presumption, however, does not apply where a Member has not adopted a measure that conforms with an international standard', Appellate Body Reports, *US/Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, 14 November 2008, available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds321_e.htm, § 694.

[12] It is commonly recognised that scientific investigation on risk is, in many fields and for many substances, quite uncertain and debated, above all considering the rapid development of technological innovation in food production and the complexity of our societies. A confirmation is to be found in the analysis of DSB disputes on the SPS Agreement: almost all the cases present a discussion based on the difficulty of scientifically demonstrating the probability of risk. See www.wto.org/english/res_e/publications_e/ai17_e/sps_e.htm.

> measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations'. This objective finds reflection in Article 3 of the SPS Agreement, which encourages the harmonization of SPS measures on the basis of international standards, while at the same time recognizing the WTO Members' right to determine their appropriate level of protection.[13]

This statement points to a first important feature of food safety regulation: Member States have the power and the responsibility to adopt all the measures aimed at protecting consumers' health and they are free to choose the level of protection to be translated into a regulatory policy. Nonetheless, this freedom – or, better, discretion – is subject to the rule of law, as administrative authorities must always act in respect of formal (national or extranational) rules. Among the latter are the principles and procedural guarantees contained in the SPS Agreement, such as the respect of international standards when they exist. The aim of such 'regulation for the regulators' is the harmonisation of domestic SPS policies, in order to have the same tools to face common problems of food safety and avoid arbitrary and protectionist measures.

In *India – Agricultural Products*, the Appellate Body (hereinafter AB) further elaborated on the nature of the obligations contained in Article 3 and the Panel's role in assessing the consistency of measures with that provision:

> In determining whether a particular SPS measure is based on, conforms to, or results in a higher level of protection than a relevant international standard, a panel must engage in a comparative assessment between the challenged measure and that international standard. In this respect, because the international standard serves as the benchmark against which a Member's compliance under Art 3 is to be assessed, it is incumbent on a panel to discern the meaning of that standard.[14]

This quote shows the peculiar relation between WTO law and international standards in food safety law. Through the reference contained in Article 3 of the SPS Agreement, the standards issued by the CAC (as well as the OIE and the IPPC) acquire quasi-binding effect for the legislation of national states and indirectly for their citizens. This happens through a peculiar and innovative legal device: a linkage, that is, a reciprocal reference by two different treaties regulating the activities of two international organisations.

The two regulatory regimes (the WTO and the standardsetters) link to each other, reciprocally gaining more effectiveness: such a mechanism has

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[13] Appellate Body Reports, *US/Canada – Continued Suspension*, § 690.
[14] Appellate Body Report, *India – Agricultural Products*, § 5.79.

been called 'linkage',[15] as two or more regulatory orders create a composite informal organisation to pursue common aims. In this way, the standards gain a peculiar legal force that they would not normally have. As has been argued, 'the most significant implication for the CAC is that its decisions have a semi-binding effect on governments. This means that the Commission is no longer a "gentlemen's club" and that negotiations within the CAC are more intense than previously was the case.'[16]

The legal strength gained by the international standards is reinforced by a complex mechanism of enforcement foreseen by WTO law. In *EC – Hormones*, for instance, the EU, despite being condemned by the AB, did not remove its ban on hormones, refusing to comply with the final decision of the DSB. Notwithstanding, the Report of the latter obtained an indirect enforcement through retaliatory measures by the US and Canada, consented to by the DSB itself. The EU and its Member States did not modify their legislation, which forbade – and still forbids – hormones, but they had to pay a sanction for this decision. This form of sanction – that is grounded on authorised and embedded retaliatory measures – is a powerful deterrent for Member States, as the latter joined the Organisation in order to enjoy the economic advantages of the free market and in this way they would lose any possible advantage derived from protectionist derogations. This mechanism of sanction proves to be a significant system to force members to abide by DSB decisions and WTO norms.[17]

This sanctioning mechanism gives new strength to international food safety standards, which are not formally binding and not directed at national governments, but are able to indirectly penetrate and condition national sovereignty

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[15] See David W Leebron, 'Linkages, Opening Speech at the Conference "*The Boundaries of the WTO*"' (2002) American Journal of International Law 96(4): 14 and Claire R Kelly, 'Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes' (2006) Berkeley Journal of International Law 24(1): 79–128.

[16] WTO, *Statement Made by the FAO/WHO Codex Alimentarius Commission at the Meeting of November 15–16, 1995*, Committee on Sanitary and Phytosanitary Measures, G/SPS/W/42.

[17] The effectiveness of the described mechanism is also evident in *India – Agricultural Products*, as the condemned State is forced to comply to with the DSB decision. The USA requested a Panel of the DSB to evaluate the compliance of India with the decision in question (*India – Measures Concerning the Importation of Certain Agricultural Products, Recourse to Article 22.2 of the DSU by the United States*, WT/DS430/16). The assessment is still going on, as the panellists have not yet demonstrated if India actually respected the DSB decision. All the documents of the case are available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3d+wt%2fds430%2f*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true.

and impose obligations on domestic authorities. Therefore, States failing to conform to international trade law decisions have no interest in using their sovereignty as a shield not to comply with these decisions. In addition, the mere fact that a country can accept to pay – compensating the losses of the sanctions with the gains of the violation, or simply because it can afford it – does not impair the effectiveness of the system.

4. GLOBAL FOOD SAFETY STANDARDISATION AND THE EU

The described mechanism of global regulation of food safety also has a significant effect inside the EU legal order.[18] Indeed, the Union is part of the WTO and acts as a single member in discussing the standards and defending its prerogatives inside the WTO.[19] At the same time, the *EC – Hormones* case showed that the EU, besides being a standardsetter (through its delegates participating at CAC meetings), is also a standard recipient, as the effectiveness of the standards works for the EU as for any other party to the WTO system.

As regards the first aspect (that of standardsetter), its decisionmaking power is formally equal to any other member: like the countries that are members of the CAC, the EU is called on to negotiate, discuss and contribute to the drafting of international standards. However, international standards are the result of bargaining, in which domestic delegates pursue their own interests. Naturally, one might expect the EU to be quite a relevant player, given its geopolitical power.

Considering the second aspect (that of standard receiver), relating to the application and implementation of international standards in the domestic legal order, the EU has, like any other member, a very limited scope to diverge from those standards. As mentioned above, the SPS Agreement does allow the adoption of measures which do not conform or are not based on an international standard, but this derogation has to be justified by a scientific demonstration of

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[18] 'Although the Codex Alimentarius is often perceived – even by experts – as a somewhat obscure player in the food legal global arena, I believe to have shown here above that the alignment between the Codex Alimentarius and EU food law on concepts, principles, structure and major topics such as requirements on food products, hygiene processes and labelling is considerable. It would require further research from political science to establish a causal relation, but at face value a considerable influence of the Codex Alimentarius on EU food law seems probable': Bernd van der Meulen, Codex Alimentarius. The Impact of the Joint FAO/WHO Food Standards Programme on EU Food Law, European Institute for Food Law Working Paper Series 2018/04 (2018) 36, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192451.

[19] Although the Member States were already members of the Codex Alimentarius Commission, the EU formally acceded the Codex with Council Decision 2003/822/CE.

risk probability, which proves to be very difficult, above all if a science-based standard already exists for that subject. Otherwise, a WTO member may still resist supranational standardisation by using national sovereignty, but this has a cost in terms of the economic sanctions to be faced.

The described system produces at least two consequences for European food safety governance.

The first one is a reduction of domestic powers in choosing the rules governing the sector: the EU authorities are no longer free to decide their food safety policies autonomously, as they need to abide by an extranational regulation, which is detailed through the application of technical standards.[20] Second, the combination of detailed and specific standards and the demand for scientific demonstration reduce the margin for political and teleological deliberation in considering alternative options in food safety measures – notably as concerns the adoption of the precautionary principle, which is applicable in the EU,[21] but not accepted by WTO law.

In general, it can be stated that the European system of food safety regulation presents certain important differences to the international/global one: it is less science-dependent, it leaves more discretion to administrative authorities – including national ones – and it admits a precautionary approach. Perhaps because of these systemic differences, the EU demonstrates significant resistance to obeying international standards. Nonetheless, as mentioned above, the mechanism of enforcement combining WTO law prescriptions and international standards is also quite significant for the EU.

5. THE STANDARDSETTERS AND THEIR SHAKY LEGITIMACY

Considering the effectiveness and *de facto* legal force of international standards and thus their capacity to affect domestic policies in food safety issues, it appears necessary therefore to examine how they are drafted, negotiated and approved, and the democratic legitimacy of the international standardsetting

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[20] See, for instance, Directive 2012/12/EU of the European Parliament and of the Council amending Council Directive 2001/112/EC relating to fruit juices and certain similar products intended for human consumption [2012] OJ L115, 1-11, adopted to take account of developments in the Codex General Standard for fruit juices and nectars (Codex Stan 247-2005).

[21] See Article 7 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L31, 1.2.2002, 1–24.

bodies in the field of food safety, focusing specifically on their purposes and activity.

In this sense, the concept of democratic legitimacy remains a legal justification for the powers effectively exercised by the regulatory bodies. As the latter belong to extranational legal orders – which are not based on representativeness and democratic elections – the powers granted by such regulatory regimes are not justified by the consent of the constituencies, but by the rule of law: global regulators need to give an account of their powers and activities acting in accordance with the law and certain procedural guarantees,[22] as no election empowered them to perform their rulemaking activity.[23]

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[22] The concept of legitimacy strongly interacts with that of accountability, as rulemakers are called on to give an account of their decisions to the accountholders: in the global legal space, these would be the world civil societies, intermediated by public bodies creating an institutional balance. Therefore, the concept of *accountability* is meant as the power that a plurality of individuals, called sovereign, has to keep under scrutiny, evaluate the activity and influence the decisions of certain subjects, which representing that community, exercise an executive authority to implement that sovereign power. And, at the same time, the opposite mirror duty, upon the latter, to give an account of their actions and decisions. For this reason, the possibility to see, to monitor, the activity of decisionmakers is central to this process, but it should also be supported by mechanisms of sanctions, of a political and/or judicial nature, which should be held by the constituencies. The expression accountability thus refers to the variety of tools through which public regulators – be they national or supranational – are called on to justify their activity. These tools comprise several devices: administrative rule of law; mechanisms of responsibility and sanctioning; systems of control or review, including that from peers. The concept of accountability goes beyond its legal definition and concerns more in particular all the techniques through which decisionmakers have to give account to decision recipients for the measures they approve and adopt. On these issues see Richard B Stewart (2006), 'Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance', unpublished, Viterbo II GAL Seminar, 9–10 June 2006, 1; Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) Ethics & International Affairs 20(4): 405–37; Sabino Cassese, Shrimp, Turtles and Procedure. Global Standards for National Administrations, NYU IILJ Working Paper No 2004/4 (2004), available at: http://iilj.org/courses/documents/HC2004.Cassese.pdf, 19 ff; Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan 2003); Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' in Deirdre Curtin and A Wille (eds), *Meaning and Practice of Accountability in the EU Multi-Level Context*, Connex Report Series No 07 (2008) 283 ff. (also published in (2007) European Law Journal 13(4): 542–62).

[23] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) Regulation & Governance 2: 137; Benedict Kingsbury and Richard B Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations' in Spyridon Flogaitis (ed), *International Administrative Tribunals in a Changing World* (Esperia 2009); Robert O

Combining the different models described by Fritz Scharpf and Vivien A. Smith, the literature converges towards the concepts of 'input', 'output' and 'throughput legitimacy'.[24] Applying these concepts to standardisation processes, it can be stated that the first is provided by the participation of national delegates in the standardsetting activity, so that legitimacy is provided by the involvement of those being governed, although only indirectly, as in an international body the input is given by governments and not directly by the people.

Second, output legitimacy is provided by the scientific grounds on which the relevant standards are based. In this way, there is sufficient guarantee that the policy solutions that are taken are neutral, sound and objective, and therefore effective in addressing the issues which a certain measure aims at tackling. Finally, throughput legitimacy or legitimacy through the process is provided by the procedural guarantees required during the standardsetting decisionmaking.

If we look at the various facets of the standardsetting procedure, it can be observed that the procedure would need to find its legitimacy by using all the models described earlier, through the combination of 'output', 'throughput' and 'input' legitimacy. This can be seen in three sets of aspects: first, in the scientific basis of the risk assessment phase (output); second, in the procedural mechanisms, structured in order to involve a multiplicity of players in the decisionmaking process and to guarantee fairness and transparency (throughput); third, in the indirect representativeness of national delegates, nominated by democratically elected bodies (input).

However, as we will see immediately, considering the *de facto* legal force of the standards, the breadth of their scope – which implies a balancing of the multitude of interests involved in food safety regulation – and the political implications of decisionmaking over the standards, all three kinds of guarantees of legitimacy appear to be insufficient, weak or at least partial.

Keohane and Joseph S Nye Jr, Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy, Working Paper of the Kennedy School of Government (2001) 20; Sabino Cassese, *The Global Polity: Global Dimensions of Democracy and the Rule of Law* (Global Law Press 2012) 58 ff.

[24] Fritz Scharpf, Problem-Solving Effectiveness and Democratic Accountability in the EU, MPIfG Working Paper 03/1 (2003), available at: www.mpifg.de; Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) Political Studies 61: 2–22.

5.1 Introducing the Codex Alimentarius Commission

The most important standardsetting player in the field of food safety, as already mentioned, is the Codex Alimentarius Commission. Its story began in 1963, when the FAO and WHO approved the Joint FAO/WHO Food Standards Programme and the Statutes of the Codex Alimentarius Commission.[25] The purpose at that time was to institute an international body – the Commission – able to produce a reliable code consisting of specific standards, general guidelines and good practices concerning food and food products. Such a code had to be based on scientific knowledge and the agreement of the Member States, and it was aimed at avoiding fragmentation and heterogeneity in the regulation of a fundamental sector for both health protection and for fair and free world trade.[26] The CAC administers the Codex Alimentarius (a Latin term for 'food law'), a collection of uniform and coded standards and guidelines. The standards are based on reports from joint FAO and WHO scientific bodies.

Formally, the CAC can be regarded as an executive body of FAO and WHO, adopting standards with external relevance.[27] However, what is most relevant is the contribution of the Member States. The delegates appointed from the Member States are coordinated and guided by the Commission, but they bear the responsibility and the power to draft, discuss and then approve the standards, which finally will be published in a permanent world food codex. Indeed, this demonstrates the peculiar nature of the CAC: it is an interstate organisa-

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[25] The CAC was born under a common programme established by two resolutions (Resolution No 12/61, approved by the General Conference of FAO on 5 October 1962 and Resolution No 16/42 of the Assembly of the WHO of 1 May 1963) of the so-called parent organisations, that is, the FAO and WHO.

[26] Regulating food safety and quality in accordance with a harmonised approach has always been strategic in the international community, where for a long time cohesion appeared to have diminished in this field – 'Food regulations in different countries are often conflicting and contradictory. Legislation governing preservation, nomenclature and acceptable food standards often varies widely from country to country. New legislation not based on scientific knowledge is often introduced, and little account may be taken of nutritional principles in formulating regulations': *Report of the First Meeting of the Joint FAO/WHO Expert Committee on Nutrition*, 1950, in Joint FAO/WHO Food Standards Programme, *Understanding the Codex*, Rome, 2016, p.1.

[27] The parent organisations administer the budget of the Commission, regulate the membership access of the States and evaluate periodical reports that the Commission has to submit. Notwithstanding this, the activity of the CAC is very autonomous from the FAO and WHO: the contribution and intervention of the parent organisations is foreseen, for instance, in the administration of the expert committees submitting scientific reports to the Commission.

tion, but at the same time it issues supranational standards,[28] with a significant harmonisation effect.[29]

The rationale, the purposes and the rules governing the functions of the CAC are in the Procedural Manual, which has now reached its 26th edition.[30] The objectives of the Commission are indicated in Article 1 of the Statutes. Among those are '(a) protecting the health of the consumers and ensuring fair practices in the food trade'.[31] This provision reveals that the activity of the Commission aims to strike a balance between the protection of consumers' health and fairness in the food trade.

Article 1 of the CAC Statutes also provides that the Commission is 'responsible for making proposals to, and shall be consulted by … on all matters pertaining to the implementation of the Joint FAO/WHO Food Standards Programme'. This means that the CAC is the body charged by the parent organisations with the responsibility to implement the Joint FAO/WHO Food Standards Programme, but not the one to materially elaborate the standards: all the relevant functions for the standardsetting procedure involve the significant presence and active contribution of several players other than the Commission, such as the States – through their delegates – and other international organisations or extranational subjects. From this perspective, it could be said that the Codex Alimentarius Commission has the organisational structure of a network. Although its main body – the Commission – acts as the central point of reference of the institution, and has powers of coordination and management, the organisation follows a horizontal development involving the participation of several national delegates; dividing the moment of decision into several phases; and involving several bodies of the organisation, as well as other external authorities, with the aim of producing common decisions.

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[28] The term 'supranational' implies a condition of hierarchy on behalf of the CAC. This is because, even if its standards are not binding and even if they are discussed and approved by the delegates of the national states, they affect domestic regulation from above, gaining force through the SPS Agreement recall and becoming internal norms by a simple translation of their content in national legislations.

[29] Since the Commission was born, in July 2015 the total output of the Codex Alimentarius stood at: 191 commodity standards, 73 guidelines, 51 codes of practice, 17 maximum levels for contaminants in foods. More than 3,770 maximum limits for food additive in foods covering 301 different additives, 4,347 maximum residue limits for pesticide residues covering 196 pesticides and 610 maximum residue limits of veterinary drugs in foods covering 75 veterinary drugs. It is fair to say that the body of work established under the Codex Alimentarius has been impressive in terms of quantity (FAO/WHO, *Understanding Codex*, Rome 2016, available at: www.fao.org/3/a-i5667e.pdf, 10).

[30] *Procedural Manual of the Codex Alimentarius Commission 26th edition*, FAO, Rome, 2018, www.fao.org/documents/card/en/c/I8608EN/.

[31] Article 1, *Statutes of the Codex Alimentarius Commission*, in Ibid, 4.

As far as the standardsetting activity of the CAC is concerned, the procedure can be described as follows. The Commission or the Member States formulate a standard proposal; the competent committees operating inside the CAC – with specific scope in relation to the food sector – elaborate a request to the scientific committees appointed by FAO and WHO with competence in risk assessment, indicating a science policy to follow. Based on the expert bodies' scientific advice, the secretariat prepares the pattern for the standard draft that is discussed and finalised in a subordinate committee by national delegates from competent national authorities. In the committees, private parties (such as NGOs and stakeholders) and international organisations can also take part as observers. Through the National Contact Points, the draft is discussed at national level and possible amendments are suggested. The final discussion occurs within the Commission and again involves the national representatives. Here, the standard is finally approved and the definitive version of the standard is made official through publication by the Commission in the Codex.

The procedural mechanism through which standards are issued resembles the structure of a domestic administrative process of law and has proven to be quite lengthy and complex. The Codex Procedural Manual divides it into eight connected phases.[32] Those which are relevant for the assessment of the legitimacy of this standardsetting process will be examined in further detail in the next sections.

5.2 The Scientific Basis of the Risk Assessment Phase and the Limits of Scientific Guarantees

Once the procedure for drafting a standard has started, the CAC can activate, where it deems it necessary, a subprocedure for risk assessment. To this end, it issues a call for scientific data to the expert committees.[33] This procedure triggers the activity of external independent risk assessors: they perform their studies and provide scientific nonbinding opinions for the risk managers. While such scientific reports are public and available on the web, sufficient guarantees of transparency – and, hence, legitimacy – are nevertheless lacking.

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[32] Ibid, 28 ff.

[33] Ibid, 34, paras 2 and 134 ff. They are five independent organisms connected but external to the CAC and instituted, coordinated and managed by FAO and WHO: the Joint FAO/WHO Expert Committee on Food Additives (JECFA); the Joint FAO/WHO Meeting on Pesticides Residues (JMPR); the Joint FAO/WHO Expert Meetings on Microbiological Risk Assessment (JEMRA); the Joint FAO/WHO Expert Meetings on Pesticide Specifications (JMPS); the Joint FAO/WHO Expert Committee on Nutrition (JECN).

First, the selection of the experts on behalf of the parent organisations is not completely transparent: the guidelines for the selection consist merely of a general list of requirements and the choice is left to the discretion of FAO and WHO Secretariats, and is often based on the CV of the candidates and not on public and open competitions or tenders.[34]

Second, only the conclusion of the process is public; all other phases leading to the scientific report are not. This lack of transparency and clarity in the procedures does not ensure an understanding of the rationale and the scientific approaches used to draw up a certain report, especially when it is inconclusive.

Therefore, it might be concluded that, while the scientific basis on which standards ought to be built should ensure the legitimacy of the final product, the lack of transparency regarding the formation of this scientific basis ultimately undermines the legitimacy of the process. This shortcoming could be overcome by providing complete reports indicating not only the results but also the methods through which the relevant conclusions have been reached, the internal debates and the minority reports.

Requiring a justification and sound reasoning for any decision implying a degree of discretion and a proper explanation of the methods and the rationale used in their studies and analyses does not constitute a breach of the experts' independence, but would offer enhanced guarantees of transparency and legitimacy.[35]

In addition to the lack of transparency, another problematic issue in terms of the legitimacy of the process concerns the expert committees, and, in particular, the lack of remuneration of the experts appointed in these bodies. This aspect may indeed have a significant influence on the neutrality of the experts: any stakeholder wanting to influence the content of an international standard has a considerable 'economic weapon' in order to convince scientists to direct their research towards certain results. As maintained in several

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[34] See, for instance, www.who.int/foodsafety/areas_work/chemical-risks/jecfa/en/ and FAO/WHO, *Fact Sheet – What Is JECFA?* Rome, 9 February 2006, 3.

[35] This finds confirmation in paras 17 ff of the 'Working principles for risk analysis for application in the framework of the Codex Alimentarius' (Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Procedural Manual*, 113 ff), indicating procedural criteria and guidelines for the risk analysis procedure, including the stage of the assessment and stressing the issue of transparency and openness. However, despite such formal indications, the scientific reports of the expert committees rarely conform to it.

institutional reports,[36] as well as by legal science,[37] this issue is quite decisive if the experts' independence is to be achieved. In addition to a special fund to provide a salary for the selected experts, the parent organisations could also institute mechanisms of protection for the latter through inspections, controls and incompatibility regimes both during service and afterwards.[38]

In conclusion, while the guarantees for 'output' legitimacy find their basis in sound science and the contribution of neutral expert committees, the current system still presents some weaknesses in this respect.

5.3 Drafting and Publishing the Standards: Increasing But Insufficient Procedural Guarantees

In the subsequent phases of the standardsetting process, the Secretariat prepares a draft standard and sends it to the States and to the relevant international organisations for comments, observations and proposals for amendment.[39] The reviewed draft is then assigned to the competent subordinate committee, where it is discussed, negotiated and materially written. This phase relies on the scientific report provided by the expert committee and on other relevant factors of a political nature, such as the 'economic interests'[40] of the States. Therefore, as said, it is open to the discretion of the drafters, who are allowed to follow the advice of the risk assessors only as a starting point and further discuss and elaborate the standard in accordance with several aspects of a political and social nature.

The investigation phase is thus twofold. The first part consists of an examination of the technical and scientific evaluations. The second, although based on the former, entails a general analysis of all relevant legal and factual consid-

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[36] FAO/WHO, *Report of the Evaluation of the Codex Alimentarius and Other FAO and WHO Food Standards Work*, Rome – Geneva, 15 November 2002, 50; FAO/WHO, *Framework for the Provision of Scientific Advice on Food Safety and Nutrition (to Codex and member countries)*, FAO and WHO, Rome-Geneva, 2007, vii.

[37] Naomi Rees and David Watson (eds), *International Standards for Food Safety* (Aspen Publications 2000) 161–2: 'FAO and WHO do not pay honoraria, thus giving experts an incentive to accept industry contributions'; Alexia Herwig, 'Transnational Governance' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004) 220.

[38] On this, think, for instance, about the case of an expert at the end of their mandate and with the promise to start working for a big food corporation immediately after the experience in the committee: it is intuitive that their neutrality might be compromised.

[39] Joint FAO/WHO Food Standards Programme, CAC, *Procedural Manual*, 32.

[40] The proposed draft standard is sent to members of the Commission and interested international organisations for comment on all aspects including possible implications of the proposed draft standard for their economic interests. Ibid, 32.

erations, and implies a discretional administrative activity. This coincides with the risk management phase and consists of 'the process of weighing policy alternatives, in consultation with all interested parties, considering risk assessment and other factors relevant for the health protection of consumers and for the promotion of fair trade practices, and, if needed, selecting appropriate prevention and control options'.[41]

It is thus at this point that the balance between health and fair practices in trade is struck. The draft standard agreed upon at this step of the procedure is not conclusive, though, as the final word lies with the Commission, where the standard is voted and approved.

During this deliberation phase, the observers' participation in the activity of the Codex should be highlighted. As stated in Rule IX of procedure of the CAC:

> any Member Nation and any Associate Member of FAO or WHO which is not a Member of the Commission but has a special interest in the work of the Commission, may, upon request communicated to the Director-General of FAO or WHO, attend sessions of the Commission and of its subsidiary bodies as an observer. It may submit memoranda and participate without vote in the discussion.[42]

Despite having only observer status, external governmental or nongovernmental organisations can influence the Codex decision on standards and have a useful role in enhancing the legitimacy of the CAC. As it is not easy for civil society to monitor Codex activities, either because decisions are made at an extranational level or because of the required technical knowledge on which standards are based, an interesting representative tool is given by the presence of NGOs within the committees, at least as observers: NGOs can inform citizens and explain Codex decisions, acting as a link between decisionmakers and decision recipients and providing a form of mediated political accountability.[43] In addition, they can also increase transparency and consumers/citizens' information, enhancing general consent and representation.

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[41] Ibid, 131.

[42] Ibid, 4.

[43] 'Organized civil society may play a key role by ensuring a broader public discussion of policy alternative and by bringing the concerns of citizens into the decision-making process … First, civil society organizations can give a voice to the concerns of citizens, and channel them into the deliberative process of international organizations. Second, they can make internal decision-making processes of international organizations more transparent to the wider public and formulate technical issues in accessible terms': Patrizia Nanz, 'Legitimation of Transnational Governance Regimes and Foodstuff Regulation at the WTO: Comments on Alexia Herwig' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004) 230.

However, since the representation of the interests is not evenly balanced, the legitimacy of the global regulators suffers. This is a clear critical issue as regards public participation in the Codex. Considering that the intervention of NGOs is foreseen only in the subordinate committees, a problem of lack of resources for complete participation is strikingly evident: only a few players can afford to participate in the sessions of all the committees (which take place all around the world), and these are generally BINGOs (business nongovernmental organisations), which are mainly multinational corporations.[44] Thus, the complexity of the structure favours the intervention of more powerful subjects, while it might be an obstacle for weaker players, such as organisations for underrepresented interests or developing countries.[45]

It might therefore be concluded that the presence of NGOs in the subcommittee does serve to some extent to ensure the legitimacy of the CAC, as it shows the attempt to guarantee some form of transparency and public participation in a body which has no direct representative mandate. However, the level of legitimacy thereby achieved is in reality quite low.

The deliberative–decisional phase in the standardsetting procedure is articulated in a number of steps. After a first discussion within the Commission, a provisional version of the standard is distributed to the Member States through the National Codex Contact Points. Here follows a domestic discussion of the standards, which are examined, assessed and evaluated. Governments can propose changes, revisions and amendments.

In accordance with the requests and the proposals from Member Parties, the Secretariat can propose a modified version of the draft and submit it to critical review by the Executive Committee. If the standard is approved by the Commission, it can already be issued in this phase with an accelerated procedure. Otherwise, the last two steps are repeated, until the standard is finally approved in the Commission.

The final approval occurs through consensus,[46] or, if this is not possible, by a simple majority. In this phase, an important innovation has to be mentioned:

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[44] At the moment, the NGOs participating in Codex activity number 156, among which only nine do not belong to the industry sector: see *International Non-governmental Organisations in Observer Status with the Codex Alimentarius Commission*, Report by the Secretariat (CAC/28 INF/1), Annex I.

[45] This is a typical pitfall of international network standardsetters, as pointed out by Gadinis, above no 2, 2, who mentions some critical aspects concerning such activity: 'lobbying by domestic interest groups in favor of rules that narrowly favor domestic actors; and the capacity of powerful states to single-handedly impose their preferred rules, especially since trade partners have little choice but to comply if they still want access to those countries' markets.'

[46] Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *Procedural Manual*, Rules of procedure, Rule XII.2, 18.

Rule no VI.6 states that 'Meetings of the Commission shall be held in public, unless the Commission decides otherwise'.[47] Unlike previous versions of this rule, the final step of the decisionmaking procedure is now not covered by secrecy. This was an evident drawback with regard to the legitimacy of the standardsetting, as such a phase was not sufficiently monitored and the national delegates were shielded from political control of the constituencies impacted by their decisions. Nowadays, at least the main formal approach is an open discussion inside the Commission, thereby somewhat increasing the legitimacy of the whole process.

Once the standard is approved and published, it can be incorporated in Member States' food safety regulations. However, an important legitimacy concern regarding this last phase is the lack of a statement of reasons containing the (scientific and political) reasons that led to the adoption of that standard. The absence of such explanation – which is not required by any norm of the CAC Procedural Manual – reduces the possibility for civil societies to understand why and how that standard, with those specific features, was approved, and by whom.

The guarantees of 'throughput' legitimacy that are to be found in the procedural mechanisms applicable to the decisionmaking phases thus still present weaknesses and pitfalls in the case of global food safety standards.

5.4 Legitimacy and Accountability of the Standardsetters: The Role of National Delegates

As shown above, the mechanism used to approve the Codex standards reproduces the archetype of a global–transnational administrative process. Indeed, it entails a series of linked acts directed to acquire knowledge, evaluate facts and balance interests, and arrive at a final decision, enshrined as a standard, applicable to States and ready for implementation at a national level. The process is global and transnational because the decisionmaking procedure involves national governments, national or regional authorities (agencies, committees, and so on), private multinational subjects, interstate organisations and so forth. In addition, it responds to a multilayer logic, foreseeing phases that are handled at the national level and phases that are dealt with at the global level, although it finally produces its effects on the territories of national states.

The contribution given by all the competent players in the procedure is remarkably interesting. In particular, for the purposes of this contribution and its aim of evaluating the legitimacy of the standardmaking process in the context of the CAC, the role and position of the national delegates merits

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[47] Ibid, 12.

further attention. As they represent domestic administrative authorities, the latter feature as standardsetters, as standard recipients and also as standard executers. When they act as standardsetters, they share their power between themselves and other subjects, and they follow principles and procedures established at international level. When instead they act as standard recipients and as standard executers, they see their interpretative and executive power notably reduced as the standards are detailed, specific and *de facto* binding. This 'double-hat' creates problems of accountability and, therefore, legitimacy in the process.

This is because the combination of international power sharing and the introduction of new 'rings' in the long chain of government make it increasingly difficult to ensure the accountability of the delegates' activities inside the CAC. State delegations, composed of bureaucrats and sector representatives, are not required to give account directly to their parliaments.[48]

At the same time, one could argue that increased accountability at national level might bring about undesired results: national governments would be responding increasingly to national constituencies and thereby the guarantees of impartial and nonprotectionist policies would decrease. This is a typical dilemma of extranational harmonisation attempts: increasing decisionmaking powers at national level may impair foreign interests, support forms of nationalism and reduce the impartiality of the decisions; on the other hand, the centralisation of the decision upon global bodies may reduce the accountability of policymakers and encourage forms of pressure and lobbies against the latter and by corporate interests.

The guarantees of 'input' legitimacy are to be found in the involvement of national states but, as we have seen, this mechanism of participation also presents a few weaknesses in terms of accountability, pluralism and effective representativeness.

6. CONCLUSIONS

In global food safety regulation, standardisation has acquired a crucial and determinant role.[49] This contribution has attempted to shed light on the legal force of global food safety standards and the legitimacy concerns surrounding the process leading to their adoption.

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[48] A criticism of this kind, generally concerning international network standard-setters is to be find in Gadinis, above n. 2, 51 and in the literature there indicated.

[49] On this see, for instance, Van der Meulen, above n. 18: 'the Codex Alimentarius is one of the very few, possibly the only, sustained attempt at harmonising national legislation on a global scale.'

It has been shown that, because of the linkage between WTO and international standardsetters, the latter have considerable influence on domestic regulation. Through the binding effect of WTO law and a system of complex regimes, global food safety standards acquire a quasi-binding force at domestic level, and achieve considerable capacity to be enforced and applied in national legal orders, thus affecting domestic policies in this field.

Furthermore, the analysis carried out above has highlighted a number of concerns regarding the legitimacy of this system of global governance. As noted, the standardsetting procedure finds, in principle, its legitimacy in the scientific basis of the risk assessment phase, in the procedural mechanisms used in the standardsetting process and in the indirect representativeness of national delegates. However, all three sets of legitimacy guarantees present a number of pitfalls.

First of all, as far as the scientific basis of the risk assessment phase is concerned, it could be concluded that the scientific process could be more sound, transparent and independent: the risk assessment could be better regulated through mechanisms of disclosure, through a better selection of experts and through the adoption of strict codes of conduct and incompatibility clauses.

As regards the standardsetting procedures, then, these could be improved to enhance their transparency and other connected guarantees. Even if transparency has been extended to the voting phase as well, public participation within the Codex Alimentarius Commission should be organised in order to avoid an excessive disparity of interests in representation: to date, a significant prevalence of industry and trade-related interests can be identified, while health and consumer protection are still underrepresented. Finally, standards are not properly motivated, as it is difficult to trace all the steps of every single procedure leading to a certain standard and to understand its scientific and political rationale.

Third, the indirect representation of national delegates also appears to be insufficient, as the chain of representation is articulated in several steps that reduce the accountability of the decisionmakers before their domestic constituencies.

In order to tackle these drawbacks, and taking European regulation of food safety as a reference, it could be useful for international standardsetters to follow the EU approach, where procedural guarantees and administrative principles act as constitutional grounds on which inclusive and pluralistic governance is based.[50] This would mean increasing transparency and impartiality;

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[50] In this way, we would witness a 'constitutionalisation' of administrative law – above all at extranational level – meaning that its principles would gain the level of constitutional law, acting as a common *Grundnorm* for the organisation and functioning

enforcing an appropriate system of participation, making it more balanced in the representation of interests; providing for a duty to give reasons; enhancing pluralism and accountability.

Such an approach would strengthen the legitimacy of the CAC. For instance, more transparency would also improve the quality of participation, as the decision recipients would easily see how certain interests influenced the CAC decision.[51] However, the guarantees of transparency, as well as those of participation, should be supported by other procedural mechanisms, such as the duty to give reasons and judicial review, which are all essential to increase administrative democracy and procedural legitimacy.[52] This implies, among other things, debate and negotiation between all the stakeholders, public participation and the application of the principles of due process.

The fundamental principles and the organisational and procedural criteria used for public regulation can act as tools of procedural democracy in order to legitimise supranational food safety governance. These legal institutes, transplanted from national or regional legal orders into global regulation, would

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of all public powers, with the advantage that this function is facilitated by the capacity of adaptation to a different legal order besides the national ones. This theory can be summed up with expression of 'administrative democracy'. It is based on the universality of administrative law principles and procedures, and on their capacity to produce transparent, participated, motivated and formally justified regulations. On this issue, see Sabino Cassese, 'La costituzionalizzazione del diritto amministrativo' in *Scritti in onore di Gaetano Silvestri* (Giappichelli 2016) 504, 517 and *passim* and Sabino Cassese, 'The Development of Global Administrative Law' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar 2015).

[51] 'The more governments are required to make their decision processes public, the more difficult it is for concentrated interest groups to obtain the results they prefer and the more likely it is that the interest of the general public will be served': Andrew T Guzman, 'Food Fears: Health and Safety at the WTO' (2004) Virginia Journal of International Law 45: 15.

[52] Such a form of democratic legitimacy is based on several theories relying on alternative devices to democratise decisionmaking: among them, the one grounded on 'deliberative democracy' or 'procedural legitimacy' is based on debate, the openness of the decision and the participation of the stakeholder and decision recipients. According to this theory, as noted by Elster, 'political choice, to be legitimate, must be the outcome of deliberation about ends among free, equal, and rational agents'. See Jon Elster, 'Introduction' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press 1998). On this, see Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (The MIT Press 1992), translated into English by William Rehg (1996) 298 ff; Jürgen Habermas, 'Postscript to Between Facts and Norms' in Mathieu Deflem (ed), *Habermas, Modernity and Law* (Sage Publications 1996); Dan Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) Yale Law Journal 115: 1547; Christian Joerges et al (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004) 3 ff.

contribute to improving integration and harmonisation, while at the same time enhancing legitimacy and accountability.