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Towards a New Cosmopolitanism: Global Reflexive Interactive Democracy as a New Mechanism for Civil Society Participation in Agri-food Governance

Dario Bevilacqua and Jessica Duncan

Abstract

In an increasingly interconnected world, where the widespread travel of goods highlights our interconnectedness, who has the power to decide the global regulations that shape the production, processing and exchange of agri-food products? How are such decisions made and by whom? Who decides what is safe to eat? Whose definition of safe is used? Where is the way to the new cosmopolitanism? In this article we seek out answers to these questions through an analysis of global food safety regulation. We review the current legal structure of global agri-food governance and consider limitations in decision-making models, restricted transparency, limited public participation and insufficient democratic guarantees.

Global food regulation necessitates transparent, participative and impartial mechanisms of policy- and rule-making. However, a common global regulation must also consider and respect pluralism. We argue that the harmonization of global food regulation thus needs to follow a democratic pattern which pursues integration without compromising pluralism, and reduces fragmentation without denying legal and cultural differences. In this context, we propose a model for global decision-making that combines associative and deliberative democracy. We then propose a plan to engage the public in policy-making by using an interactive procedural mechanism of deliberation and by engaging civil society organisations in decision-making. Enhanced civil society participation in global agri-food governance has the capacity to increase efficiency, impartiality, transparency and democracy in the global policy-making process.

KEYWORDS: agri-food policy, democracy, food safety regulation, global governance, regulation, public participation

Introduction

The development of globalization, visible in the organization of world markets and in the enlargement of global socio-economic spaces, extends to the administration and the regulation of society. This is to say that the area beyond the state is not simply global from an economic or social perspective, but recently – notably over the last two decades – there has been a strengthening of a global legal space which is distinct from classical inter-statute law, developing as a *jus commune* for the evolving global society.¹ This legal space, explains Cassese (2008: 10) encompasses “a vast number of different regulatory bodies, a mass of rules, a great quantity of procedures, and a complex array of links both to national bureaucracies and civil society.”

Food and agriculture are increasingly implicated in this matrix of global regulation and governance and consequently agri-food sectors around the world are “becoming increasingly open and homogenised towards international standards” (Giovannucci and Purcell, 2008:3). The dominant economic and development perspectives that inform the present market-based model of agri-food governance tend to champion agro-industrial techniques and the development of technological methods of intervention in agriculture. Such methods focus on increasing production and are reliant on biotechnology, fossil fuels and genetic modification.²

There is growing opposition to this approach and an increasing number of people are championing the idea of food sovereignty as a way of framing resistance and forwarding alternative models of food governance and food systems. At the global level, the politics of food production and trade are being made visible in ways that are politically mobilizing through the food sovereignty movement which emerged from the resistance of peasant farmers in under-consuming countries to the industrialisation of agriculture. The food sovereignty movement frames its resistance against a globalizing food system in terms of local (primarily peasants and Indigenous) peoples’ ability to define their own food systems, to produce food locally, to save seeds, to consume culturally appropriate food and to engage in fair systems of global trade.

These two approaches to agriculture (industrial agriculture and food sovereignty) are each armed with their own scientific, social, cultural and economic rationales. They do not exist as distinct, static or necessarily opposing

¹ There is growing scholarship in the area of global law. See for example Esty (2006), Krisch *et al.* (2006), Cassese (2005), Stewart *et al.* (2005).

² Much has been written on the techniques of industrial agriculture, see for example Lang and Heasman (2004); Horrigan *et al.* (2002); Vandermeer (1995); Wilson (1991); Soule *et al.* (1990); Poincelot (1986); Widdowsom (1981).

categories. Nor can they be considered as two separate legal, administrative or agricultural techniques, as they are indeed both supported and informed by political choices and rationales. Therefore, at sites where these standpoints diverge, we are challenged to question: which approach, or which components of these approaches, are most appropriate for sustaining food systems? Moreover, in an increasingly globalised society, where the widespread travel of goods highlights our interconnectedness, who has the power to decide the global regulations that shape the production, processing and exchange of agri-food products?

These are politically charged questions and are difficult to answer. They necessitate that we grapple with an increasingly integrated and globalized market economy, a multidimensional system of norms and value and a socio-economic system that has prompted the development of an evolving global regulation that establishes common rules for common phenomena. Furthermore, as alluded to above, these questions cannot be appropriately answered by science or law alone. Under the guise of rationality, legal prescriptions and scientific endeavours are indeed political (Millstone and van Zwanenberg, 2009; Busch, 1994). As Millstone and van Zwanenberg (2009:599) explain, there are clear examples of international regulatory bodies, like the Codex Alimentarius Commission (CAC), providing not only scientific advice, but also policy advice and specific policy recommendations:

If their advice had been strictly scientific it would have been confined to indicating what was, and was not, known about the possible consequences of adopting a range of alternative policy options, leaving it to risk-managers and policy-makers to choose among those options in the light of that information. The advice from the [committee] has, however, typically been monolithic and prescriptive, recommending the adoption of particular options... The Codex [has] repeatedly represented decisions as having been based on, and solely on, “sound science” while in practice they were based on implicit and covert economic and political considerations and judgements.

In this context, we argue that answers to the aforementioned questions must start from a democratic foundation and a legitimate decision-making process. The architecture of global governance cannot be conceived by ignoring the fact that the exercise of power must be legitimized not only to the rule of law (Mattei and Nader, 2008), but also by a sovereign people (even indirectly): “political choice, to be legitimate, must be the outcome of deliberation about ends among free, equal, and rational agents” (Elster 1998). However, in the global space, a sovereign people is difficult (if not impossible) to define. A lack of tools

to collect and represent preferences is evident. Furthermore, global regulation still lacks representative bodies, a global constitution and, above all, a global *demos*.

Considering the preceding questions on decision-making in global agri-food governance, rather than focusing on the “who” or on the “what”, we argue that new approaches should stress the “how.” How can decision-making to be undertaken in order enhance legitimacy, transparency and democracy? How is this possible in our globalized and fragmented world? How is it possible to represent the will of such a multilayered and heterogeneous civil society?³ Where is the way to a new cosmopolitanism?

We approach these questions through an analysis of food-safety regulation. Strongly inter-twined with world-trade regulation and evidently connected to agricultural, environmental, health and social interests, food safety is a decidedly global sector, and its governance at the global level presents all of the aforementioned problematic insights while offering opportunities for possible solutions. For instance, deciding if Genetically Modified Organisms (GMOs) can enter a market is not an issue that can be considered in isolation from political implications such as agricultural policy, socio-cultural and economic considerations and environmental strategies. Rules and standards governing the trade of food cannot only rely on scientific reports and formal procedures but must also seek to be trans-culturally appropriate and based on democratic consensus so as to support suitable policies.

In what follows, we review the current structure of global agri-food governance and highlighting limitations in consultation and decision-making models. We then turn our attention to an analysis of global governance. As we show, this form of extranational regulation presents several challenges with respect to legitimacy, impartiality and accountability on the part of decision makers. From here we consider the function and role of the Codex Alimentarius Commission (CAC) and the implications of Codex standards on nation states. We pay particular attention to legitimacy-related problems, honing in on participation patterns. We then present an explanation of a new model to guide participation of civil society organizations in global governance. After describing the model we consider its application so as to improve public participation at the CAC byway of enhancing transparency, accountability and the effectiveness and appropriateness of food safety standards.

³ By “civil society” we refer to a world-wide area of interest. The global civil society is fluid, complex, indefinite and continuously evolving; it has no determined geographical borders. It is not structured in accordance with a rational predefined organization and it is composed of individuals and groups such as families, associations, NGOs, and so on.

Global governance and legitimacy

Within the field of global governance we are witnessing the developmental and incremental use of executive powers in a world-wide legal space. Sabino Cassese (2008:10) suggests that global law “is generated through a process of accretion and accumulation, and the cooperative dialogue between regimes means that the principles of each should not be interpreted and applied in a vacuum.” He continues by explaining that it “is in this process that some have recognised the emergence of a general body of law at the global level.”

This global public law involves the development of several legal tools (e.g., treaties, general principles, rules, standards, institutions, and procedural mechanisms) established beyond national borders either by states, or by other bodies (often international), with the aim of delivering services, establishing standards and guidelines for national authorities, monitoring compliance, or acting as “clearing houses”. At present, there are at least two thousands global legal regimes whose administrations and judicial bodies (where these exist) are linked to other regimes through dialogue, cooperation and division of labour (Steward *et al.*, 2005).

This process, also defined as “juridical globalization” or “global governance” (see for example Etsy, 2005; Kingsbury *et al.*, 2006), can be seen in the accelerated development of global regulatory regimes such as the Codex Alimentarius Commission (CAC).⁴ The CAC, established in 1962, is a joint FAO and WHO Expert Advisory Committee that, under the rules of the WTO, administers the *Codex Alimentarius* (Latin term for “food law”), a collection of coded standards. The standards are based on reports from joint FAO and WHO expert bodies (e.g., Joint Meeting on Pesticide Residues), but are drafted and approved by delegates from nation states. This means that CAC is structured and conceived as an executive intergovernmental body. As we will explain in greater detail, the CAC issues global food safety standards which can be directly implemented by domestic legal orders and which, through linkage to WTO law, assume a notable binding force over national administrative authorities.

⁴ Another example of this global regulatory mechanism from the financial sector is the “Financial Sector Assessment Program” (FSAP), jointly enacted by the World Bank and FMI in 1999. Through FSAP, organizations control the compliance of member states to their financial standards. Indeed, there are several such standards-setting agencies operating in various fields, like the *Basel Committee*; the *International Association of Insurance Supervisors* - IAIS; *International Organization of Securities Commissions* – IOSCO; The International Organization for Standardization (ISO).

We must keep in mind that not all sectors developed in the same way. For instance, while the regulation of trade and financial markets has reached a considerable level of legal integration, in terms of common global regulation, provisions concerning peace-keeping, human rights and environmental protection are still fragmented, based on state sovereignty and mainly ruled by traditional international law. Nonetheless, several global regulatory regimes are increasingly independent from states – even if the former still encompass the latter in their decision-making proceedings. These global regulator regimes involve not only state action, but they also imply a proactive intervention of international organizations, private bodies and new forms of public powers (Cassese, 2006). What this means is that states now have to share their sovereign powers; they must negotiate, compromise and eventually succumb the decisions made at the global level and once norms are approved, they must implement them. These norms possess enforcing powers in so far as they are supported by international adjudicative bodies and apply common rules that are binding for members of the enacting body.

Global governance does not eliminate states, as states continue operating in the new ultra-national context as global actors in conjunction with other players (Cassese, 2006). Nonetheless, in this process, administrative power – as exercised in order to pursue general public interest – and accountability shift and are at times lost. Specifically, with reference to the territory over which domestic authorities have traditionally been sovereign, power is lost, or shared, for three reasons:

1. Influence and constraints of several global actors (foreign states; international organizations; transnational regulatory regimes; multinational or private bodies);
2. New models of domestic governance, based on contractual patterns; and,
3. New approaches to regulation that are market-oriented and shaped by moral suasion and a *laissez faire* philosophy (Beck, 2005:72-3).

In the global legal space, the way state power translates into concrete measures changes: it is not based on the consent of elective representatives but rather on positive law (e.g., international treaties). Therefore, executive power – traditionally based on law enforcement and political guidance – now mainly consists of the former, that is, of legal prescriptions alone. In this way, it changes because with democratic leadership, principles and norms were shaped and interpreted according to a teleological and publicly-shared perspective.

Without a representative mechanism at the global level, political choices are made by unaccountable executive agencies (extra-national and national), including powerful lobbies, organizations or private subjects (such as multinational corporations) (Benvenuti and Down 2007:1). As a result, there is a very real risk

that opinions which conform to dominant ideologies or highly influential interests will prevail over underrepresented interests, often those of the general public.

The international legal system is still highly fragmented⁵ and heterogeneous, appearing as the “aggregate of the legal norms governing international relations” (Guggenheim, 1967:1). Therefore, there are not only problems of conflict between states, but also of conflicts between different interests, such as health, environment and trade. Alternative mechanisms of democratic political orientation and of popular education and collection of preferences are at too rudimentary stage and currently favour strong market-based interests (Beck 2005). In these fields, to date, there has been the tendency to neglect the protection of social interests in favour economic conditions which in turn culminates into ‘race to the bottom’ in the protection of the general interest.

Global food safety regulation

In January 1998, the Appellate Body (AB) of the Dispute Settlement Body (DSB) condemned the European Communities (EC) to lift their ban cattle meat containing growth-promoting hormones,⁶ as it unduly restricted international markets and resulted in financial damages for the complaining parties of the dispute (USA and Canada complained that the EC measure damaged North American meat exports). The AB stated that the EC did not provide adequate scientific evidence that the hormones in beef posed a danger to human health as required under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).⁷ The latter relies directly on CAC standards, which it considers to be sufficient to justify national trade-restrictive measures. If domestic regulations are more restrictive than the CAC standards – as the EC measure that prohibited hormones were (the Codex standards allow for the presence of growth hormones in beef)⁸ –, the stricter regulation must to be justified through a scientific demonstration of the presence of an ascertainable risk.⁹

⁵ Fragmentation has recently been defined by Koskenniemi (2007) as “the breakdown of the *substance* of general international law into allegedly autonomous, functionally oriented, ‘self-contained’ regimes.”

⁶ The European Communities considered hormones dangerous for human health and enacted a restrictive regulation prohibiting the use of hormones in cattle-meat for reasons of health protection: Directive of the Council 96/22/EC 29 April 1996 – GU L 125, 23 May 1996. According to the European Communities, the evidence provided to the Panel by the majority of its own scientific experts indicated that there was a risk of adverse effects arising from the use of hormones. On this see the report of the WTO Appellate Body Report (1998), *EC Measures Concerning Meat and Meat Products* (further on *EC-Hormones*).

⁷ The SPS Agreement is part of the Marrakech Agreements (which created the World Trade Organization) and entered into force on the 1st of January, 1995.

⁸ At its Twenty-First Session, in July 1995, the Codex Alimentarius Commission approved a standard concerning the maximum levels of residues for five growth promoting hormones. The

The EC did not comply with the AB decision and maintained its ban on hormones. However, the decision was enforced through retaliatory measures initiated by the USA and Canada and supported by the WTO. DSB decisions concerning economic damages affecting member countries are enforceable through the application of (normally forbidden) tariffs or duties for the amount of the economic loss.

International adjudicatory courts, such as the Dispute Settlement Body, have always had the problem of sanctioning and enforcing their judgments. However, DSB decisions concerning economic damages can be enforced through the application of these compensatory measures. This form of sanction is a strong deterrent for member states that joined the WTO in order to enjoy the economic advantages of open markets and therefore they are likely to abide by DSB decisions. In this way, a voluntary and non-binding standard, approved with a simple majority and secret vote by a non-representative international standards-setting body, has the effect of an enforceable law on a regional organization and, indirectly, also on its member states. In the “EC-Hormones” case, the European Communities did not modify their legislation forbidding hormones, but they had to pay sanctions for this decision.

This case was followed by four more, each decided under the scope of the SPS Agreement. In each of the cases, the Dispute Settlement Bodies of the WTO excluded the application of any precautionary approach and condemned the market-restricting country for their inability to scientifically demonstrate the likelihood of the alleged risk.

These cases are emblematic not only of global and interconnected nature of food-safety regulation, but also of their local implications. If a state or a regional organization wants to issue health-protective measures that have the effect of restricting trade, the state cannot rely only on the principles of its legal sources – such as the ones contained in its constitution¹⁰ – and on the political will

decision was finalised by a secret majority vote: 33 delegates voted in favour, 29 opposed and 7 abstained.

⁹ Article 3 of the SPS Agreement requires that if a State wants to establish measures restricting international trade for health protection reasons it only has three options: 1. to *base* the measures on an international standard; 2. to issue measures which *conform to* that standard; 3. to adopt stricter measures, but based on a scientific risk assessment (Article 3, paragraphs 1, 2, 3, SPS Agreement). Article 5.1 of the SPS Agreement regulates risk assessment, which must be founded on available scientific evidence. The decision of the Appellate Body (AB) relied on the fact that the risk assessment of the EC (which opted for the third option, having adopted a stricter measure than Codex Alimentarius Commission’s standard), was not based on sufficient scientific evidence and did not demonstrate a direct relationship between the presence of the hormones and the risk of contracting cancer. For more on this see Herwig (2004).

¹⁰ For instance, in the EC-Hormones case the European Communities could not apply the precautionary principle, foreseen in Art. 174 of the treaty establishing the European Community, which can be considered as the constitutional text of the European Community.

of the people's representatives. That is, unless it can provide scientific justification, a state must comply with the principles and the procedural guarantees required by an international trade treaty, or pay fines.

If we consider the wide discretion of CAC decision-makers and the capacity of the standards to be *quasi*-directly implemented at the state level, we see that the CAC entails a function that is at the same time normative and executive. Such a regime cannot be regulated through legal instruments typically used by national democracies, such as checks and balances, general elections and classic vertical accountability mechanisms. In order to give account of such a rule-making activity, the CAC needs to seek legitimacy in alternative ways.

Currently, the CAC seeks out legitimacy in two ways: through indirect representation, as national delegates are accountable to their governments, and through a procedural mechanism which, adopted in the standard-setting process, resembles the typical structure of an administrative process of law, originally created at the nation state level to democratize public administration. While both approaches are important, neither (either alone or in combination) achieves the level of legitimacy necessary for crucial policy decisions at the global level.

The first mechanism – indirect representation – shows an evident weakness as the combination of international power-sharing and the introduction of new links in the long chain of government make it increasingly difficult to ensure the accountability of the delegates' activities inside the CAC. State delegations, comprised of bureaucrats and sector representatives, are not required to give account directly to their parliaments. This shifts the power from the representative to the executive, leading to a democratic deficit.

For what concerns the second mechanism – the procedural one – despite a democratically inspired rationale to increase fairness, impartiality and effectiveness in the decision-making, it still presents some notable drawbacks. In such a global institution, the procedures for decision-making, when compared to domestic legal orders and evaluated with respect to their effectiveness in enhancing democracy, still do not ensure enough guarantees of representativity, impartiality and accountability.

Codex standards are issued through a procedural mechanism that resembles the structure of a domestic administrative process of law (Bevilacqua 2006). This, however, presents drawbacks in terms of democratic legitimacy: it is not transparent, the standards do not include proper motivation or explanation of the factual and legal premises upon which they are based and they cannot be submitted to any judiciary review. Thus, the participatory system is for many intents and purposes ineffective and unbalanced.

On the last issue, significant legal mechanisms are provided to ensure the participation of private international actors at the standard-setting procedure in CAC meetings. This form of hearing, however, presents its own limitations with

respect to democratic participation and accountability. First, point n. 4, of Rule IX, “Rules of procedures” of the CAC does not formally guarantee effective participation: “Subject to the provisions of paragraphs 5 and 6 of this Rule, the Directors-General of FAO or WHO *may invite* intergovernmental and international nongovernmental organizations to attend as observers sessions of the Commission and of its subsidiary bodies”. There is no obligation to guarantee participation, which is essentially voluntary and based upon NGOs’ awareness and interests. Secondly, stakeholders can obtain observer status, but are admitted only after a selective process and if they satisfy certain requisites.

These procedure – described in Rule IX, of the 16th edition Rules of Procedures of the Codex Alimentarius Commission (2006:39-40) – are an improvement on the previous rules. The selection criteria laid out in Rule VIII of the 14th edition of the Codex’ Rules of Procedures, which were mainly of a formal nature, presented the following drawbacks.

First, the participatory mechanism did not have controls in place to foster balanced, transparent and plural participation. No quotas were established to ensure cross-sectoral interest representation and as a result, NGO participation was unbalanced and unreflective of civil society¹¹ and participation was most prevalent from the BINGOs (business non-governmental organisations) (Rees and Watson, 2000).¹² Second, the capacity and cost of participation played – and still plays – an important role, as Codex meetings are held around the world and the cost of participation can be prohibitive for many actors (Wallach 2002:7).

The new Procedures do not completely resolve the above mentioned limitations (namely the problem of the obstacles linked to logistics and capacity, thereby reducing the power of intervention by smaller and underrepresented stakeholders). The new Procedures have yet to prove their functionality with respect to a more open consultation process. However, on paper, they facilitate a diversified selection of intervening private actors thereby pluralising policy options.

The new rules show progress in what concerns the organization and the legal rationalization of participation as well as the transparency of the participating procedure and of the intervening organizations themselves. Namely, there is more emphasis on all the requirements demanded of the intervening organizations so as to clarify their legal nature, scope, membership, funding and

¹¹ NGO observers have represented a wide range of interests at Codex, but as Rees and Watson (2000:155) state “the majority of observers have always been industry funded”.

¹² At present the NGOs participating to Codex activity are 156, among which only 9 do not belong to the industry sector, see *International Non-governmental Organisations in Observer Status with the Codex Alimentarius Commission*, Report by the Secretariat (CAC/28 INF/1), Annex I.

purpose.¹³ Moreover, the new formula tends to simplify the intervention, by encouraging collaboration between NGOs.¹⁴ This is likely to foster effectiveness and it has the potential to increase pluralism by encouraging differentiation and aggregation on common issues and purposes pursued by the different intervening actors. Therefore, stakeholders' contribution to the CAC's work might be able – in the near future – to produce more impartial outcomes and to favour accountability mechanisms.

It is important to mention that private actors participate in the negotiations inside the CAC in two other significant ways: by intervening in the discussions occurring in the national committees and in the National Codex Contact Points.¹⁵

Beyond the limitations posed to participation under the current Rules of Procedures, the phases of investigation, scientific risk assessments (performed by expert committees¹⁶) and standard-drafting also lack transparency. Approved

¹³ The new norms require applicants to submit: Aims and subject fields (mandate) of organization, and methods of operation (Enclose charter, constitution, by-laws, rules of procedures, etc.); (...) Member organizations (name and address of each national affiliate, method of affiliation, giving number of members where possible, and names of principal officers; (...) Structure (...); Indication of source of funding (...); Past activities on behalf of, or in relation to, the Codex Alimentarius Commission (...); Area of activity in which participation as an observer is requested (Commission and/or Subsidiary Bodies).

¹⁴ If more than one organization with similar interests is requesting observer status in any field of activity, such organizations will be encouraged to form themselves into a federation or association for the purpose of participation.

¹⁵ National Committees are working groups composed of qualified experts representing public institutions and the private sector. Here public participation is regulated by national laws, as the national committees can freely organize themselves, with only the onus to guarantee a mirror functioning with the CAC in order to favour dialogue. Amongst national delegations National Committees a problem of unequal participation occurs, as only a few countries have consumer representatives, and food industry giants dominate the scene as they can generally afford the high costs of extra-national participation. The National Codex Contact Points are domestic bodies ruled by the competent Ministry, aimed at determining the national strategy for Codex and receiving and spreading information related to the CAC and its committees. They are national organizations empowered with functions of both internal and international relevance. In addition, they coordinate and negotiate with private actors who want to participate in the standard-setting process. In National Contact Points no form of supervision and no guarantees of transparency are required to show which stakeholders intervened in elaborating the strategy of the national delegations.

¹⁶ The scientific reports issued by the scientific committees are public and available to everyone. However, the same publicity is not guaranteed in two other relevant moments of the assessment proceeding. First, the selection of members (based on Art VI of FAO Constitution and on section 31 of the Regulations for Expert Advisory Panels and Committees of the Basic Texts of WHO, and managed respectively by the two "parental organizations") is not sufficiently transparent: The procedural guidelines provided by the "parental organizations" for the appointment of scientists are only generic lists of general principles, and the selection is merely based on the evaluation of the C.V. of the applicants. There is no public contest and the choice is thus quite discretionary, not public and with few safeguards of impartiality and openness. Second, the process through which

NGOs and state officers participate in the subordinate Committees of CAC, but these proceedings are not made public and thus political accountability of decision-makers is often restricted to their own good will.¹⁷ When the draft enters in the “decision phase”, articulated in several steps involving also the Member States’ governments, the standard-proposal is sent to the Commission for adoption. If the standard is agreed upon by the CAC through *consensus* or, when consensus is impossible, simple majority, the standard is approved and published in the Codex final approval phase. The public is kept at bay during the discussions, votes are not released as public record and no observers are admitted, highlighting an evident lack of transparency and correspondingly, accountability.

As we have discussed above, several actors are involved in the standard-setting process: international institutional organizations; non-governmental organizations; governments and technical authorities; sub-national or regional administrative authorities; private corporations; global scientific bodies. These actors form a network. This network component of food safety regulations is organised horizontally: in theory, there is no higher or highest authority but instead, several actors interacting, negotiating and bargaining. However, it is important to make a distinction between the legal organisation of power and actual power relations. Formally, in these processes, players are organized horizontally. However, in reality, material resources, effective representation and factual power – by the described legal architecture – allow for the establishment of hierarchies.

Global food standards affect producers, processors and consumers – therefore all citizens – of member states (and in many instances of non-member states). How can citizens participate in a global institution such as the CAC? What rights and legal instruments do citizens have to influence or complain about decisions made at the global level? When they are able to intervene and how? Do all citizens or interest groups have an equal opportunity to be heard?

Observers, even if not directly influential, could still increase transparency and consumer/citizen information. Civil Society Organisations (CSOs) have a role to play in representing alternative perspectives, in informing society and in explaining Codex decisions. CSOs must participate in processes of global standard making as links between decision-makers and citizens, providing a form of mediated political accountability. As Nanz (2004:230) writes:

results are found is not open, as only the final document can be viewed by the public. The expert committees exercise a technical and bound discretion, therefore they need to enjoy an elevated independency and that is why they are not subject to a political or generally discretionary control by national governments.

¹⁷ Keohane and Nye (2001:4) state that this is typical of “club-like institutions”, where states delegates “negotiate in secret, then report their agreements to national legislatures and publics.”

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”

However, monitoring Codex activities is challenging because decisions are made at an extra-national level, and understanding requires advanced technical knowledge on which standards are based. Moreover, the “legal distance” between the governed and the governors and the absence of mechanisms of control and sanctions on behalf of the public favour a lack of accountability on the part of decision makers and a decrement of citizens’ participation and sovereignty. As we saw in the “Hormones” case, there is a strong mechanism of adjudication to ensure the compliance of health national measures with global trade laws.

Also, if the representation of interests is not balanced, the activity of the global regulators would be “accountable in the wrong way” (Kirsch, 2006:250), decreasing efficiency, equality and impartiality. Moreover, if representativity and transparency are not already ensured within CSOs themselves and if their members are not accountable to the people they represent, their work might have the opposite of the desired effect, providing inaccurate information, misleading public opinion and diminishing civil society participation.

As our analysis shows, despite the move towards a more democratic model, in global agri-food regulation there is still a marked lack of accountability, transparency and equal representation of interests and values. We have argued that in addition to member states representation, Codex’s procedural legitimacy (and so to other global systems of regulation) should rely on wider transparency and on balanced public participation. These are intended as a full and generally extended implementation of mechanisms of openness and access to information for the public and as the guarantees of equal forms of interest representation models in the decision-making processes. Transparency and participation, as legal administrative tools originating from national constitutional principles, can be adapted to the global area. Indeed, the administrative principles and the procedural rules normally applied at the domestic level can be used as means to increase accountability so to guarantee a better participation scheme, and thus fairer and more representative decisions at the level of global governance.

Middendorf and Busch (1997:45) argue that “a closer approximation of the ‘public good’ can be achieved by encouraging the participation of the fullest range of constituents”. Indeed, the call for public participation in policy is not new. For

example, in 1970, Pateman argued that the development of the ability and desire of people to participate is crucial to democratic societies. What is new is the global context and the development of a global *demos*.

When it comes to food, the world's largest industry and a material of primary importance, meaningful public participation is central. We acknowledge that "[w]hile creating opportunities for participation does not guarantee that the best possible decision will result, at least it does appear to increase the possibility of better decisions that are more responsive to the needs and desires of the broader public" (Middendorf and Busch, 1997:54).

Opening up participation is not a simple or immediate solution. Broader transparent mechanisms for public participation will provide a power counterbalance, by ensuring the involvement of several stakeholders in the policy-making process. Specifically, the mechanisms already in place should ensure the active involvement of actors representing public interests, including health, environment, labour, distribution and ethics.

Considering for instance the participatory mechanisms of CAC, where participation at the National Contact Points appears crucial in the determination of policies which will be then discussed at the global level, the process needs to be transparent, reciprocally reviewed (Codex members should be aware of the influence that stakeholders have on national delegations) and properly pluralistic, by involving participators from all the sectors involved.

In addition, in order to establish a balanced participatory model, the global governing institution (i.e., CAC) must ensure better representativity within their legal participatory mechanisms and non-institutional actors must take an active role in this process. There is the need of a normative change, which favours, as well as regulates, public participation at global decision-making proceedings and, at the same time the birth of new associations – or the development of old ones – in order to have a wide range of actors able to represent a diversity of interests in the world-wide arena of public deliberation towards the pursuit of the public good.

We also acknowledge the complexity of agriculture and food safety standards, but this should not be used as a rationale for restrict involvement. By arguing that global food policy is too complex to involve a diversity of players, we end up forwarding a system that encourages decision making without consideration for broader implications (Middendorf and Busch, 1997:48). Furthermore, as mentioned above, technical decisions have real social implications. Growing interest in alternative food systems (fair trade, organic and local, for example) is evidence that people are already playing an active role as consumers in shaping the markets.

In his discussion of the need for public participation in agriculture research, Busch (1994) provides a three-fold rationale for public agriculture

research, if we accept that all technical changes are also social changes. These can be adapted and applied in support of public participation in agri-food governance. First, increasing participation in decision making at the global level is compatible with the democratic principles of participating nations. Second, while not guaranteeing it, “broad public involvement in decision making will increase the chances of better decision making... because a broader range of values is likely to be represented and the probability of error may be reduce” (Middendorf and Busch, 1990:46; see also Fiorino, 1990). Even if there is a need to localise governance in such a field as agriculture, so as to support shorter and more sustainable chains of production and regulation, there is still the need to face global problems with global solutions and to anchor local centres of interest to global ones. To collect energy, ideas and solutions and to value them on par with those of the more organized powers, such as multinational corporations. To ensure increased representation inside global regulatory regimes, we propose a project that relies on GRID, a framework for enhanced civil society participation in global agri-food governance.

Global Reflexive Interactive Democracy (GRID)

In the global legal sphere, where a direct representative body is lacking, regulatory policy and rule making necessitate transparent, participative and impartial mechanisms for decision-making. Correspondingly, the development of global regulations needs to follow a democratic pattern that is participative and transparent.

One solution might be found in the application of Global Reflexive Interactive Democracy (GRID). GRID is a model for enhancing CSO participation at the level of global governance and is informed by a combination of associative and deliberative democracy. It relies on strong contribution from local actors – like private associations – and on flattening the relationship between governors and governed so that the resulting governance architecture is no longer structured as a top-down, vertical relationship, but rather as a horizontal, procedural dialectic. As the name suggests, the model is constructed to address issues of global governance. GRID seeks to enhance participation by framing an approach based on reflexive democracy and interactivity.

Democracy, in its most abstract and simple form, can be defined as government by the people and is broadly based on two principles: all citizens have equal access to power and all enjoy universally recognized liberties. Our project is specifically geared towards the arena of global law and thus our conceptualisation of democracy extends to the global sphere. Furthermore, the motivation for this model is the enhancement of democracy in global agri-food governance and the model was thus developed from this sectoral perspective.

Reflexive democracy focuses on “co-operation, based on mutual understanding and developed through dialogue” (Johnsen *et al.* 2005:443). As defined by Johnsen *et al.* (2005:446), it is a “practical concept for social change”, but it is also a perspective on democracy through which:

innovation and inclusive ideas emerge. It is subsequently a process by which democracy, in all the positive meaning of creating a better society for all, evolves because it is open to participation (inclusive), it is legitimate since it is public and democratic, it is emancipatory and creative, since as a structure, it has a low level of formalisation, is decentralised and has no hierarchical function with predefined objectives.

Johnsen *et al.* (2005:442) also explain that:

The focus is set on the processes that are prior to political decision-making and that is creative and helps to elaborate, reconcile and extend mutual understanding between the involved parties.

Associative democracy is generally understood to be a model of participatory democracy wherein individual actors participate with self-governing interest groups which in-and-of themselves are organised around democratic principles. As Wolfgang Streeck (1995:188) notes, it is about “socially responsible self-governance of functional groups” (see also Held, 2006; Perczynski, 1999; Cohen and Rogers, 1993). Here, participation means more than mere consultation, and provides accessible and relevant information to people so as to facilitate active involvement in the design and delivery of international decisions. In addition, understanding that participation from every single person is impossible; the described model offers a solution based on organization of participation through associative bodies, such as associations and INGOs (international NGOs), acting as democracy-enhancing links between decision-makers and civil society. Perczynski (1999:13) notes that “facets of deliberative democracy are also clearly present in associative democracy, as associations could provide concrete arenas of deliberation, and, in fact, the overall associative system could also be seen as an arena of negotiating, competing and co-operating associations.”

Deliberative democracy, “revolves around the transformation rather than simply the aggregation of preferences” and its “notion includes collective decision making with the participation of all who will be affected by the decision or their representatives” (Elster, 1998:1). It also includes “decision making by means of arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality” (Elster, 1998:1). John Dryzek (2002:1) explains that deliberative democracy necessitates a social process wherein participants (“deliberators”) “are amenable to changing their judgments, preferences, and views during the course of their interactions, which involve persuasion, rather

than coercion, manipulation, or deception.” Like Dryzek (2002:2), we defend deliberative democracy that “is critical in orientation to established power structures, including those that operate beneath the constitutional surface of the liberal state, and so insurgent in relation to established institutions.”

Through associative democracy, CSOs can collect ideas and opinions, create centres of aggregation, and act as intermediaries in the global space. Through an application of the principles of deliberative democracy, they can use the participatory models of global regulators to undertake proactive activities, advance ideas, proposals and requests in order to influence the decisions of such institutions. These actors are points of reference for global civil society and active subjects for international institutions. A GRID approach can also improve procedural mechanism by justifying their regulatory activity as negotiated, discussed and decided in a transparent public space with representative representation.

The final component of the GRID framework is interactivity. Interactive refers most specifically to the development of policy, but extends to the interaction of network actors. With respect to interactive policy development, there is general consensus that policy is developed (usually by governments) in consultation or cooperation with stakeholders (Verweij *et al.*, 2003; Healy, 1997; Renn *et al.*, 1995).¹⁸ Following Mayer *et al.* (2005) we define interactive policy making as “the early involvement of citizens and organized stakeholders in public policy-making in order to explore policy problems and develop solutions in an open and fair process of debate that has influence on political decision making”.

The acronym GRID is an appropriate metaphor. Grids are networks, often used for communication (networks of radio or TV stations) or networks of conductors distributing electric power: electric grids require that all component parts are connected and work together. When one is ignored, left out, or ceases to work, power goes out, people are left in the dark.

GRID is central to the development of an innovative system of civil-society involvement that takes up patterns of deliberative, associative and representative democracy combined together in a new procedural and proactive model of global decision-making. It is our intention to develop a project framed by the GRID model to foster active engagement in the development of global regulation. As we will explain, fundamental to our proposal is making use of an interactive, open and virtual (online) peer-to-peer educational space and engaging already established networks.

¹⁸ We take for granted the benefits of interactive policy-development, most notably securing public support and enriching decision making by providing knowledge and information. For a discussion of these merits, see Verweij *et al.*, 2003; Pelletier *et al.* 1999; Healy, 1997; Renn *et al.*, 1995.

Empowering the GRID

An application of the GRID model has the capacity to help new actors not only populate the global political scene, but also that they take advantage of new opportunities. If, at the state level, political parties have traditionally played a dominant role in policy making, albeit sharing their powers with aggregated private interests groups and trade unions, in the global arena, this is likely no longer the case. In this legal space, certain actors, such as multi-national corporations, are playing an increasing role and are fast becoming the new protagonists in the emerging field of global governance. Currently, civil-society, academic and ecological groups remain on the periphery, but there is an opportunity for them to step up and actively participate in the regulatory processes.

GRID supports the establishment and structuring of a network to act as a bridge between agri-food regulators and the people impacted by their decisions, activating the space provided by currently underutilised mechanisms in global law. The network could be sectoral and aggregated on collective interests, but it is the only vehicle – at the moment – able to enhance broad-based representation. Such a model would imply unity in diversity; cooperation and self-awareness: interdisciplinary without centralisation or reductionism; horizontal dialogue for common solutions. Participation and activities in the network are to be structured both horizontally and vertically (Local ↔ Local, Local ↔ Global, Global ↔ Local) and might be articulated in the following terms.

First, the horizontal phase involves a cooperative exchange between all the organizations and actors (both as individuals and as categories, e.g., farmers, processors, consumers) inside the network. This phase concerns peer-to-peer interaction, trust, discussion and the development of common platforms. Actors participate in activities, initiatives and projects and contribute with ideas, opinions, reports, projects, etc. to the activity of the network. In this way, the network responds to the ideal of associative democracy, which relies on the community.

Specifically, this component of network participation will include, but is not limited to:

- i. Presentation of new ideas, solutions and policy recommendations based on experience and knowledge;
- ii. Involvement in public forums, discussions and debates;
- iii. Information sharing (articles, letters, podcasts, videos, art, reports, conferences, online forums, public debate and discussion);
- iv. Feedback to the network through a variety of channels (articles, letters, podcasts, videos, art, reports, conferences, online forums, public debate and discussion);
- v. Participation in online forums.

This is followed by a two-fold vertical phase.

1. With the horizontal phase as a grounding prerequisite, the network becomes a depository of, and embodies, a diversity of knowledge, values, needs and opinions. These are synthesised and transformed into common platforms and then distributed back to the membership. Here, we have deliberative and associative democracy together at the level of civil society through which the network can reflect and be a depository of people's will.
2. The network also serves an educational function, informing civil society, by making public presentations, proposals, clarifying trends and new regulatory acts coming from institutional regulators, which might be unknown or not understood by most of the population. The network's responsibility is to interpret and explain regulations and complicated issues.

Finally, there is another two-fold vertical phase, which follows the preceding processes realising a reflexive, interactive decision-making process:

1. The network forwards common platforms through specific targeted proposals, reports, surveys and memoirs to be presented to global agri-food regulatory institutions. The structure of the network – involving a plurality of subjects sharing similar objectives – implies a widespread distribution. This would facilitate the inclusion and participation of national institutions adapted to national/local peculiarities. In this phase, the model presents a notable representative aspiration, as the more active the network, the stronger it becomes in fostering and supporting proposals and decisions on behalf of its membership.

Specifically, this component of network participation will include, but is not limited to:

- i. Achieving stakeholder status at international regulatory meetings;
 - ii. Achieving stakeholder status at the National Codex Contact Points;
 - iii. Observing international regulatory meetings;
 - iv. Add a diversity of approaches, considerations and solutions to global agri-food governance decision making.
2. The network is charged with explaining to its members and to the public how global institutions are acting and responding to network solicitation. In this way, there is enhanced transparency and accountability inside these bodies, providing an alternative form of checks and balances in the hands of citizens. As in representative democracy, this is the phase where polities give account of their decisions.

This component of network participation will include, but is not limited to:

- i. Enhancing transparency at international agri-food governance negotiations, through feed-back mechanisms incorporated in the structuring of the network;
- ii. Clarifying, supporting or contesting technocratic policies, through a clear application and elucidation of scientific knowledge and lived experience.

We are cognisant that the establishment of a network is not a guarantee of an open and participatory one. Middendorf and Bush illuminate that any mechanism for public participation can be distorted: any mechanism can be made to *appear* to represent a broad constituency, and yet in fact be highly unrepresentative. They can, in various ways, be manipulated by public officials to suit their own purposes (Middendorf and Busch, 1997:49). Notwithstanding, the inclusion and increased participation of NGOs and similar bodies are essential as they embody the link between *decision-makers* and *decision-recipients*, and they could be a solution to the democratic deficit affecting the models of global *governance*. The aforementioned fragmentation of the system and the strong power of certain actors (such as multinational corporations) expose the limitations of small NGO intervention. To overcome this requires a different solution, based on the contribution of actors possessing the power and the structure to face the challenge. Through the application of a network structure, we can foster a united and differentiated body: one that it is comprised of different interests, and balances them internally, reducing fragmentation. Networks are effective in bringing different groups together under common principles, in collects resources and capital (social and financial) and linking together a broad cross-section of actors. Moreover, it represents a parallel structure to the global system of regulation, able to interact with the same normative and administrative language.

The creation of a strong and supportive network is powerful as it links together producers and co-producers¹⁹ from different territories and different fields and points of view. Through these connections, this project can produce common scientific and technical knowledge, new political and sociological theories and alternative solutions to problems linked to food safety, food security and food quality. In addition, it can inform producers and co-producers about new risks and limitations or problems in developments of global agri-food governance. Finally, this network can take up opinions and suggestions directly from the people in a bottom-up mechanism of consultation.

¹⁹ A co-producer, a term borrowed from Slow Food, positions consumers as active agents who play a central role in food production. This notion further supports Wendell Barry's (1992) statement that idea that eating is an agricultural act and that consumer action has a direct impact on our food systems.

With proper support and motivation, this network can embody the challenge of supporting public participation, by working in a two-fold way. On one side, it should require more institutional guarantees for an equal and egalitarian participation. On the other side, it should act as a prime actor of participatory activity in food safety institutions – such as Codex – in order to strengthen the voice of under-represented interests, like farmers, consumers and environmental NGOs.

Without a global *demos*, without a constitution and a parliament, global civil society will be able to speak and be heard through a strong and diversified network of actors, allied together, in organisations who forward interests and interpreting principles and ideals. Only in this way can global regulators avoid becoming mere congresses of ambassadors from different and hostile interests, turning instead to deliberative assemblies where the highest consideration is given to the global good and not where private interests guide.²⁰

Conclusion

In this article we have highlighted several notable and problematic insights. First, there is an emerging and rapidly developing global public law. Second, this field has developed in a unique way in the agri-food sector, where the interconnections with the trade of goods and the need to have high standards of health protection have required a common, trade-oriented and standardised regulation. Third, the current model of global food safety decision making, with its fulcrum in the Codex Alimentarius Commission, has specific drawbacks pertaining to CAC's legitimacy: namely, a lack of transparency in several phases of the standard-setting procedure; a lack of accountability mechanisms; limited legal tools to ensure impartiality and democratically conceived decisions; and, an unbalanced system of public participation at policy-making proceedings. Fourth, the problems of CAC are common to other global regulatory regimes insofar as a general representative body, a global constitution and a global *demos* are lacking and our world remains socially, culturally and politically fragmented. Fifth, a possible solution for respecting pluralism and enhancing participation and transparency can be found in the enactment of the GRID model. GRID is inspired by the doctrines of associative and deliberative democracy and is based on the increment of democratic guarantees (transparency and participation), on the inclusion of a

²⁰ This draws from a speech by Edmund Burke concerning parliament: "Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates, but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole" (cited by Kurland and Lerner 1987:391-2, italics in the original).

plurality of actors and their reciprocal interactions. To respond to limitation in the current agri-food governance negotiation process, the creation of a network of a diverse representation of citizen stakeholders would produce a counter-balance to the current domination of corporate interests and would enhance more pluralistic and democratic decision-making procedures.

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