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Panel “Administrative Procedure: Current Evolutions”

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Procedure in International Bodies

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A. Statement of the problem and key terms

“International bodies”

- IOs (with international legal personality, ILP), currently est. 250.

Other bodies with or without ILP: conferences of the parties (COPs), meetings of the parties (MPOs); forums, networks, “soft IOs”, etc.

Note: The historical (19th century) term is: Administrative Unions (*Verwaltungsunionen/ Unions administratives*).¹

“Procedure”

The formal process leading to the adoption of a legal act (“decision”) of the body.

Research questions

Are regular procedures identifiable? Which types? Are they codified (at least in a soft ways)? What are their typical elements?

Do they (and to what extent and how) fulfill the functions of enabling and limiting global governance activity? Do they contribute to effectiveness and legitimacy and “better decision-making”? Do they respect the principles of global constitutionalism and of *good administration*?

B. The different governance-functions of IOs

No separation of powers (three branches of government) as within the constitutional state.

Especially no clear-cut separation between law-making and law-application. Symptomatic: A “decision” can mean concrete-individual and abstract-general acts.

(1) *Mainly the implementation of primary (and secondary law) ≈ administration*

Example: Article III(1) WTO-Agreement (1994).

(1b) *Enforcement by Member States (MS) under international procedural prescriptions*

The normal level of implementation is the national level: *implementation by the member states* (“indirect administration/implementation/enforcement”).

However, international law can prescribe the procedures to be followed by the MS.

¹ G. Jellinek *Die Lehre von den Staatenverbindungen* [1882] (Scientia Aalen 1969) at 159: „Verwaltungsgemeinschaften“.



Example:

- WIPO Advisory Committee on Enforcement of Industrial Property Rights: Best practices and implementation procedures.

(2) Rule-making/standard-setting (“secondary law”) in its proper sense

With external effect. But most often non-binding recommendations, guide-lines etc. This activity may have a legal basis in IO-founding document (treaty-constitution) or not.

Examples:

UN

- Resolutions of the UN-GA (Art. 11 UN Charter)
- The UN Guiding Principles on Human Rights and Transnational Corporations and Other Business Enterprises (2011).

OECD:

- OECD Guidelines for Multinational Enterprises (2011).

ILO

- Labour Recommendations (Art. 19 ILO-Constitution).
- „Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy“ of 17 November 2000.

International Whaling Commission:

Regulations and recommendations.

OIE (World Organization for Animal Health).

Terrestrial Animal Health Code of the OIE (**TAHC**, 21st ed. 2013).

Issues: Addressees? Technocracy? Binding nature possible (esp. through referrals)!

(2b) Traditional rule-making (not considered in this paper)

(1) With internal effect.

Example: staff rules.

(2) Adoption of conventions which need to be ratified by the MS to become binding for the ratifying MS only.

a) In existing IOs:

Examples: Labour Conventions (Art. 19(2) ILO-Constitution).

Elaboration and Approval of Conventions and Agreements by the FAO Conference (Article XIV FAO).

WHO: Elaboration of the WHO Tobacco Framework Convention (2003).

b) In inter-state conferences outside an existing IO

- UNCLOS III (ended in adoption of UNCLOS 1982).

- Rome Conference for the Statute of the ICC (1998).

(3) Monitoring; compliance-control (“carrots and sticks”)

This includes inspections (disarmament); judicial pronouncements (courts, tribunals, arbitral bodies).

Will be left out here – not typically administrative function.

(4) “Enforcement”/sanctions

But no police or bailiff available.

UN-Security Council only in a limited sense: May authorize MS to take military means. May compel MS to impose non-military sanctions.



(5) *Special case: targeted sanctions against individuals*

Travel bans and asset freezing.

C. The purposes of procedures, concomitant to addressees of legal acts

Max Weber: Rationalization.

“Good administration” = **effectiveness** and **legitimacy**.

(1) Procedure as enabler (the French admin. tradition): simplification, predictability, hearing etc. furnishes information.

Improvement of quality: “better decision-making”.

Example: UN ECE Almaty Decision II/4 (2005): “12. Providing international access opportunities in environmental matters, and establishing and strengthening procedures that enable the taking of these opportunities, generally **improves the quality of decision-making** and the implementation of decisions.”

(Better quality is an aspect both of effectiveness and of legitimacy.)

(2) Procedure as constrainer and controller:

- Predictability.

- Social acceptance in pluralistic society (in the absence of agreement on the outcomes (Luhmann)), and this leads to better implementation.

Less room for power play → protection of the weak.

Rudolf von Ihering *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* Part II (5th edn von Breitkopf und Härtel Leipzig 1898), at 471: ‘Die Form ist die geschworene Feindin der Willkür, die Zwillingschwester der Freiheit. Denn die Form hält der Verlockung der Freiheit zur Zügellosigkeit das Gegengewicht, sie lenkt die Freiheitssubstanz in feste Bahnen, dass sie sich nicht zerstreue, verlaufe, sie kräftigt sie nach innen, schützt sie nach aussen. Feste Formen sind die Schule der Zucht und Ordnung und damit der Freiheit selber und eine Schutzwehr gegen äussere Angriffe – sie lassen sich nur brechen, nicht biegen.’

- Positivistic legitimacy through observation of legality (“rule of law”). Procedural propriety creates a presumption of validity.

‘A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted.’ (ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, para. 20.

Various groups are possibly affected by activity of the IO

and possibly involved in the procedures in IOs.

But: So far no concept of “party” to a global admin. proceeding.

- the Member States (MS) ≈ “share-holders”.

- third states,

- staff,

- outside individuals; NGOs / global civil society/global public ≈ “stakeholders”.

Are there concomitant procedural rights ?

Or are there – at best “objective” procedural rules in favour of certain actors?

(1) MS. Typical: voting rights.

(2) NGOs

Participation: presence, receive information, circulate documents. “voice, not vote”.

threshold. accreditation.



(3) In particular: individuals?

Examples:

- UNHCR recognition of refugees.
- World Bank project financing: resettlement, housing, etc.
- WTO trade-related decisions: affect exporters, importers, consumers.
- WHO health related decisions (vaccination; quarantine; packaging of cigarettes, etc.
- ILO recommendations and conventions on labour standards.
- CITES: listing of species.
- UNESCO: Listing of a cultural heritage site.
- UN Security Council: targeted sanctions (travel ban; asset freeze).
- WIPO protection of patents: denial of life-saving medicine.
- Patent Cooperation Treaty (PCT 1970): preliminary examination of a patent application by the “International Preliminary Examining Authority”.
- UN peace operations and territorial administration: affects housing; food; water; etc.

Legal bases and legal form of the procedural rules

I. Trans-organizational

- (1) No general codified legal procedure for adopting acts in IOs.
- (2) Possible customary law on overarching procedural principles with regard to the classic inter-state procedures.
- (3) Soft law **principles of good administration?**

II. “Rules of procedure” in individual IOs

The legal basis/the empowerment of the body may be found in the constituent treaty of the IO.

Examples:

UN Charter: Art. 21 for the GA; Art. 30 for SC (still only “provisional rules of procedure”, S / 96 rev. 7 of 1982); Art. 72(1) for ECOSOC.

ILO: Art. 7(8) of the ILO-Constitution: “The Governing Body shall regulate its own procedure and shall fix its own times of meeting.”

FAO: Art. XIV (6) FAO-Constitution:

“The Conference shall make rules laying down the procedure to be followed to secure proper consultation with governments and adequate technical preparations prior to consideration by the Conference or the Council of proposed conventions, agreements, supplementary conventions and agreements.”

III. Binding force of procedural rules?

D. Contents of procedures

Classic diplomatic, inter-state type items of procedure

- Representation and credentials
- Presidency and other offices, including their election.
- Agenda-setting.
- Speaking rights.
- The right of initiative (submission of proposals, motions, etc.).

Especially voting schemes

I. Voting power



- One state – one vote (e.g. Art. 18(1) UN charter for GA).
- Weighted votes according to:
 - Population (e.g. Art. 16 TEU).
 - Financial power (e.g. Art. V(3) World Bank; Art. XII(5) IMF).

II. Voting requirements

(1) Unanimity

Examples: Art. 5 Covenant League of Nations (both organs: Council and Assembly).

Art. 20 Committee of Ministers of the Council of Europe.

Veto power of P 5 in UN SC (Art. 27(3) UN Charter).

(2) Majority voting, normally qualified.

Examples for the requirement of a 2/3 majority:

UN GA, according to Art. 18 UN Charter, 2/3 for important questions.

ILO (founded 1922). 2/3 majority for the adoption of conventions and recommendations.

Generally, at **inter-state conferences**: “The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.” (Art. 9(2) VCLT).

But: Such conventions have to be ratified afterwards by the MS (= binding only in case of consent); recommendations are not binding.

Examples for simple majority:

Art. III(2) ICRW (1946) for the adoption of recommendations (resolutions) by the International Commission for the Regulation of Whaling.

Art. IV(4) UNESCO Constitution: “The General Conference shall, in adopting proposals for submission to the Member States, distinguish between **recommendations** and **international conventions** submitted for their approval. In the former case a **majority vote** shall suffice; in the latter case a **two-thirds majority** shall be required. Each of the Member States shall submit recommendations or conventions to its competent authorities within a period of one year from the close of the session of the General Conference at which they were adopted.”

(3) Consensus (acclamation, absence of formal protest).

Examples: Art. IX(1) with fn. 1 of the WTO-Agreement (1994); Art. IV FAO; Art. VIII B 18 Civil Aviation Organization); Art. 16 Mercosur. Prevailing real practice in UN GA.

Global public (constitutional and administrative) law elements of procedures

- Principle of legality (legal basis), incl. principle of constitutionality, i.e. respecting the constitutional document), ILA report 2004.²
- Principle of procedural regularity, ILA report 2004.
- Neutrality and impartiality/objectivity. Equal treatment.
- Speediness/no undue delay.
- Transparency in its various facets: access to documents, hearing, obligation to give reasons.
- No abuse of discretion.
- Avoidance of errors in fact and in law.
- Review (internal or external) and obligation to inform about review.

² International Law Association, Final report on the Accountability of International Organizations, Report of the 71st conference held in Berlin, 16-21 August 2004, p. 164-241.



E. The tryptichon of international procedure: Transparency, Participation, and Access to Justice

Aarhus Convention: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 28 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (addressed to states).

→ transferred to the international organizations (bodies, forums, conferences) as addressees of obligations by the **Almaty Guidelines** (2005):

(United Nations Economic Commission for Europe, report of the Second Meeting of the Parties to the Convention on Access to Decision-Making and Access to Justice in Environmental Matters held in Almaty, Kazakhstan, 25-27 May 2005, decision II/4 entitled Promoting the Application of the Principles of the Aarhus Convention in International Forums, ECE/MP.PP/200572/Add.5, 20 June 2005).

I. Transparency

- **WTO: The Sutherland Report** (Peter Sutherland et al. (eds), *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: WTO, 2004), paras. 183-205.
- **UNFCCC**, Subsidiary Body for Implementation, Synthesis Report on Ways to Enhance the Engagement of Observer Organizations, FCCC/SBI/2010/16, 19 October 2010, with a view to the 33rd session in Cancun, 30 November to 4 December 2010, with proposals for 'ensuring transparency, accountability and information-sharing' (paras. 16-17 and 26-28).
- **World Bank:** 'World Bank Policy on Access to Information', 1 July 2010, <http://documents.worldbank.org>.
- **Security Council:** S5 in the UN: draft resolution A/66 L.42/Rev.1 in the GA: 'Enhancing the accountability, transparency and effectiveness of the Security Council' (May 2012).

EU

Art. 10(3) TEU '[d]ecisions shall be taken as openly and as closely as possible to the citizen.'

Article 11 TEU: '1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.'

Art. 15 TFEU foresees public legislative proceedings and access to documents: '1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible. 2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act. 3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph'.

The individual and general right of access to documents has the statute of a fundamental European right (Art. 42 Charter of Fundamental Rights).

All legal acts must give reasons (Art. 296 TFEU).

All legal acts must be published in the Official Journal (Art. 297 TFEU and Art. 13 of the Transparency Directive).

Transparency Regulation: Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to Documents, OJ 2001 No. L145/43, 31 May 2001.



II. Participation ('cooperation' or 'consultation' with, or 'information') of NGOs

The branch of international law with the most elaborate schemes of information and participation clearly is international **environmental** law:

Art XI(7) CITES Treaty (1973); Art 6(5) Vienna Convention on the Protection of the Ozone Layer (1985); Art 11(5) of the Montreal Protocol on Ozone Depletion (1987); Art 15(6) Basel Convention on the Transboundary Movement of Hazardous Waste (1989); Art 10(5) Aarhus Convention (1998); Art 22(7) UN Convention to Combat Desertification (UNCCD, 1994); Art 23(5) Biodiversity Convention (1992); Art 29(8) Cartagena Protocol on Biosafety (2000); Art 7(6) UNFCCC (Framework Convention on Climate Change, 1992); Art 13(8) Kyoto Protocol (1997), and the secondary law and rules of procedures within the treaty regimes.

UNEP (UN Environmental Programme): Civil Society Consultations on International Environmental Governance (2001).

Other fields of international law and respective bodies:

- UN ECOSOC 1996, Res. 1996/31 – *Consultative relationship between the United Nations and non-governmental organisations* (UN Doc A/RES/1996/31), 49th plenary meeting of 25 July 1996.
- Council of Europe, *Participatory Status for International Non-governmental Organisations with the Council of Europe*, Res. (2003) 8 of 19 November 2003, adopted by the Committee of Ministers at the 861st meeting of the Ministers' Deputies.
- In international economic law: Art 12 c) OECD-Convention (1960); Art 13(2) Convention Establishing the WIPO (1967); Art V(2) WTO Agreement (1994).

UN Security Council: Arria formula meetings (since 1992).

III. Access to justice (against IOs)

EU

Art. 263(4) TFEU: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

World Bank

International Bank for Reconstruction and Development and International Development Association

- Resolution No. IBRD 93-10.
- Resolution No. IDA 93-6, "The World Bank Inspection Panel" of 22 Sept. 1993, ILM 34 (1995) 520-523.

UNMIK

Human Rights Review Panel (HRRP; since 2010), review of UNMIK and EULEX in Kosovo
UNMIK Regulation No. 2007/3 amending UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Review Panel of 12 January 2007.

UN SC

Ombudsperson. De-listing recommendation.

Res. 1409 (1009), paras 20-27 and annex II (Annex of the 1967-working guidelines 2010, revised in 2011).



Different matter: remedies/access to justice for staff of the IO

concerning labour disputes.

Internal remedies are important because the immunity of the IO precludes resort to ordinary domestic remedies against IO in the seat state.

Trend is a continuous improvement of remedies.

Example: UN Dispute Tribunal und Appeals Tribunal (UNAT). Important reform and introduction of two instances in 2010).

Some fragmentary conclusions and questions

Most of the novel, global public law-type of procedures with transparency and participation relate to rule making/standard-setting, not to administrative action in the narrow sense.

The pioneer field for the development of the procedural standards of transparency/participation and access to justice is international **environmental** law. Why?

A major purpose of global governance procedures is to secure the accountability of the international bodies.

But towards whom?

Can the tryptichon of “administrative” procedural guarantees compensate for the absence of a body of **democratic** constitutional law?

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- Jacob Katz Cogan, *The Regulatory Turn in International Law*, *Harvard International Law Journal* 52 (2011), 321-372.
- Matthias Goldmann, *Internationale öffentliche Gewalt* (Heidelberg: Springer 2014 forthcoming).