

PROACTIVE STRATEGIES IN GLOBAL LEGALITY REVIEW*

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«To the extent that the judicial profession becomes the daily routine of deciding cases on the most secure precedents and the narrowest grounds available, the judicial mind atrophies and its perspective shrinks»⁽¹⁾

1. It is arguable that the application of strategies is a persistent habit in the working of any court. Either ancillary to the cardinal components of a given legal system or secondary to the judicial aim of performing specific tasks, strategies define the contours of judicial behaviours, and operationalise judicial rationales towards the issues in question.

Borrowing on insights from legal history, two examples are worth a brief mention. In tenth century Iceland, the laws were passed by the “legislature” – the *Lögretta* – by the majority of its members, the *godord*. Their enforcement, however, was left entirely to the private parties’ bargaining. Ultimately, the sanction behind all legal judgments or arbitrated settlements was the blood feud – or the fear of it. In later periods, if a claimant could not receive satisfactory reparation, alternative solutions would have been made accessible by courts: private parties could bring an action against the guilty party and repeatedly sue him and his supporters. Tort claims could be transferred to neighbours with sufficient economic strength to prosecute them. Eventually, primitive forms of arbitration were used⁽²⁾. Nine centuries later, in the East German Democratic Republic, the *Gesellschaftliche Gerichte* promoted legality in minor cases. These social courts adopted a strategy of dialogue and amicable resolution. They operated in the absence of uniform hearing procedures, primarily upon the request of workers or labour groups. Their final resolutions put forward measures for settling disputes in the prevalent form of recommendations to local councils, officials or private citizens⁽³⁾.

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¹ I.R. KAUFMAN, Biographical Directory of Federal Judges.

² See D.D. FRIEDMAN, *Law’s Order. What Economics has to do with law and why it matters*, Princeton 2000, at 263; R. POSNER, *Medieval Iceland and Modern Legal Scholarship*, 40 *Michigan Law Review*, 1495 (1992); I.W. MILLER, *Avoiding Legal Judgement: The Submission of Disputes to Arbitration in Medieval Iceland*, 28 *American Journal of Legal History*, 96 (1984).

³ See P.W. SPERLICH, *The East German Social Courts; Law and Popular Justice in a Marxist-Leninist Society*, Santa Barbara, 2007; N. TRAVIS WOLFE, *The Proactive Responsibility of East German Criminal Courts*, 15 *Criminal Justice Review*, 22 (1990).

The quantity and variety of strategies by courts is potentially unlimited in its extent⁽⁴⁾. This is particularly true for the supranational legal system, where the number of mechanisms and proceedings for reviewing the legality of decisions adopted by global administrative bodies has undergone a significant transformation in the last twenty years.

To begin with, the number of judicial or quasi-judicial bodies has increased exponentially. In almost synchronized fashion, their competencies have become widely spread. Thus, an international legal system populated by a handful of operative courts has rapidly developed into a ramified patchwork where a number of entities, collectively referred to as the “global judiciary”, currently reside and operate. Take, for instance, the environmental arena: no fewer than twelve new non-compliance monitoring bodies have been brought into being since 1990⁽⁵⁾.

The sudden rise of judicial globalization has generated two supplementary outcomes. Different actors, both at the supranational and national level, have been involved in the process of review. As things currently stand, international institutions, domestic judges and public administrations are engaged as active participants in the monitoring and compliance processes. Even private corporations, multinationals, trade unions, media, religious and social bodies and, of course, non governmental organizations (NGOs) have repeatedly taken part in the process of review⁽⁶⁾. In a related manner, the very concept of legality review has undergone considerable changes. Moving from an orthodox concept of scrutiny of the adherence to a given set of rules, the present-day mechanisms of review at the global level have broadened, adopting a mixed nature. Not longer is respect for the norm in question the only consideration; fulfilment of policy goals, conformity with standards and, to a far greater extent, the recognition and acceptance of the possession and use of power are focused on. In the end, compliance is blended with implementation⁽⁷⁾.

⁴ The literature on judicial strategies is vast. See A. CHAYES: *The Role of the Judge in Public Law Litigation*, 89 *Harvard Law Review*, 504 (1976); A. SCHWARTZ, *Relational Contracts in the Courts: an Analysis of Incomplete Agreements and Judicial Strategies*, 21 *The Journal of Legal Studies*, 271 (1992); A.D. VESTAL, *Reactive Litigation*, 47 *Iowa Law Review*, 11 (1961-1962). More specifically on the international sphere See L. DIAZ, B. HART DUBNER, *On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: a Proactive Approach to the Evolution of International Law*, 32 *Syracuse Journal of International Law and Commerce*, 1 (2004-2005); H.H. KOH, *The Value of Process*, 11 *International Legal Theory*, 27 (2005); P. KOIJMANS, *The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy*, 56 *International Law and Comparative Law Quarterly*, 741 (2007); T. TREVES, *Le controversie internazionali. Nuove tendenze, nuovi tribunali*, Milano, 1999.

⁵ Among the most recent are the Kyoto Protocol Compliance System, created in 1997; the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; the Stockholm Convention on Persistent Organic Pollutants of 2001; the Compliance Committee of the Cartagena Protocol on Biosafety, operating since 2005; and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters that will be fully analyzed in the article. An attempt to classify all international judicial bodies has been made by the Project on International Courts and Tribunals. See <http://www.pict-pecti.org/index.html>. See also A. DEL VECCHIO, *Giurisdizione Internazionale e Globalizzazione*, Milano 1992; S.S. ABRAHAMSON, M.J. FISCHER, *All the World's a Courtroom: Judging in the New Millennium*, 26 *Hofstra Law Review*, 273 (1997); R.P. ALFORD, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 *American Society of International Law Proceedings*, 160 (2000); P.S. BERMAN, *The Globalization of Jurisdiction*, 151 *University of Pennsylvania Law Review*, 311 (2002); T. BUERGENTHAL, *Proliferation of International Courts and Tribunals: Is it Good or Bad*, 14 *Leiden Journal of International Law*, 267 (2001); J.I. CHARNEY, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 *New York University Journal of International Law & Politics*, 697 (1999); E.U. PETERSMANN, *Justice ad Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 *University of Pennsylvania Journal of International Economic Law*, 273 (2006).

⁶ See M.E. KECK, K. SIKKINK, *Activists Beyond Borders: Advocacy Networks in International Politics*, Ithaca, New York 1998; K. MARTENS, *NGOs in the UN System: Examining Formal and Informal Mechanisms of Interaction*, 11 *International Law Journal of Civil Society*, 11 (2004); A. REINISCH, C. IRGEL, *The participation of non-governmental organisations (NGOs) in the WTO dispute settlement system*, 1 *Non-State actors and International Law*, 127 (2001); H. CULLEN, K. MORROW, *International civil society in international law: The growth of NGO participation*, 1 *Non-State Actors and International Law*, 7 (2001).

⁷ On the concept of legality and its evolutions See P.S. REINSCH, *The Concept of Legality in International Arbitration*, 5 *American Journal of International Law*, 604 (1911); E. BLANKENBURG, *The Waning of Legality in the*

As a result, various kinds of approaches and standards have been adopted by global courts. For the sake of rationalization, however, this article's primary assumption is that two major approaches can be conceptualized. The first is outlined in terms of a "reaction". In turn, the second will be described in terms of proactiveness. In reality, the difference between the two strategies is much less clear-cut than in this dichotomous representation. In many cases, they are manifestations of different points along the same *continuum*, ultimately converging in an effort to reassert respect for legality. Yet, in a theoretical perspective, these two forms of review are utterly dissimilar.

Reactivity can be streamlined as a fast, direct, and mainly top-down oriented answer. Aimed at delivering a prompt restoration of the *status quo ante*, a reactive review is committed, first, to quick solutions in pursuing the certainty of legal and social order. Secondly, the effectiveness of this form of review is dependent on its steadiness. Typically, ousting the agent that has performed the illegal act is conceived as a crucial step in a reactive *manoeuvre*. The annulment of an administrative act, the termination of a contract, or the withdrawal of a document are all exemplary countermeasures in a reactive strategy. Ultimately, a top-down drive is very likely to occur. The complainant's position is initially managed at the supranational level and, afterwards, enforced at the domestic level.

The range of variance present in a proactive review displays an interesting digression from the reactive rationale. At the bottom, a proactive strategy is durative, designative in its overture, multi-directional in its proceedings and multi-phased in its accretion. Furthermore, proactiveness exhibits a significant degree of variformity when crafting practical solutions for effectively dealing with disputes.

Upon closer examination, a proactive strategy is developed, firstly, alongside a prevalently extended timetable. Secondly, the reinstatement of the legal *status quo ante* is infused and intermixed with constant negotiation. The aim is twofold: to produce valuable information for the parties and to dispose of the breach through dialogue. In turn, the party structure is amorphous and subjected to iterative changes over the course of the litigation. Thirdly, legality is reinstated through a number of progressive steps rather than a single direct decision. Lastly, proactiveness reveals a complex – and therefore fascinating – structure in placing the supranational level alongside the domestic level in the review of legality. As a case in point, the supervision of composite forms of ongoing relief at the global level relies on the intercession of the local expertise, namely domestic administrations and tribunals. Consequently, in place of the exclusively top-down structure presented by reactive review, here this is complemented by – and fused with – a bottom-up approach.

Given this brief description, this article explores proactive reviews of legality in the global legal system *inter se* and *vis-à-vis* reactive forms of legality review. Reactivity mirrors a traditional form of judicial review. However, for a number of reasons, both practical and political, this form of review is not always appropriate in the global arena. Thus, a proactive review reflects an attempt by global courts to bypass these limits in order to reinstate legality. The review is pursued through a *de facto* administrative procedure. This "shortcut" minimizes intrinsic limitations such as the lack of executive authority to compel appearance and compliance; and, all at once, maximizes the delivery of effective remedial solutions. In many other respects, however, a proactive review can be time-consuming and uneconomical. Besides, its compliance and impact rates are not easily measurable because they are hinged on transient factors such as the sequential accomplishments of structural reforms at the domestic level.

In order to fully develop these arguments, the article is divided in three parts. The first part is devoted to the description of the fundamental principles of proactive review. In this respect, it takes into account the phases through which the review is developed, the actors involved, and it

Concept of Policy Implementation, 4 Law & Policy, 481 (1985); M. BENNETT, "The Rule of Law" Means Literally What it Says: The Rule of the Law: Fuller and Raz on Formal Legality and the Concept of Law, 32 Australian Journal of Legal Philosophy, 90 (2007).

explores the interactions between the global and the domestic level. The second part expounds the rationale of a proactive review. Of primary interest are the motivations behind the choice made by the global reviewing entities to give a proactive response while dealing with the review of legality. Three elements will be considered: the legal nature of the global courts, the rules governing compliance, and the political issues related with the review of legality at the supranational level. In the last part some concluding comments are provided, arguing that there is a connection between the transformation of the supranational legal system and the adoption of proactive strategies. In particular, it seeks to understand the relation between the adoption of such practices and the desire of global courts to be accepted within the global legal order, in a manner that "fits" with the way in which global administrative law has evolved.

The analysis is supported by the description of few landmark cases from five global reviewing bodies; ⁽⁸⁾ namely, the Compliance Advisory Ombudsman (CAO) of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA); the Inspection Panel (IP) of the World Bank (WB); the Compliance Committee (CC) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter "the Aarhus Convention"); and, to a lesser extent, the Compliance Review Panel (CRP) of the Asiatic Development Bank (ADB), and the Independent Review Mechanism (IRM) of the African Development Bank (AfDB). At intervals, the jurisprudence of the Appellate Body (AB) of the World Trade Organization (WTO) will be taken into account.

Regarding the specific cases, thirteen complaints have been thoroughly examined. These are the "*Yanacocha gold mines*" case; the "*Guatemala Marlin*" case; the "*Antamina*" case; and the "*Allain Duhangan*" case, all handled by the CAO. The "*Mumbai urban transportation*" case; the "*Honduran land administration*" case; and the "*Vlora power sector*" case, which were handled by the IP. The "*Kazatomprom*" and "*Danube river*" cases, both handled by the CC. The "*Colombo-Matara highway*"; the "*Melamchi water supply*"; and the "*Fuzhou environmental improvement project*" cases, handled by the CRP. Finally, the "*Bujagali Hydropower*" case, handled by both the IRM and the IP. While these cases present a significant range of divergence, in many other respects they show some patterns of commonality that are helpful in terms of setting out the basics of the constitutive elements of proactivity. The selected sample of cases deals with four major legal issues: the diverse modalities of proactive review; the complex relation between global courts and national governments, civil society and judiciaries; the rationale behind the adoption of such strategies; and the cross-fertilization of reviewing practices.

2. In what follows, the conduct of a proactive review will be presented in schematic form by differentiating three stages of the process and outlining each in brief.

The proposed distinction is not categorical. It provides a rough first cut of the development of a proactive strategy at two levels, the domestic and the global, and their constant interaction. In this essential draft, solutions are initially formulated at the global level. Then, they are elaborated within the domestic boundaries, under the persistent vigilance of the global court. Lastly, the decisions are locally implemented. Often, this implementation can cause changes in the global regime as well.

The first phase of the process is held at the global level. To put it crudely, in the *ouverture* the global entity appraises the complaint in its substance. The request is registered and, following a preliminary investigation on the site, the outlines of a strategy are traced. Subsequently, its implementation is decentralized to the domestic level.

⁸ In order to avoid terminological difficulties, this paper relies on a broad definition of global judiciary. The terms "reviewing body/entity" and "global courts" are used interchangeably. The following criteria have been used in identifying the global judiciary: the permanent nature of the body, the independence of the members, and the power to adjudicate disputes on the basis of predetermined rules of procedure.

With specific regard to the modalities of review, potential solutions are many and varied. Quite frequently the entirety of the process is devolved to *fora* specifically designed to deal with the actors involved.

In June of 2000, for instance, following the accidental loss of toxic waste on a stretch of the Peruvian highway connecting Lima to Choropampa, several mining companies involved in a local IFC-financed project filed a complaint with the CAO. The complainants sought an independent investigation of the case. In particular, they pointed to the local authorities' negligent response to the incident as the main cause of the acute poisoning suffered in the local communities. Notwithstanding the appointment of an independent commission of experts, who were brought in to file a report on the event's responsibilities, two extensive new complaints were filed to the CAO shortly afterwards. The complainants were, respectively, three neighbouring communities and a local NGO. The spectrum of allegations ranged from the shareholders' and government's lack of managerial competence to the environmental, social and economic unsustainability of the project. Therefore, in its 2001 final report the CAO suggested the creation of a consultative forum where a collaborative problem-solving process could take root. The forum, named «*Mesa de Dialogo y Consenso*» (MDC), would have been composed of NGOs, representatives of local communities and government officials. The proposal suggested that a finite number of participants would join the MDC. This solution would have encouraged a more meaningful and positive dialogue and guaranteed the effectiveness of the decision reached. In addition to the forum's meetings, however, a number of individual consultations would have been held to guarantee the participation of the numerous stakeholders not officially represented in the MDC. Eventually, the MDC was created. Between 2001 and 2003 the forum successfully operated, generating several relevant documents, and progressively remodelling the dialogue between the civil society actors and the shareholders involved in the project. Later, between 2005 and 2006, its activity was reviewed by an independent commission. Finally in 2006, after the publication of the CAO's exit report, the parties unanimously proposed to renew the MDC's mandate or even to transform it into a conflict resolution body.

Albeit a frequently adopted mechanism, the creation of *fora* for discussion is not a dogmatic rule. At least three other hypotheses are conceivable. On occasion, the global entity has opted for intensifying the cooperation with advisory bodies already operating locally.

In January 2006, for instance, the IP dealt with a complaint related to a land administration resettlement in Honduras (⁹). The IP initially acknowledged the complaints filed by some Honduran NGOs questioning the effectiveness of the «*Mesa Regional*» (MS), a forum in which conflicting local interests had been represented since the project's start-up. In the complainants' view, the forum lacked legitimacy. In their opinion, it had been created in spite of the disagreement of the local indigenous community, the Garífuna people, and had never represented them effectively. The IP considered the request eligible and in 2007 drafted an investigation report. The strategy suggested, as a first step, was to bolster the MS's consistency. In this regard, the report pointed to intensifying the cooperation between the MS and the leading representative bodies of the Garífuna. Subsequently, the IP advised that a closer supervision of the MS and up-to-date knowledge by WB staff would be helpful limiting further damage to the Garífuna's chances of survival. The third step concerned the project's implementation. In short, the IP put found it that it would be necessary to involve the national «*Inter-Sectoral Commission for Protecting Land Rights of Garífuna and Misquito Communities*» (ISC) in future consultations. This governmental agency could play a significant role in helping to address the concerns that had been raised and promote dialogue between local communities and the government. The fourth and last step addressed the different types of conflict resolution procedures, judicial and extra-judicial, available to solve the land conflicts. On the merits, the IP argued that a better coordination between the different procedures would be preferable. Therefore, the arbitration procedures provided in the project were to be harmonized with the local resolution procedures. The MS was indicated as the device through

⁹ Request No. RQ 06/01.

which harmonization could be achieved. Also, an increase in budget allocations for training conciliators and arbitrators was deemed a further useful step.

Yet in other cases, review has been pursued by strengthening the local framework of civil society actors. Serving as an illustration in this regard is a 2004 complaint on a WB financed urban transportation project in Mumbai. The project consisted of three components: the improvement of Mumbai's rail transport system, the improvement and extension of the road-based transport system, and the resettlement and rehabilitation of the affected communities. In total, four requests for inspections were filed to the IP (¹⁰). All of them, however, pertained to similar concerns: the inadequacy of the resettlement plans for the affected people. Thus, the strategy designated a two step process of review. In the earliest, the IP opted for improving the credibility of the local NGOs. According to the project design, in fact, almost all direct responsibility for field operations was delegated to two local NGOs. To strengthen their accountability, the IP pointed at the expansion of their institutional capacity and expertise. Ultimately, once an effective institutional framework had been established, the IP highlighted the conversion of the NGOs into small administrative agencies cooperating in close contact with the «Mumbai Metropolitan Regional Development Authority» (MMRDA). Furthermore, the IP suggested two additional corrective actions. Firstly, it insisted on promoting a well-structured grievance system to sustain the renovation of the institutional framework. Secondly, the WB was requested to increase the number of staff members on the project, improve transparency in its processes, and control closely the project's future evolution.

Lastly, in specific events the strategy has been to entrust the local government with the choice of pertinent solutions. Most notably in this regard is a complaint recently handled by the CAO on a mining project in Guatemala. In 2003, the government of Guatemala, pursuing a neo-liberal political program aimed at attracting foreign capital, issued a digging concession to exploit some gold and silver strip mines. The project was granted IFC financial support. Between January 2005 and June 2006 some local and international NGOs complained to the CAO about the negative impact of the project on the environment, and the failure to conduct adequate consultations with the local indigenous communities. In its assessment report, the CAO recommended that a high-level delegation from the government, the mining company and a representative of the complainants should consider engaging in dialogue to establish the next steps towards achieving a resolution of the dispute that would be acceptable to all. In fact, the absence of clear government regulations on participation and disclosure had resulted in uncertainty for local people regarding the extent to which they should have been informed and consulted. Accordingly, the government of Guatemala was suggested to provide for participation in a manner that it considered appropriate under the circumstances. On the merits, the IP's only suggestion was the indication that the mining company would be the ideal interlocutor in undertaking enhanced consultations with local community groups. Following these requests, the Guatemalan government committed itself to the endeavour of ameliorating the project's governance, mainly through improving participation possibilities. Hence, the government established a «High Level Commission» (HLC) to review and address mining issues. This Commission consisted of members of the Catholic Church, the government, industry and NGOs. In addition, local communities were consulted through a referendum (¹¹).

There are many legitimate explanations for these variations. At this stage, however, it is more important to clarify that, these divergences apart, two elements recur in every proactive approach. The first relates to the heterogeneity of rules pertaining to standing. The second concerns the actual objectives of the review.

3. Conceptually, in adopting rules of standing, courts are seeking to control, and contain, the accessibility of parties to a dispute. Rules on this point may vary. Nevertheless, we may

¹⁰ Requests No. RQ 04/03 and RQ 04/04. The case is fully illustrated in S. CASSESE *et al.*, *Global Administrative Law. Cases and Materials*, New York, 2008, at 129.

¹¹ See S. CASSESE *et al.* (2008), *supra* note 10, at 133.

normally assume that standing is granted to an actor with a personal stake in the outcome of the controversy. The mere interest as a member of the public in the restoration of legality is not enough.

When moving to the observation of the supranational legal system, the question becomes considerably more complex⁽¹²⁾. As a rule of thumb, allowing broad access to disputes is important for both the global courts and the process of review. Courts have an interest, firstly, in increasing their agenda and creating a virtuous circle where one case breeds others. Through this process they hope to build a stronger reputation, making a larger portion of civil society fully aware of their existence. Secondly, and relatedly, through the recognition of broadly formulated standing rights, global courts are seeking to increase their legitimacy. At the same time, broad standing is useful for the process of review. By giving widespread access to compliance mechanisms, the goal is to reinforce the perception of the global review as a powerful weapon of advocacy *vis-à-vis* domestic and global institutions.

A cursory investigation of the rules governing the access to dispute resolution procedures confirms this assumption. In all of the reviewing entities considered in this article, a wide range of state and non-state actors have been granted full standing rights. In some cases the reviewing bodies accept requests filed by both groups and individuals, while in others accessibility to a dispute is moderately narrower: only the requests of groups, and not those of private individuals, are admissible.

The CAO and the CC belong to the first category. According to its terms of reference and operational guidelines, the CAO responds directly to the concerns of individuals, groups of people, and organizations. Moreover, to the extent necessary to carry out the assigned duties, the CAO is expected to maintain appropriate contacts with NGOs, civil society and the business community⁽¹³⁾. Similarly, the CC considers any relevant information submitted to it, without any distinction with respect to the sources of that information. In fact, the compliance mechanism is triggered when any member of the public makes a communication concerning a Party's compliance with the Aarhus Convention⁽¹⁴⁾.

Moving to the second category, we find the IP, the IRM, and the CRP. The IP acknowledges the requests filed by the affected party in the territory of the borrower, by the local representative of such party or, exceptionally, by another representative⁽¹⁵⁾. On its behalf, the IRM has the authority to receive complaints from groups of affected people, their representatives and, as an exception, from a foreign representative acting as an agent of adversely affected people⁽¹⁶⁾. Finally, as stated in its operating procedures, requests for compliance can be filed to the CRP by groups of people (or their representatives) who are negatively affected by ADB's projects⁽¹⁷⁾.

4. The second recurring element in proactive strategies is tied to its objectives. Notwithstanding the different solutions adopted, all proactive approaches are aimed at attaining three goals. Of course, in the long-run, a proactive review is aimed at an effective reinstatement of

¹² See B. KINGSBURY, The Concept of "Law" in Global Administrative Law, 20 European Journal of International Law, 23 (2009).

¹³ Both the Terms of reference and the Operational Guidelines can be consulted on the CAO's official website: www.cao-ombudsman.org.

¹⁴ See Article 15 of the Aarhus Convention on review of compliance and the following Decisions No. I/7, titled "Review of Compliance", adopted at the first Meeting of the Parties of 2002, and No. II/5, titled "General Issues of Compliance", adopted at the second Meeting of the Parties of 2005. See also the Guidance Document on Aarhus Convention Compliance Mechanism, available here: <http://www.unece.org/env/pp/compliance.htm#Documents>.

¹⁵ See Resolutions No. IBRD 93-10 and IDA 93-6, establishing an independent Inspection Panel, 22 September 1993, at par. 12. The Resolution has been reviewed in 1996. Further clarifications on its content have been provided in 1999. All the documents are available here: www.worldbank.org/inspectionpanel.

¹⁶ See the Operating Rules and Procedures of the IRM, at 3. The document is available here: <http://www.afdb.org/en/about-us/structure/independent-review-mechanism/>.

¹⁷ See the Operating Procedures adopted by the CRP on June 2004, at 4. The document can be consulted here: <http://lnadbg4.adb.org/dir0035p.nsf?Open>. See also the ADB Operations Manual, Section L1/OP, at 6.

legality. In the short-term, however, the primary goal is to promote a constructive dialogue. Also, in the mid-term, proactivity encourages a stronger partnership between the global and the domestic level. While this representation is an obvious simplification, it remains a useful sketch of the kind of approach necessary in order to achieve effective solutions. Given that it relates to the factors motivating the adoption of a proactive strategy, this aspect will be analyzed in the following section. Here I would like to stress a different, although related, point. Interestingly enough, in their attempt to achieve the aforementioned goals, proactive strategies are deeply inspired by solutions well known within domestic administrative proceedings.

The creation of a forum for dialogue closely resembles the French «*Commission Nationale du Débat Public*» (CNDP). In this case, an independent administrative body is in charge of consulting with a large number of stakeholders with conflicting interests, and providing a reasoned decision⁽¹⁸⁾. The role of the MDC in the *Yanacocha gold mines* case, for instance, has been that of a multi-stakeholder dialogue roundtable. It helped prevent and resolve conflicts between the local communities and the mining industries. The MDC, similarly to the French CNDP, has facilitated conflict mediation training, and has promoted dialogue, transparency and public understanding. Upon conclusion of its involvement in the petition brought by the local communities, the MDC published a final report that resembles closely the CNDP's *bilan du débat*.

Where an advisory body already exists, this strategy reinforces its presence by increasing the number of actors involved. Moreover, the oversight by the global body is strengthened. This kind of solution calls to mind the «Advisory Committees» (AC) operating under the U.S. Federal Advisory Committee Act. As a matter of fact, the ACs conduct public hearings on matters of importance that come before the administration and provide independent expert advice on a range of complex scientific, technical, and policy issues. In doing so, impartiality, openness and administrative efficiency are furthered⁽¹⁹⁾. In the strategy developed by the IP in the *Honduran land administration* case, the MC's role was originally simply to involve local communities. Then, at a latter stage, it was asked to provide even-handed advice to the local government. Again, the strategy's short-term goal is to widen negotiation and participation.

In the third case, in which a specific forum for consultations was lacking, dialogue is encouraged by entrusting a network of civil society actors and public institutions with this task. In basic terms, this solution evokes the rationale behind the Italian «*Conferenza di servizi*» (CDS). A CDS is created when decision-making processes are of particular complexity, involving different administrations and stakeholders⁽²⁰⁾. For instance, the IP in the *Mumbai urban transportation* case created a public/private network to deal with a particularly complex situation.

Finally, in the fourth case, the intercession of the national government occurs through the use of domestic administrative proceedings and institutions. Here, we may expect the domestic hard procedural rights to combine with the global soft law standards and strengthen the respect of legality. For instance, in the *Guatemala Marlin* case the results of the prior referendum held by the government were validated upon review by the national constitutional court.

5. Once a strategy has been established, the process of review is decentralized at the domestic level. Having described the possible models of review and their shared attributes, this section will focus on the dynamics of the reviewing sessions. I will try to make my point in two

¹⁸ See E. LE CORNEC, La participation du public, 4 *Revue française de droit administratif*, 770 (2006); R. PEYLET, Quelques enseignements d'un débat public, 46 *Actualité Juridique Droit Administratif*, 2328 (2006).

¹⁹ For a general overview, See S.P. CROLEY, W.F. FUNK, The Federal Advisory Committee Act and Good Government, 14 *Yale Journal on Regulation*, 451 (1997).

²⁰ See L. BOBBIO (ed.), *A più voci. Amministrazioni pubbliche, imprese, associazioni e cittadini nei processi decisionali inclusivi*, Napoli, Roma, 2004; T. MIELE, Il rapporto pubblica amministrazione-cittadino dopo la stagione delle riforme, 1 *Nuova rassegna di legislazione, dottrina e giurisprudenza*, 1 (2005).

steps. First, I will provide a description of the general goals of the sessions. Then I will move on to identify the participants and analyze the roles they play.

In their contours, the domestic reviewing sessions appear to be more conversational than adversary. This approach is adopted in order to achieve a dual goal.

To begin with, the dialogue is didactic in its scope and non-hierarchical in its form. The educational purpose is aimed at engendering a constructive conversation among participants, disseminating valuable information, and clarifying ambiguities. Information is beneficial to the court, which relies upon the evidence in weighing the alternatives, as well as to the parties. The adoption of the no-dissent rule as a standard of reference in the forming of opinions is particularly instructive in this regard. Not coincidentally, the organization is non-hierarchical. Each participant is equally entitled to put forward his position and suggest proposals.

At best, the dialogue is aimed at obtaining, firstly, a general agreement, or, at the very least, the elaboration of a limited agenda of future actions⁽²¹⁾. Secondly, it is plausible that the sharing of information corresponds to a sort of “normative aspiration” of the reviewing entities. In order to understand the problem, it might be useful to recall the hybrid composition of the global arena. Due to the blurry separation of competences among global regulators, the global regime lacks a general positive theory. Hence, global courts use the acquisition and allocation of information to the stakeholders to bring the discourse about norms from latency to fulfilment. This is a form of constructive bargaining. Generally speaking, the courts’ purpose is to ease the shift from soft law standards to hard law principles. In parallel, the courts’ goal is to contribute to the development of a more effective review and implementation of legality⁽²²⁾.

6. As for the participants involved in the process of review, three categories can be identified. The first encompasses the domestic public institutions⁽²³⁾. The second and third are civil society actors and the judiciary, respectively.

Normally, in proactive review, national governments, regional and local institutions, administrative authorities and agencies of various natures are constantly involved. Roughly speaking, we can assume that their number is determined by the complexity of the complaint, as perceived by the global court. Thus, two major interdependent variables are likely to be present.

The first variable is quantitative in nature. In some cases only a few selected government officials take part in the review process; in others, this number is larger. Additionally, and depending upon the circumstances, the total number of public representatives can increase or decrease at different points in the review process. In many respects, however, the trend is towards increasing rather than reducing the involvement of the public sector during the reviewing process. One may observe, for instance, the MDC as a forum where a limited and stable number of local

²¹ On the use of dialogue in international dispute resolution *See* T. GINSBURG, R.H. MCADAMS, *Adjudication in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 *William & Mary Law Review*, 1229 (2004).

²² A full analysis of the normative aspiration of GAL is clearly far beyond the scope of this paper. However, because of its importance, it will arguably attract greater explicit attention among international scholars. Still, to date only few (and mainly topical) works have focused on it. Some references of a more general kind can be found in A.M. SLAUGHTER, *International Law and International Relations Theory: A Dual Agenda*, 87 *American Journal of International Law*, 205 (1993); B.K. WOODWARD, *Global Civil Society and International Law in Global Governance: Some Contemporary Issues*, 8 *International Community Law Review*, 247 (2006). On judicial review and normative aspiration, at the domestic level, *See* F. BARRY, *Politics of Judicial Review*, 84 *Texas Law Review*, 257 (2005-2006); at the domestic and transnational level, *See* E. BENVENISTI, G.W. DOWNS, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 *European Journal of International Law*, 29 (2009). On transnational and global law normative aspiration *See* O. PEREZ, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 *Indiana Journal of Global Legal Studies*, 25 (2003); A. PETERS, *Global Constitutionalism Revisited*, 11 *International Legal Theory*, 39 (2005).

²³ The use of the expression “public sector” in this article is meant to address the domestic public administrations at large. Both the public administration and private enterprises which have received a state subsidy and operate in the name of the state are considered. By contrast, when enterprises are operating in their own capacity and name, they are considered as part of the civil society.

officials have been involved from the beginning until the end. By contrast, all the other cases follow a different pattern. The MS has been joined by another administrative agency, the ISC, during the course of review. Correspondingly, the network of NGOs in the *Mumbai urban transportation* case has been supported by the MMRDA in a latter stage of the review. In the *Guatemala Marlin* case the Guatemalan government has established the HLC.

Two additional examples help to further explain this: in them, both the CAO and the CC elaborate a strategy that demands the progressively closer involvement of the public sector in the review. In 2005 the CAO, following a complaint filed by Peruvian NGOs, consumers, and business associations, created a “Planning Workshop” (PW). In origin the PW was conceived as a measure to respond to the inadequacy of the initial responses given to the protests that had arisen around an MIGA-financed mining project. In fact, the early interactions with the local communities had been conducted through the appointment of a board of scientific experts and the development of consultations at the local level. Yet this solution had proved unsuccessful. Later, the role of the PW was broadened. First, it was charged with strengthening the effectiveness of another consultative body, the «*Comité de Monitoreo, Vigilancia y Fiscalización Ambiental de Huarney*» (CMVFAH), which was operating locally. The CMVFAH included governmental institutions at the national and municipal level, businesses organizations, NGOs and one university. Second, the PW was appointed to schedule further steps in order to work towards the peaceful conclusion of the protests. In its final report of the case, the CAO defined the PW as a decisive stage in the creation of a developed network of stakeholders and shareholders. In the CAO’s opinion, in order to obtain an effective reinstatement of legality, the number of public actors should be increased to a greater extent. For instance, the network should involve the competent domestic regulatory agencies. It would possibly operate through small working groups committed to specific issues and would be supervised and coordinated by a consultative body such as the PW itself.

The second case originated in 2004, after Ukraine had begun the construction of a navigable canal between the Danube River and the Black Sea to facilitate the passage of vessels. Shortly after, two submissions were filed to the CC of the Aarhus Convention. The first complainant was from a local NGO concerned with environmental and participatory issues. The second submission was filed by the Romanian Government, with whom Ukraine shares the delta. The submissions pointed to the Ukrainian lack of compliance with the Convention, addressing the untimely and partial information given to the public, particularly over environmental concerns. In its final report to the Meeting of the Party (MOP), the CC recommended that Ukraine should submit a strategy containing a time schedule on the transposition of the Convention into the national law. In the CC’s report, Ukraine was explicitly requested to establish a number of capacity-building activities directed toward the judiciary and, more specifically, the public officials involved in the environmental decision-making processes in operation⁽²⁴⁾.

The second variation deals with more substantive issues. Specifically, it is concerned with the actual involvement of public actors within the reviewing process, which can vary from case to case. Of course, an in-depth analysis of the topic would extend far beyond the remit of this article. Yet, for the purpose of canvassing the advancement of proactive strategies it might be useful to draw a preliminary categorization. The role of public officials can be classified in one of two ways. Firstly, they can be asked to participate in a purely advisory capacity. This is the most ordinary and frequent option. The composition of the MDC and the MS composition, for example, included several members of the local public authorities. Their main task was to provide factual information to support the ongoing consensus building process. Second, and more rarely, the involvement of the public sector may be designed to assist the advancement of the strategy to its next step. Take, for instance, the network of public actors in the *Mumbai urban transportation* case or the joint action of the PW and the CMVFAH in the *Antamina* case. Both these networks have been used by global

²⁴ Report No. ECE/MP.PP/C.1/2005/2/Add.3.

courts as a device to supervise and facilitate the resolution of the dispute in its final stage, by adopting measures favourable to the needs of the affected communities.

7. A second class of interests that takes an active part in the process of review is civil society at large. In fact, benefits in the global review for individuals, small corporations and NGOs are largely conditional on the fact that access is easy and fairly inexpensive. Global review is seen by civil society actors as a way to accrue a greater degree of influence, by mobilizing support for their demands. At the same time, due to the conversational and non-hierarchical structure of proactive sessions, the actors could have confidence in global review as a highly effectual way of modifying the national law to their needs and expectations.

Once again, cogent evidence is provided by an analysis of actual cases. The presence of civil society is a regularly recurring feature of all the models of proactive review. To begin with, whether a forum for discussion is created, reinforced, or absent, all strategies insist on the participation of affected communities and of any other representative of groups with conflicting interests. In this respect, the MDC, the MS, the ISC, the HLC and the PW are all related.

With specific regard to the assortment of civil society actors involved in the process of review, five categories can be distinguished. These are: individuals or organized groups (such as NGOs), businesses, religious bodies, academics, and experts from various backgrounds.

The involvement of civil society is pursued in different ways. As showed by the *Yanacocha gold mines* case, for instance, private stakeholders are consulted through the activity of the MDC and individual consultations. In the *Mumbai urban transportation* case, on the other hand, the engagement of civil society is secured by fostering its commitment to the local public authorities. From time to time, however, the usage of different, less conventional, forms of interactions happen. The recent *Fuzhou environmental improvement project* case, handled by the CRP, can be used as an example⁽²⁵⁾. As stated in the 2009 report on the case, during the assessment of eligibility the requesting parties met several times with the CRP. They claimed to be negatively affected by the realization of an infrastructure project in the Fuzhou municipality, in the People's Republic of China, which had been granted a loan from the ADB in 2005. Because of their number, and of other practical matters, almost all the meetings between the CRP and the requesters were held over internet. Specifically, they were conducted via teleconferences.

8. Finally, collaboration with the domestic judiciary is present. In this case, in contrast to the others, the involvement comes in a latter stage of the review. In fact, the role of the national judiciary is condensed in the implementation phase of the review.

Some clarification is needed. From one perspective, it is a matter of concern that communication between global and domestic courts raises a host of procedural and political problems. Nevertheless, the potential payoffs are significant. *Rebus sic stantibus*, it still too much of a stretch to describe the two systems as a single component in one and the same strategy. Yet it is crucial not to lose sight of the fact that the global entities and the local judiciary are already and increasingly embedded in a mutual quest for legality. Not surprisingly, proactive review strategies frequently look for the opportunity for closer cooperation with national judges.

One may take, for instance, the Aarhus Convention's CC in the *Kazatomprom* case. In 2004, a Kazakh NGO submitted to the CC a communication alleging the non-compliance of the Kazakh government with the Aarhus Convention⁽²⁶⁾. The communication lamented the violation of the right to information in relation to the governmental decision to import and dispose of radioactive waste. A request for information to Kazatomprom, the Kazakh national nuclear authority, went unanswered. Subsequent claims and appeal procedures in courts of various jurisdictions failed. In

²⁵ At present, the process of review is ongoing. See the Report on eligibility that has followed the Compliance Review Panel Request No 1/2009.

²⁶ Communication No. ACCC/C/2004/01.

the MOP decision following the CC report, the Kazakh government was requested to adopt a strategy, including a time schedule, for transposing the provisions of the Aarhus Convention into national law. What is of particular significance here is that the MOP requested the strategy to include capacity-building activities for the judiciary, public officials, and any other person with public responsibilities involving in the environmental decision-making. The judiciary, in particular, was to be trained on the implementation of the Convention and the compliance procedures⁽²⁷⁾.

More generally, on any occasion in which proactive approaches have addressed the possibility of an overall rethinking of the domestic institutional framework, a development of the grievance mechanisms operating at the global and national level has been suggested. In some senses, the *Honduran land administration*, the *Mumbai urban transportation* and the *Guatemala Marlin* cases all resemble each other in this respect.

Interestingly enough, in specific cases, the promotion of a culture of dialogue and the development of stronger collaboration with the global entities has been implemented autonomously by national judges. A significant example is given by a complaint recently brought before the CAO. In October 2004, people living in the Himachal Pradesh region filed a complaint alleging that their water supplies were at stake because of an IFC-financed project for the construction of a hydroelectric power plant that required the diversion of the Duhangan River. In 2006, in its first report the CAO elaborated a strategy suggesting a number of steps to reinstate legality. The strategy postulated an increase in dialogue and meetings in order to try to bring the competing interests together. The attempted solution, however, was unsuccessful. In early 2006, the inhabitants of the village of Jagatzuk sought an injunction through the Indian High Court to prevent the company from moving forward with the project. Despite the fact that the case was decided in favour of the company, the Court's decision was clearly favourable to the CAO's former orientation. The community, in fact, was encouraged to work together with the project's shareholders to resolve the issues amicably. In particular, the Deputy Commissioner was appointed to assist in the creation of a "Village Development Committee" (VDC) that could co-ordinate relations between the shareholders and locals. Subsequently, other follow-ups were drafted. In them the CAO, broadening the High Court's suggestions, recommended that some "Tailored Training Workshops" (TTW) should be created in the interest of the community members, the shareholders and local authorities. The TTWs would provide guidance in structuring fair, transparent, representative and durable mechanisms for the resolution of conflicts. Moreover, the TTWs were to be coordinated by the CAO and the Deputy Commissioner to ensure they could perform in a complementary fashion to the VDC.

9. The third and last phase of this form of review is carried out halfway between the global and the domestic level. In spite of its apparently domestic nature, proactive review processes in fact require constant global supervision. Albeit apparently lying in the background for the most part of the *iter*, the monitoring of the global reviewing body is palpable. The global entity has a constant control of the proceedings. In the beginning, by tailoring it to the concrete needs of the parties involved. At a later stage, once the outcomes have been collected, the global judges propose further steps to eradicate the cause of illegality. Moreover, the emission of the final decision rarely affirms the irrevocable termination of the affair. Habitually, instead, its subsequent administration and enforcement call for the continuing participation of the global management, the national governments, judiciary, and civil society. The *Allain Duhangan* case that has just been summarized, for instance, illustrates this idea perfectly. To support it further, it is useful to present a concise description of two additional cases, both brought before the CRP.

In June of 2004, a Joint Organization of the Affected Communities on the Colombo-Matara Highway, representing the interests of local NGOs and communities, requested the ADB to initiate

²⁷ Decision II/5a, Doc. ECE/MP.PP/2005/2/Add.7.

an investigation⁽²⁸⁾. The claimants pointed to the adverse effects that a highway from Colombo to Matara, being built with the help of ADB funds, was having on communities located nearby. In question were a considerable degradation of the environment, a significant loss in the local agriculture-based economy, and the destruction of the social structure. In large part, the harm would have occurred because of the ADB's omissions in formulating, processing and implementing the project. The request was determined eligible and, in the 2005 aftermath report, the CRP recommended an overall reassessment of the project's realization. Both the ADB and the government of Sri Lanka were engaged as participants. As indicated by the ADB, the reappraisal should have committed to, first, developing additional guidance in the global terms of reference and therefore avoiding similar complaints in the future. Secondly, the ADB requested that a well-staffed monitoring mechanism would be established by the appointment of a national independent body. As a matter of fact, since June of 2006 the process of monitoring is ongoing. Two annual reports have already been published and a third one is in the drafting process. The documents report ongoing implementation activity in strengthening the effectiveness of the project, under the auspices of the CRP.

The second case originated in a request for the examination of ADB's compliance with its own and procedures, in particular with regard to information disclosure and the environment, in a Water Supply Project located in the Melamchi and Kathmandu Valleys in Nepal. The fact that the constant implementation of review was advised even where the complaint was rejected strikes as of importance in this case. In its final report on eligibility in 2004⁽²⁹⁾, the CRP has determined that the request was not eligible and therefore invited the applicants to readdress their claims to the ADB and the competent national authorities. Nevertheless, having noted that a number of individuals from local communities had not gone through the process of consultation fully, the CRP advised the competent local authorities to satisfactorily address their requests. The report stated that new complaints could be filed at any time during the realization of the project.

10. So far, in observing the evolution of proactivity, its cons have been deliberately ignored. Before moving ahead, however, two contrary arguments should be considered.

As Oscar Wilde once observed, reflecting on socialism, its main trouble "is that it takes up too many evenings"⁽³⁰⁾. In all fairness, mediative processes such as he kind of proactivity outlined above are time-consuming. In addition, they can be demanding in economic terms. The two aspects will be analyzed in this section, beginning with the time factor.

As suggested above, speed is essential to reactive strategies. Alongside with securing the maintenance of the social order, a fast response is helpful in deterring future antisocial behaviour. Indeed, when an infringement is followed by a fast reaction, the perception of the appropriateness of the legal system in question is strengthened.

Doubtless, the time factor is also an indispensable ingredient in any proactive strategy aimed at successful outcomes. Unlike a reactive approach, however, in proactivity the time function is grounded on the manner in which the management of the complaint is intended to lead to a dialogue-driven restoration of legality. This solution is inevitably time-consuming. As a consequence, the period between the lodging of a complaint and the elaboration of a solution is diluted. Thus, having settled on a solution, the eventual re-establishment of the legality requires further implementing actions. In all, the proactive review of legality is – with the consent of the parties – a much longer process.

This assumption is amply demonstrated by the facts. In all of the above-mentioned cases, the whole process has been developed over an extended time schedule. From the registry of the inspection request to its acknowledgement, four years on average have passed. This figure is even

²⁸ Request No. 2004/1 "Southern Transport Development Project".

²⁹ Request No. 2004/2 "*Melamchi Water Supply Project*".

³⁰ See O. WILDE, *The soul of a man under Socialism*, London, 1904.

more remarkable when juxtaposed with the terms of reference and operational guidelines of the reviewing bodies. The CAO, for example, expressly commits itself to ensuring that complaints are handled in a timely and prompt manner. According to its operational guidelines, approximately 120 working days are scheduled to conduct an assessment of the conflict and the alternatives for resolving the issue⁽³¹⁾. For its part, the IP sets a number of time limits in its procedures and guarantees that they shall be strictly observed⁽³²⁾. Similar provisions can be found in all other global judicial institutions. The ADB states in its Operations Manual that the CRP is expected to conclude the first procedural step in the review of compliance within three months from the date of the request. However, as further specified in the Manual, this period excludes the time needed for translations, the time to deal with requests for additional documents, and even the time needed by the parties to facilitate resolution of their problems during the implementation phase⁽³³⁾. The IRM's operating rules also provide deadlines for the different steps of the review process, and a number of exceptions to these⁽³⁴⁾. Finally, in decision No. I/7 of the MOP that creates a system of compliance, the expression "as soon as possible" is used in conjunction with the stipulation of rigid conditions on the time limits of the review. Notwithstanding these specifications, in reality the major concern in all the global institutions described in this article is that the correct sequence of actions to be implemented. Only minor weight is put on the time factor *per se*. The elaboration of rapid responses is circumstantial.

Interestingly enough, at times a permissive approach to the time factor has proven crucial even in the presence of a predominantly reactive orientation. Two revealing examples can be identified in the jurisprudence of the AB. In the famous *shrimp-turtle* case the AB opted for a constructive dialogue with the United States on a potential reconsideration of the relationship between trade and environment, rather than cutting the conversation off and looking for a direct solution to the case. Even if time-consuming, in the end the accommodation of environmental concerns and compliance with the trade regime was successful⁽³⁵⁾. In contrary fashion, in another well-known case (known as the *hormones* case), the AB denied the European Community the opportunity to develop further studies because of tight time limits; here, the judicial intervention resulted in something of a fiasco. The parties' stubbornness was ultimately extremely uneconomical in terms of time, and the affair ultimately gave rise to bitter criticisms on the legitimacy of the WTO⁽³⁶⁾.

As for the second aspect, proactive strategies are virtually always more demanding than reactive strategies in purely economic terms. Higher costs depend in part upon the longer time schedule. Besides, a dialogue-driven rationale necessitates greater use of human and logistical resources in order to push for successful outcomes. Costs are determined by the organizational expenses (i.e. the preparation of a meeting), by the creation of consultation bodies, and by a number of related issues (i.e. media coverage). It can be safely assumed that higher costs are one of the many factors behind the decentralization of this form of review. By delegating to domestic authorities, global courts manage bargaining costs and are thus able to give proper attention to all cases that are submitted to them.

³¹ See the CAO's Operational Guidelines, at 13.

³² See Resolutions No. IBRD 93-10 and IDA 93-6, establishing an independent Inspection Panel, 22 September 1993, at par. 18 and 19.

³³ See the ADB Operations Manual, Section L1/OP, at 5.

³⁴ See the IRM Operating Rules and Procedures, at 6.

³⁵ See Appellate Body, United States – Import Prohibition of Certain Shrimps and Shrimps Products, No. WT/DS58/AB/R, 6 November 1998. The case is illustrated in S. CASSESE, *Global Standards for National Administrative Procedures*, 68 *Law and Contemporary Problems*, 109 (2005).

³⁶ See Appellate Body, EU – Measures Concerning Meat and Meat Products (Hormones), No. WT/DS26.48/!B/£, 13 February 1998.

11. Thus far this article has concentrated on the observation and description of proactive strategies. Having settled at least provisionally on a working definition, the main thrust of the following section is to speculate on the aetiology of proactivity. Along with an explanation of the possible reasons behind the choice of proactivity by global courts, some related problems will be discussed.

The proactivity rationale can be clarified via a three-pronged account: first, by defining the “genetic attributes” of global courts; second, by exploring the rules of procedure; and third, by examining the political outcomes of global courts’ decisions.

First and foremost, the drift toward proactivity can be explained by means of the legal nature of the global reviewing entities currently in existence. At a high level of generality, many global courts resemble what we refer to collectively as Alternative Dispute Resolution (ADR) mechanisms. Within domestic litigation, ADR mechanisms have been increasingly established due to their speed, inexpensiveness and, moreover, for the higher degree of creativity in problem solving that they show when compared to the adversarial model of litigation (³⁷). Admittedly, limiting the global review of legality to a “mere” exercise of arbitration would be to undervalue it in some respects. That global review is more elaborate than this is beyond question. In many other respects, however, it is safe to say that, much of the time, global judicial entities work exactly as ADR mechanisms. That is to say that they operate as advisory and conciliatory bodies whose decisions are of a recommendatory nature.

Thus, I posit that the use of proactive strategies is largely (although not solely) explicable when understood as a method used by global courts to minimize intrinsic limitations such as the lack of executive authority to compel appearance and compliance, while at the same time maximising the delivery of effective remedial solutions. Global proactive courts, moving from a fragile jurisdictional base, are conscious of the necessity to align their jurisprudence with the needs of states as well as global institutions. As a consequence, they encourage the active involvement of these and other parties in the decision-making process, in the hope that these will be jointly accepted by all. Via this engagement, each side involved has their needs satisfied. States preserve a moderated control in the process. Likewise, the global regime develops its standards and sees its reputation within the community increased.

This assumption can be buttressed by way of addressing two additional points. The first one concerns the methods in which the global judges have been trained and selected. The second relates to the appropriateness of adjudication in dispute settlement.

Undoubtedly, many global judges have received an extensive legal education and have a profound knowledge of the basic structures of codified legal systems. My point, however, is that the mastery of legal concepts obtained through a traditional legal background is beneficial but not vital in the development of a creative proactive strategy. Rather, global judges have to learn, if anything, how to skilfully deal with the potential of a “canvassing” dialogue and the use of soft-law standards (³⁸). A closer look at the rules governing the selection processes of global judges confirms this assumption. Not surprisingly, all of these processes are very similar (³⁹). Most notable here is the fact that there is no legal requirement that the judges be qualified or even that they have received legal training. In practice, the majority of the persons appointed are selected on the basis of different

³⁷ See J.I. CHARNEY, *Third Party Dispute Settlement and International Law*, 36 *Columbia Journal of Transnational Law*, 65 (1997). With particular reference to ADR strategies See C. MENKEL-MEADOW, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 *Journal of Legal Education*, 7 (2004); *When Litigation is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering*, 10 *Washington University Journal of Law and Policy*, 37 (2002).

³⁸ *Contra* R.L. HELFER, A.M. SLAUGHTER, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale Law Review*, 273 (1997-1998).

³⁹ See R.O. KEOHANE, A. MORAVCSIK, A.M. SLAUGHTER, *Legalized Dispute Resolution: Interstate and Transnational*, 54 *International Organization*, 457 (2000).

skills. Specifically, these skills are the ability to deal thoroughly and fairly with the requests, integrity and independence, and recognized competence in the related fields.

For this last reason, it is to be agreed the idea that, because of their background, global judges probably find it more natural to develop a strategy where the review is pursued through persuasion rather than coercion⁽⁴⁰⁾. On this view, the role of the mediator is not merely ancillary to that of the adjudicator, but joins, if not replaces, it as central. Under the circumstances of the cases presented in this article, it would have been reckless of the courts to attempt to impose clear-cut solutions on the basis of a legal reasoning not shared by all the parties involved. Such an attempt would have increased the tensions obstructing the realization of a project rather than reducing them.

In this regard, the *Colombo-Matara highway* case is illuminating. In recommending an overall reassessment of the project, the CRP involved the litigants in the monitoring of its implementation. At heart, the proactive judges do not deliver a decision to the parties, as a reactive court would have done. Instead, they try to show a credible pattern for cooperation, pointing out an equitable distribution of responsibilities for the future implementation of the project. To give another example, in the *Allain Duhangan* case the creation of the TTWs and the VDC is intended, first and foremost, to permit the elimination of tensions among the stakeholders. The reinstatement of legality is then pursued through a constructive dialogue that this has enabled.

12. The rules governing the compliance mechanisms are a second element in justifying the adoption of a proactive strategy. However, it must be emphasized that this factor is of limited significance and plays only a secondary role.

My claim is self-explanatory: the more detailed the rules of procedure, the less a proactive approach is likely to be adopted. In the AB, for example, the adjudicative process is governed by detailed rules of procedure. The adoption of the final decision is preceded by a discussion in the Dispute Settlement Body, the WTO's "political arm". Since its origin, then, the AB has favoured a literal approach in interpretive matters. This choice, which has supported a predominantly reactive jurisprudence, has been pursued to secure its own existence and guarantee greater acceptance by the disputing parties. Only occasionally, when the literal interpretation has been shown to be inadequate and a decision has to be taken nevertheless, the introduction of moderate creativity has been used as a secondary technique. An illustration of the phenomenon can be found in the "completing the analysis" technique developed in the *Omnibus Appropriation Act* case of 2002⁽⁴¹⁾; or when the AB has handed down decisions linking the General Agreement and other principles of international law⁽⁴²⁾. Other examples can be found in the decisions accepting unsolicited *amicus curiae* briefs in appellate proceedings: the *Shrimp/Turtle*, *Carbon Steel*⁽⁴³⁾, and *Asbestos* cases⁽⁴⁴⁾.

⁴⁰ On the concept of socialization in international law *See* R. GOODMAN, D. JINKS, *Toward an Institutional Theory of Sovereignty*, 55 *Stanford Law Review*, 1749 (2003); H.H. KOH, *Internalization Through Socialization*, 54 *Duke Law Journal*, 975 (2004-2005). On reputation and compliance within international relations *See* R.O. KEHOANE, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, 105 (1984); G.W. DOWNS, M.A. JONES, *Reputation, compliance, and International Law*, 31 *Journal of Legal Studies*, 95 (2002). On compliance *See* also B. KINGSBURY, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 *New York University Journal of International Law & Policy*, 679 (1999); T. TREVES, *Judicial Lawmaking in an Era of Proliferation of International Courts and Tribunals. Development of Fragmentation of International Law?*, R. WOLFRUM, V. ROEBEN (eds.), *Development of International Law in Treaty Making*, Berlin, 2005, at 587.

⁴¹ *See* Appellate Body, United States – Section 211 Omnibus Appropriations Act of 1998, No. WT/DS176/AB/R, 2 January 2002.

⁴² *See* Appellate Body, United States – Standards for Reformulated and Conventional Gasoline, No. WT/DS2/AB/R, May 20 1996.

⁴³ *See* Appellate Body, United States – Imposition of Countervailing Duties on Certain Hot-Rolled and Bismuth Carbon Steel Products Originating in the United Kingdom, No. WT/DS138/AB/R, June 7 2000. *See* also J.P. TRACTHMAN, *Decision of the Appellate Body of the World Trade Organization. United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, 11 *European Journal of International Law*, 733 (2000).

By contrast, in the CAO – which is, by all measures, the most proactively-oriented among the global reviewing entities analyzed in this article – the operational guidelines are clearly inclined in the direction of open fact-finding and concrete solutions. According to paragraph 2.4 of its guidelines, the CAO assists the stakeholders in breaking through *impasses* with any suitable method. These methods include facilitation and information sharing (e.g. the *Yanacocha gold mines* case), joint fact-finding (e.g. the *Allain Duhangan* case), dialogue and negotiation (e.g., again, the *Yanacocha gold mines* case), conciliation and mediation (e.g. the *Antamina* case), and monitoring (e.g. the *Guatemala marlin* case). Similarly particular provisions can be found in the operational rules of all the other reviewing bodies. The IP, for instance, is allowed to undertake preliminary assessments; indicate autonomously to the WB the date on which it would present its findings and recommendations; conduct thorough on-site investigations (e.g. the *Mumbai urban transportation* and *Honduran land administration* cases); and, finally, to decide itself whether it is satisfied that the WB’s compliance or evidence of intention to comply is adequate, and reflect this assessment in its reporting. In terms of the CRP and IRM, the functions are of the same nature. They include engagement with all stakeholders in the understanding of the issues (e.g. the *Fuzhou environmental improvement project* case); the monitoring of implementation of decisions (e.g. the *Colombo-Matara Highway* case); and, more generally, the use of every problem-solving techniques, such as independent fact-finding, mediation, conciliation, dialogue facilitation and reporting (e.g. the *Bujagali Hydropower* case, that will be discussed *infra*, in section. 14). Lastly, the CC’s *modus operandi* authorizes it to decide upon appropriate measures to bring about full compliance with the Convention (as shown in all of the relevant cases examined in this article).

13. A third and final reason behind the adoption of proactivity is linked with its political value. At first blush, both reactive and proactive strategies have an acknowledged political function. Jurists and political scientists have extensively documented courts’ political behaviour when redistributing power within the legal system and the social order, allocating values in matters of particular significance to the community, or even legitimating public policies through the decisions they deliver⁽⁴⁵⁾. In this article, however, this issue is dealt with only to the extent necessary to support the belief that global courts’ existence (and therefore their approaches to review) is affected by politics on at least of two different occasions.

In many important respects, a direct connection between the political consensus encompassing a global institution and its advisory/compliance mechanisms exists. Thus, where affected communities and governments perceive a global institution as ineffective, two opposite outcomes are possible. On the one hand, the number of complaints filed to the reviewing bodies could decrease as parties seek other solutions (such as, for instance, private arbitration). On the other hand, and inversely, the number of complaints could increase beyond a reasonable limit. In both cases repercussions would negatively affect the activity of the reviewing body in question, undermining its role. Hence, from the standpoint of global courts, a process of decentralization complemented by top-down supervision (an arrangement characteristic of proactivity, or at least a significative portion thereof) appears as a solution.

At a deeper level, judicial strategies, and indeed proactivity, can be interpreted as the result of an attempt by global courts to arrive at a peaceful (or at least not troublesome) *cohabitation*

⁴⁴ See Appellate Body, European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products, No. WT/DS1135/AB/R, April 5 2001. More generally, on the *amicus curiae* briefs See J. PEEL, Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization, 12 Colorado Journal of International Environmental Law and Policy, 61 (2001).

⁴⁵ See T. BECKER, Comparative Judicial Politics. The Political Functioning of the Courts, Lanham, 1987; R. WHEELER, The Political Function of Court Systems, 5 Judicature, 296 (1973-1974); L.M. FRIEDMAN, Legal Rules and the Process of Social Change, 19 Stanford Law Review, 786 (1966-1967); J.S. MARTINEZ, Towards an International Judicial System, 56 Stanford Law Review, 429 (2003).

politique with the Management of the global institution (⁴⁶). In effect, in spite of the recurring declarations of independence, a certain control by the political branch is unavoidable.

Broadly speaking, the political bodies of the institution have an evident interest in containing the expansion over a certain limit of the reviewing activity. Authorizing a reviewing body to lead the structuring in the global arena, even just through legality review, might be seen as an alteration that would reduce the discretionary power of both global institutions and states. The possibilities for political institutions within global regimes to restrict the activity of their courts seem boundless.

In material terms, the global governing bodies could reduce the costs for the reviewing process with the intent to affect the effectiveness of the court. It is beyond question that any significant abatement in costs would ultimately prove a serious obstacle in the courts' capacity to meet the needs and expectations of the affected communities. In non-material terms, one should remember that, first of all, the global governing bodies always have the last word on the implementation of the courts' recommendations. Also, it is worth noting that the global institutions insist on limiting the tenure in their adjudicatory bodies to short terms (⁴⁷). The IP members are designated by the Board for a non-renewable period of five years. In the CAO's terms of reference, it is provided that the Ombudsman is appointed by the President of the IFC from among the full-time employees at management level for a period of three of five years (renewable only by mutual consent). Both in the ADB and AfDB (in the former upon recommendation of the President) members of compliance bodies are nominated by the Board of Directors for a non-renewable term of five years. And lastly, the eight members of the CC are elected by the MOP upon the nomination of parties, signatories and (unlike in other cases) NGOs. Four of them serve only until the end of the next MOP. The other four serve for a full term of office (which commences at the end of an ordinary MOP and runs until the second MOP thereafter).

One alternative for courts to evade these political limitations might be to develop the rule of law in a creative manner at the global level. So recast, the adjudicatory function would guarantee them possibility to perform their functions effectively in spite of the limits to the delegations of authority.

14. This article has emphasised the importance of the notion of proactive judicial strategies in the review of legality at the global level. In the attempt to define the concept of proactivity and explain how it is developed, it has described the struggle by the global judiciary to design processes capable of crossing the social, economical and cultural divides in the global arena and affirming the rule of law. In this regard, it has suggested that creative strategies, of the type adopted by an increasing number of reviewing bodies, could turn out to be the *lingua franca* in the dialogue over legality.

These, however, are only preliminary thoughts. Our understanding of judicial strategies at the global level is still to a considerable extent intuitive and anecdotal. Indeed, many questions are still in need of an answer. The following concluding comments argue that future developments in proactivity are counterbalanced by a number of problems. Firstly, it might be questioned whether there is a connection between the progressive shift of the global sphere into a mature and complex legal system and the adoption of proactive strategies. Secondly, the extent to which these strategies can truly affect the implementation of legality in the global legal system remains unclear.

⁴⁶ See the theory of the "faithful agent" in W.M. LANDES, R.W. POSNER, The Independent Judiciary in an Interest-Group Perspective, 18 *Journal of Law & Economics*, 875 (1975); T.W. MERRILL, Pluralism, The Prisoner's Dilemma, and the Behaviour of the Independent Judiciary, 88 *North-western University Law Review*, 1113 (1988); N.S. ZEPPOS, Deference to Political Decision-makers and the Preferred Scope of Judicial Review, 88 *North-western University Law Review*, 296 (1993).

⁴⁷ The problem is addressed by P. STEPHAN, Courts, Tribunals and Legal Unification – The Agency Problem, 3 *Chicago Journal of International Law*, 333 (2002). In the author's opinion limits in tenure also render difficult the development of coherent approaches by adjudicatory bodies.

The first question can be answered in the affirmative. As the previous section has indicated, the development of creative approaches in courts is partly explicable as a response to the ramification of the global legal system⁽⁴⁸⁾. As the global arena grows more complex, and multiple-party involvement increases, the problem of how to protect procedural rights requires adequate solutions. Viewed in this context, proactivity is a way of acting in accordance with this composite patchwork, moving beyond the traditional dyadic negotiation and its limited remedial taxonomy. Concomitantly, the normative aspiration of global courts (defined *supra* in section 5) and the related attempt to ease the shift from soft to hard law standards can also be interpreted as impacting upon the transformations of the global sphere.

Nevertheless, both the adoption of approaches that “fit” with an increasingly complex global administrative law and the attempt to develop hard law principles within its boundaries are difficult tasks to realize. Obstacles pertaining to structural relationships and incisiveness may arise.

To begin with, at the global level a complete judicial system (at least in the way it is currently understood) is lacking. There is neither hierarchy of powers nor any sort of formal structural relationship among global courts. Concerns exist that the absence of a structural framework could defer, if not preclude, the uniform application of the rule of law⁽⁴⁹⁾. Either way, one can still argue that the development of principles of law is not necessarily inhibited by the absence of a formal structure⁽⁵⁰⁾. Rather, the interests of legality could be best served by a less formal hierarchical system, adaptable to the constant changes occurring in the global patchwork.

In effect, in the global arena repeated interactions among global courts are already taking place⁽⁵¹⁾. For example, in April 2007 the IP was received a request to initiate an investigation on a project for restructuring an electric power generator in Albania⁽⁵²⁾. In the request, the complainants lamented the negative impact of the project on the local environment and economy. In support of their position, they quoted a 2005 CC decision that had found the Albanian government in non-compliance with the Convention. In its draft findings, the CC had found a violation of the rules governing public participation and disclosure and had invited the WB to comment⁽⁵³⁾. In the IP recommendation to initiate an official investigation, the outcomes of the CC review played an important role. The IP supported the previous CC’s findings on participation, disclosure and the environmental impact of the project. Almost concomitantly, in May 2007 the IRM and the IP, having received similar requests to launch an investigation into the Bujagali Hydropower Project, agreed to combine their efforts in resolving the complaints. The two bodies have signed a Memorandum of Understanding that covers the terms of sharing information and the use of specialist consultants. However, assessment of violations of the respective organizations will be carried out independently, in respect of the different terms of conditions and operational guidelines

⁴⁸ On the evolution of the global administrative system See R.B. STEWART, B. KINGSBURY, N. KRISCH, *The Emergence of Global Administrative Law*, 68 *New York University Journal of International Law & Politics*, 15 (2005); S. CASSESE, *Oltre lo Stato*, Bari, 2000; *Il diritto globale*, Torino, 2009.

⁴⁹ See S. SPELLISY, *The Proliferation of International Tribunals: A Chink in the Armour*, 15 *Columbia Journal of Transnational Law*, 143 (2001-2002).

⁵⁰ See B. KINGSBURY, *supra* note 19, at 679; S. CASSESE, *Administrative Law without the State? The Challenge of Global Regulation*, 37 *New York University Journal of International Law & Politics*, 663 (2005).

⁵¹ See J.S. MARTINEZ, *supra* note 21, at 436; C. BAUDENBACHER, *Judicial Globalization: New Development or Old Wine in New Bottles?*, 38 *Texas International Law Journal*, 505 (2003); A.M. SLAUGHTER, *A Global Community of Courts*, 44 *Harvard International Law Journal*, 191 (2003); A. DEL VECCHIO, *Globalization and its effects on international courts and tribunals*, 5 *The law and practice of international courts and tribunals*, 1 (2006). On the interjudicial co-operation at the domestic level See E. BENVENISTI, G.W. DOWNS, *supra* note 23.

⁵² Request for Inspection No. RQ07/03.

⁵³ See Communication ACCC/C/2005/12 by the Alliance for the Protection of the Vlora Gulf.

⁵⁴). Previously, due to the IFC involvement in the financing of the project, another complaint was lodged with the CAO, which has carried out its own autonomous ⁵⁵).

Interactions among proactive courts have the potential to become a critical factor in the cross-pollination of commonalities. In the *Vlora power sector* case, the decision was reached on the basis of another decision, from a different body. As in the doctrine of precedent, consistency with an earlier decision is used to provide a bulwark of legitimacy to a new opinion. In a similar manner, the agreement between the IP and the IRM in the *Bujagali Hydropower* case is aimed at reducing costs and sharing factual data and information among the experts involved in the review.

The correctness of this hypothesis, however, is open to debate. On the one hand, it can be assumed that proactive courts that collaborate would respond more adequately to the germination of the global legal system. In such a setting, the development of a *jurisprudence constante* would provide stable lines of reference without affecting the multiform nature of proactive solutions. Moreover, the building of a sufficiently vast caseload would result in attracting an increasing stream of complainants. Finally, this would further develop the principle of legality in the global arena. On the other hand, at present the cases displaying cross-references of this sort are still in the minority. A degree of ambiguity still hampers convergence in the relations between decisions. It is not by chance that, in the *Bujagali Hydropower* case, the IP and the IRM agreed that their decisions should each be legitimated on the basis of their respective rules of procedure, instead of simply opting to issue a joint decision. What is more, neither of the two reviewing bodies quoted the CAO's prior opinion on the case.

The second handicap – which brings up the second general question on proactivity – is related with the incisiveness of proactive outcomes. To what extent are the dialogues and interactions decisive in reinstating legality? In effect, the compliance and impact rates of proactiveness are not easy to measure; indeed, it is often unclear whether the dispute has been settled or not. Proactive approaches are by nature dependent upon transient factors such as the conduct of successful negotiations, and the progressive accomplishment of reforms at the domestic level ⁵⁶). Undoubtedly, these are powerful objections. My suggestion, however, is that they provide only a partial observation of the phenomenon. If we reflect in terms of the appropriateness of review, the scenario changes. A reactive oriented litigation, although it has its uses, may not be appropriate to advance the quest for legality in a manner that “fits” with the way in which global administrative law is evolving. As argued elsewhere, the imposition of a western-rooted concept of the rule of law is in tension with the ambition to universality ⁵⁷). Instead, proactivity attempts to deal with the multi-jurisdictional and multi-faceted global disputes by preferring diversity and pluralism. Review in proactive courts is facilitated through the elaboration of a path to a solution agreed upon by the parties to the dispute.

In conclusion, proactive strategies to date have offered global reviewing bodies a practicable way of working around their innate limits and thus to live up to the expectations of national governments and global institutions. In this regard, the next steps in the evolutionary process of the global system will be crucial. In many ways, moving from the assumption that judicial strategies differ by degree rather than in kind, some sort of integration between reactive and proactive approaches is foreseeable. On the one hand, to be truly effective the use of creative approaches in

⁵⁴ See the IRM Eligibility Report for Compliance Review on Compliance Review Request No. RQ2007/1, 24 August 2007, at 20. See also the Compliance Review Report, 20 June 2008.

⁵⁵ The CAO closed the complaint in January 2005. The Assessment Report determined that at that stage there was no role for facilitation or mediation given that IFC had not yet made a final decision concerning its participation.

⁵⁶ See T. GINSBURG, R.H. MCADAMS, *supra* note 9, at 1237.

⁵⁷ See C. HARLOW, *Global Administrative Law: The Quest for Principles and Values*, 27 *European Journal of International Law*, 187 (2006); B.S. CHIMNI, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 *New York University Journal of International Law & Politics*, 799 (2005); A. DEL VECCHIO, *I tribunali internazionali tra globalizzazione e localismi*, Bari, 2009.

courts must ultimately be backed by incisive structural reforms aimed at strengthening the enforceability of judicial mechanisms. On the other hand, reactive courts could attempt to develop the creativeness of their decisions to a greater degree, ensuring that judges are selected from a wide range of different backgrounds, and increasing the use of consensus-building techniques would be necessary.