Rule of law and participation: 
A normative analysis of internationalized rulemaking as composite procedures

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Procedural standards of participation have the capacity to structure and constrain the exercise of authority. Focusing on the way decisions are formed, this article argues that the depletion of such standards in processes of reception of transnational and international decisions within the EU potentially leads to situations of unrestrained authority and can constitute a challenge to the rule of law. It sets out the basis for a conceptual and normative analysis underpinning the argument that procedural standards of participation can be considered part of the rule of law. The depletion of such standards is one facet of a broader problem. Intertwined decision-making procedures that cut across EU and international levels of governance challenge the ability of law to limit executive action. The challenges that internationalized rulemaking procedures pose to law can only be apprehended if they are seen in their entirety as segments of a broader regulatory cycle. On this basis, this article proposes a reconceptualization of the decision-making procedures that operate the substantive coordination between different sites of governance. Having an EU focus, the article contributes to the analysis of the challenges and possibilities of the rule of law in the current realities of the diffusion of power resulting from internationalization.

1. Internationalized rulemaking and procedural standards of participation

The provision of public goods depends increasingly on decisions adopted by a variety of bodies at different levels and sites of governance. Internationalization is one factor of this diffusion of decision-making power. In the EU and elsewhere, regulatory policies are often defined and decisions are made under the influx of acts adopted in

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international fora. Substantive issues pertaining to the food we eat, to the testing of pharmaceuticals, to the risks of hazardous substances and chemicals increasingly depend on rules and decisions adopted internationally or transnationally, transposed into EU law, and then filtered into national law. Decisions proceeding from a variety of external fora are incorporated in EU law. The source of legal authority of the decisions received may be uncertain; nevertheless, those decisions may acquire an undisputable legal character by the fact of reception or, at least, a normative constraining effect they lacked at the international or transnational level. To the extent that this is the case, the intersection between EU law and international and transnational regulatory regimes opens new paths for public action.

At the same time, as previous research has shown, procedural standards that structure decision-making within the EU—among them, those that set the terms of participation—tend to be weaker in the segments of EU law that result from the reception of international and transnational decisions. This may occur as a result not only of arguably imperfect formal rules of reception, but also of informal links of administrative collaboration established between EU institutions and bodies, on the one hand, and international and transnational regulatory bodies or networks, on the other.

This article focuses on procedural standards of participation to argue that their depletion by effect of reception can constitute a challenge to the premise that public authority ought to be structured and constrained by law. Reception depletes the capacity of procedural standards to structure discretion and thereby constrain the exercise of public authority in areas of regulation where courts hardly enter. It may

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2 For example, reception is grounded in a functional argument not captured by the formally assumed international commitments of the EU (e.g., best practices).

3 The argument is developed in Mendes, Administrative Law Beyond the States, supra note 1, at 111–132 and in Mendes, EU Law and Global Regulatory Regimes, supra note 1.

4 For more detail, see Mendes, EU Law and Global Regulatory Regimes, supra note 1, Section 3. Highlighting the same problem for US decisions shaped by global regulatory norms and practices, see Stewart, supra note 1, at 702, 705–709.

5 Stressing the relevance of administrative incentives, in the case of the US, see Stewart, supra note 1, at 705, 719, 747.

6 Contrasting governance and public law perspectives in the analysis of regulation beyond the state, see Armin von Bogdandy, Philipp Dann & Matthias Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, in The Exercise of Public Authority by International Institutions. Advancing International Institutional Law 3, 7–16 (Armin von Bogdandy et al. eds., 2010). Authority is used in this article as defined id. at 11–12.
potentially lead to situations of unrestrained authority. This perspective unfolds the deeper impact of reception of international and transnational decisions on law’s capacity to limit the executive. By relying on the external ramifications of its internal regulatory activity, the executive loosens the procedural constraints that would otherwise apply to its decision-making procedures.\(^7\) The depletion of procedural standards therefore emerges as a problem of the rule of law, as it limits law’s ability to structure the exercise of discretion and constrain public authority. Behind complex governance arrangements that coordinate EU and international actors and their decisions, what may be at stake is the balance between the exercise of authority, on the one hand, and, on the other, the protection of autonomy (connoting a private sphere of liberty and dignity) on which public law mechanisms have been built within the state. This article has an undeniable EU focus. Its starting point are the effects of the interaction between the EU and other regulatory systems on EU (domestic) procedural standards.\(^8\) Yet, as shown here, this “internal perspective” points to an external and deeper dimension of the problem. What is being depleted are not rules or practices that assume a specific form in domestic legal systems, but the premise that law ought to structure and constrain the exercise of authority, irrespective of whether it results from internal or external action. This leads one to question—be it through the lens of the values upheld in the domestic legal systems—the very legitimacy of international and transnational decision-making procedures.\(^9\)

Framing the depletion of procedural standards that ensure participation in decision-making procedures as a problem of the rule of law, raises a number of conceptual and normative issues which are addressed in this article. To begin with, the association of this phenomenon with the rule of law is prone to criticism for two main reasons. First, the legal character of the procedural standards at stake is disputed. The use of the term “standard” connotes the idea that the rules or practices that support participation in decision-making procedures at the global level do not pertain strictly to law.\(^10\) As they are practiced within the EU and within international and transnational regulatory regimes, they belong to the language of governance and are far from being affiliated with the rule of law. Indeed, these standards were often put into place to enable public authorities to benefit from the knowledge of stakeholders, to create motivation for compliance, as a means of adjusting to claims of legitimacy.\(^11\) Second, as the examples in this article demonstrate, these standards apply to procedures that lead to the adoption of regulatory decisions of general scope.

\(^7\) Also indicating the problems of a sharp distinction between international and domestic affairs, from the perspective of the limitation of executive power, see Eyal Benvenisti, Exit and Voice in the Age of Globalization, 98 MICH. L. REV. 167, 187–189 (1999), albeit referring to treaty-making powers.

\(^8\) Mendes, EU Law and Global Regulatory Regimes, supra note 1.

\(^9\) On the multifaceted concept of legitimacy, see Julia Black, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes, 2 REGULATION & GOVERNANCE 137, 144–150 (2008). Acknowledging the limits of adopting a legal perspective on legitimacy, this article sets out to assess the extent to which internationalized decision-making procedures can be captured by law.

\(^10\) On a similar use of the term—opposing it to “principles” and “rights”—see Carol Harlow, Global Administrative Law. The Quest for Principles and Values, 17 EUR. J. INT’L L. 187, 190 (2006).

\(^11\) Black, supra note 9, at 144–151.
legal persons are affected only indirectly insofar as such decisions bind or commit their authors and other decision-makers. The focus of this article is not due process guarantees which are depleted when the chain of intertwined decisions results in the exercise of direct authority over individuals, impairing their fundamental rights, which would speak directly to the rule of law.\(^\text{12}\)

Next, once it has been established that treating the depletion of procedural standards as a rule of law problem is conceptually possible, this approach has normative consequences. Procedural standards ought to retain the capacity of procedural law to structure discretion and constrain the exercise of public authority stemming from the intertwining of decisions that straddle different legal and regulatory systems. Reading participation through the rule-of-law lens will require adjustments and variations to the procedural rules currently practiced. Finally, the capacity of procedural law to structure discretion and constrain authority also requires a reconceptualization of the procedures through which such intertwining operates, or at least of the external role of the actors involved. Instances of public authority emerge from the external links between procedures. Internationalized procedures are neither only European, national nor international.\(^\text{13}\) They result from a cascade of intertwined decisions. For this reason, they should not be seen in segmented terms, at the risk of impeding solutions that constrain such authority.

The argument that the depletion of procedural standards of participation can be a rule of law problem is developed in the first part of the article. The article begins by returning to the empirical analysis on which it is based in order to assess the extent to which internationalized decision-making procedures may lead to instances of unrestrained authority (Section 2). Unrestrained authority, if it is possible to establish it, refers only to the formation of decisions. Therefore, the article addresses only one of several ways in which discretion can be structured and authority constrained. Section 2 clarifies the conceptual, methodological and normative premises that enable us to read the depletion of procedural standards of participation in the light of the rule of law. This is the starting point of a more detailed conceptual and normative analysis that establishes the basis to bridge the two terms of a prima facie odd equation—participation and rule of law—and indicates the reasons why they ought to be bridged (Section 3). The second part of the article outlines the normative consequences of reading the depletion of procedural standards as a rule of law problem. It argues that governance practices might need to be reinterpreted in legal terms, thus revealing the limits of current EU procedures. In addition, the article argues that, to the extent that the exercise of authority stemming from the intertwined EU and international procedures is to be brought under the realm of law, those procedures need to be reconceptualized. The article suggests two

\(^{12}\) The prominent example would be the reception in EU law of the UN Security Council resolutions establishing terrorist sanctions. That due process guarantees are an aspect of the rule of law is a common law perspective; it is not, however, unknown to the German conception of Rechtstaat and in the French construction of état de droit (see, e.g. JACQUES CHEVALLIER, L’ÉTAT DE DROIT 14–16, 19, 30, 51–52 (5th ed. 2010)).

\(^{13}\) Mireille Delmas-Marty, Governance and the Rule of Law, in DEMOCRATIC GOVERNANCE. A NEW PARADIGM FOR DEVELOPMENT? 207, 208 (Séverine Bellina, Hervé Magro & Violaine de Villemur eds., 2009).
possible routes: conceptualize them as composite procedures; emphasize the procedural duties of EU institutions and bodies when acting in an external role (Section 4).

2. Framing the problem: A challenge to the rule of law

2.1. Two instances of depletion

Forms of unrestrained public authority may occur insofar as international decisions received into the EU legal order are not subject to procedural constraints that would apply if such decisions were adopted internally, while as a result of their reception they acquire the legal force that equivalent EU acts would have.\(^{14}\) Let us start by revisiting two examples on which this argument is built in order to better assess the contours of the problem.\(^{15}\) The two examples deal with limit situations in which the legal character of the procedural rules depleted and/or of the decisions finally adopted can be questioned. But in both cases the constraining effect of reception may have an indirect impact on the legal sphere of individuals.

The EU is a member of the International Convention for the Conservation of Atlantic Tunas, and, as such, legally bound by the decisions of the respective Commission (ICCAT), including fisheries conservation and management measures.\(^{16}\) Such measures—for example, recommendations regarding the definition of total allowable catches of Bluefin tuna—are incorporated into EU law via Council Regulations adopted on the basis of article 43(3) of the Treaty on the Functioning of the European Union (TFEU).\(^{17}\) Those decisions are at the core of the EU Common Fisheries Policy. They have a far-reaching impact on the range of legally protected interests that ought to be protected and pursued in the implementation of this Policy.\(^{18}\) Equivalent EU acts that do not stem from international

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\(^{14}\) As mentioned, the following analysis zooms on decision-making procedures and, specifically, rules and practices of participation, ignoring other possible mechanisms of control.

\(^{15}\) The examples are taken from Mendes, EU Law and Global Regulatory Regimes, supra note 1, where more detail is given.


obligations are subject to consultation of Regional Advisory Councils, composed of interest representatives. By legal determination, the Council needs to take their views into account when pursuing the public interests protected by the EU fisheries legislation. Consultation is explicitly excluded in the case of regulations that transpose decisions of Regional Fisheries Organizations, such as the ICCAT, and it is not compensated by the possibilities of participation of interest representatives in ICCAT decision-making procedures. At least until recently, ICCAT mostly held closed meetings, and NGOs had difficulties in accessing information. The absence of procedural constraints at the international level leads then to a closed decision-making procedure. In addition, this procedure is not subject to a requirement of consideration, or justification, of the range of legally protected interests, which would apply if the decision would be adopted internally.

The European Commission and the European Medicines Agency (EMA) are part of a transnational network—the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH)—that also includes representatives of the Japanese and the American regulatory agencies for pharmaceuticals, as well as private associations representing the pharmaceutical industry in these three regions. The ICH guidelines define the technical requirements that ensure the safety, efficacy, and quality of new pharmaceutical products (e.g., requirements regarding clinical trials in humans, the use of animal testing, the assessment of new drug applications). They are non-binding guidelines. They are received in EU law as non-binding guidelines of the Committee for Medicinal Products for Human Use (CHMP, operating within the EMA), but are used by the EMA as benchmarks for assessing the quality, safety, and efficacy of pharmaceutical products, which is a condition sine qua non for obtaining an authorization to market a new drug within the EU. Alternative routes to comply with this requirement “may

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19 At present, these representatives come mainly from the industrial fishing sector, but the on-going reform of the Common Fisheries Policy envisages modifications also in this respect, with a view to ensuring a balanced representation of all interests involved (see Proposal for Regulation, supra note 18, art. 52(1)).

20 Regulation 2371/2002, supra note 18, art. 4(2). On the role of Regional Advisory Councils, see Mendes, EU Law and Global Regulatory Regimes, supra note 1, at 997–999.

21 See Mendes, EU Law and Global Regulatory Regimes, supra note 1, at 1000–1004.


24 See further Mendes, Administrative Law Beyond the State, supra note 1, at 128 (also in Mendes, EU Law and Global Regulatory Regimes, supra note 1, at 1012).

be taken” but need to be “appropriately justified.” The ICH guidelines are adopted following a consultation procedure that, albeit conducted by the EMA, does not provide any guarantees of due consideration of the views voiced, unlike the equivalent procedures followed purely for the adoption of EMA guidelines.

In the last example, an additional aspect is relevant. Even though the weight of the pharmaceutical industry in consultation procedures for the adoption of internal guidelines is likely strong, the EMA purports to involve representatives of patients, consumers, and healthcare professionals in its consultation procedures. In particular, by force of EU law, the interests of patients need to be protected in the decision-making procedures that lead to granting an authorization to market a new drug. The EMA is bound by this requirement. This is not an explicit condition that the ICH needs to comply with. This difference may influence the assessment of the views submitted by these groups, where they actually participate in consultation procedures, repressing their voice even further.

Crucially, in internal procedures, the pharmaceutical industry does not have a formal say in the adoption of internal guidelines, whereas it does in the adoption of the ICH guidelines. This feature may raise doubts regarding the possibility of capture.

The reception of the ICH guidelines seems to pose more serious problems than the reception of decisions of ICCAT regarding the allocation of fishing opportunities, mentioned above. The problem is not only that the internationalized procedure gives fewer guarantees of participation. There are also no procedural guarantees that the public interests, which the EMA is bound to comply with by force of EU legislation, are effectively considered in the adoption of the ICH guidelines that are incorporated in EU law. Although the purposes of the ICH are not incompatible with those interests—technical harmonization may even have an important role in fostering them—its activity is driven by commercial needs. The risk that the ICH guidelines may deviate from the


29 Regulation No. 726/2004, supra note 25, art. 3(2)(b).

30 A point also made in Mendes, EU Law and Global Regulatory Regimes, supra note 1, at 1013.

31 On this point, see Berman, supra note 27, at 27.

32 It mainly aims at “reducing or obviating duplication of testing carried out during the research and development of new human medicines”: see ICH Terms of Reference (2000), available at http://www.ich.org/about/vision.html (last accessed Feb. 4, 2014). See also Berman, supra note 23, at 357.
public interests protected by EU pharmaceutical legislation may be enhanced by the possibility that embeddedness in transnational networks may increase the autonomy of EMA vis-à-vis the Commission and the Member States, as recent research suggests.\footnote{Martijn Groenleer, Linking up Levels of Governance: Agencies of the European Union and their Interaction with International Institutions, in The Influence of International Institutions on the European Union. When Multilateralism Hits Brussels 135 (Oriol Costa & Knud-Erik Joergensen eds., 2012). Groenleer explicitly says that his is a tentative conclusion in need of confirmation by further empirical research.}

2.2. Unrestrained public authority?

May these situations lead to possible instances of unrestrained authority? This case needs to be made with care. First, what results from the above is that international decisions may not be subject to procedural guarantees of participation that structure equivalent decision-making procedures in the EU. Per se, this does not necessarily entail a judgment regarding the exercise of authority. It may be debatable whether these decision-makers are vested with public authority and whether their determinations have legal value or nature (for example, the authority of the ICH guidelines comes from the fact that an international expert forum, composed of regulators and industry, enacts them as best practices).\footnote{See further Bogdandy et al., supra note 6, at 14–16. Concretely on these examples, see Mendes, EU Law and Global Regulatory Regimes, supra note 1.} Secondly, this also does not entail a judgment regarding the adequacy of the procedures followed for their adoption. These procedures may be adequate for the type of decisions adopted at the international level and to the purposes served by the bodies that adopt them. It is also arguable that, irrespective of the level at which they are made, some of these decisions may be better left to the technical or political process, outside of the legal or quasi-legal realm. Certainly, in their origin and design, some of them were not conceived as legal processes at all.

Yet, irrespective of their source, legal or non-legal character, binding or non-binding nature, the international decisions mentioned above are received as authoritative in the legal systems that implement them, and may acquire legal and constraining significance by effect of such reception.\footnote{For example, the ICH guidelines become the rules against which the quality, safety, or adequacy of a medicinal product is assessed—an assessment that is a condition to grant a market authorization. See Regulation No. 726/2004, supra note 25, art. 12(1) and EMA Procedural Guidelines, supra note 26, at 4 and 5 (§§ 2.1 and 2.2).} As such, they are capable both of constraining the legal sphere of the persons concerned by decisions adopted on their basis (for example, pharmaceutical industries that, excluded from the decision-making circles, are affected by a potentially detrimental rule), albeit indirectly; and of defining the composition of competing interests that, according to national or regional legislation valid in the systems where they are received, need to be respected in carrying out a given policy (for example, the protection of health via a medicinal product that constitutes a significant therapeutic, scientific, or technical innovation; the interests of patients; animal health).\footnote{Regulation No. 726/2004, supra note 25, art. 3(2)(b).}

Whether binding or non-binding, such decisions acquire legal authority from the moment in which non-compliance or compliance has legal consequences—such as refusal of marketing authorization, or a heavier burden of proof regarding certain
characteristics of a product, in the case of non-compliance with ICH guidelines; or prohibitions of fishing certain species as a result of ICCAT recommendations. This typically occurs at the domestic level, through reception. More “imperfect” participation or lack of rule of participation may be adequate in the setting where these decisions are adopted. But the existing rules or practices of participation do not take into account the later vertical effect of the decisions adopted, that is, the actual regulatory effects such decisions end up acquiring by virtue of reception. Arguably, for this reason, the procedural rules and practices followed at the international level are not adequate to decisions that end up having legal character.\textsuperscript{37}

This is only part of the problem. The possibility of unrestrained authority does not result in isolation from the decisions adopted in international and transnational regulatory fora. Rather, it results from the \textit{combination} of, on the one hand, a lack of constraints in the law-making power of international and transnational bureaucracies that would be adequate to decisions intended to become eventually binding on natural and legal persons, \textit{and}, on the other, from the sidestepping of procedural constraints which domestic administrative decision-makers would need to follow if that decision were to be adopted internally.

Irrespective of how they are formed and received, such decisions could \textit{a posteriori} be subject to judicial review by EU and domestic courts (in the absence of apposite instances of review at the international level). Yet, not only is there little evidence so far of such controls being made,\textsuperscript{38} but also many of the regulatory decisions adopted in this fashion hardly ever reach the courts. The EU and domestic courts tend to limit their assessment to the domestic act that incorporated the international decision with little consideration for its international links.\textsuperscript{39} This would point to the need to include such controls \textit{during} decision-making procedures, with a view to avoiding the possible absence of legal limits to the exercise of authority that ends up impacting on rights and legally protected interests of natural and legal persons. These are both individual or collective interests (for example, smaller pharmaceutical companies producing generic medicines that cannot comply with the costly standards on the quality of pharmaceuticals that the ICH has decided upon),\textsuperscript{40} and diffuse interests (for example, interests of patients in the marketing of pharmaceutical products; environmental interests in the definition of fishing quotas).\textsuperscript{41}

\textsuperscript{37} For a critique of the absence of procedural rights of participation in rulemaking procedures within the EU, see Joana Mendes, \textit{Participation in EU Rule-Making. A Rights-Based Approach} 99–100 (2011).

\textsuperscript{38} Making this argument with regard to the US, see Stewart, supra note 1. To the author’s knowledge, there is no known study in EU law on this issue. An additional problem may be judicial deference towards the external action of the executive (see Benvenisti, supra note 7, at 194–195).

\textsuperscript{39} Judicial review tends to focus on EU legal acts that transposed international decisions, and not the decisions themselves—see Nikolaos Lawanos, \textit{Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States} 56–57 (2004).

\textsuperscript{40} See Berman, supra note 27, at 12, on the concerns raised by ICH guidelines.

\textsuperscript{41} These considerations assume that the regulatory processes at issue ought not be left only to the political process, due to the constraining effect they end up having in the legal sphere of natural and legal persons. This premise may be discussed, and one should bear in mind that not all instances of regulation have a legal relevance of the type that would justify legal constraints.
2.3. Participation and law: premises

The examples mentioned above address procedural standards of participation in decision-making procedures that involve the reception in the EU legal order of international and transnational decisions. While analyzing the possibility and the contours of administrative law beyond the state, some authors hesitantly include the principle of participation under the heading of the rule of law, as one of its components. Others consider it a “fashionable ‘good governance’ value” partially derived from managerial theories of public administration, rather than a classical administrative law principle stemming from the rule of law doctrine, albeit acknowledging the “particularly ambiguous” character of participation. Yet others, in a similar vein, stress “the fluidity of principles” circulating in different fields of evolving contemporary law. At the same time, such fluidity reveals the “openness of law to principles stemming from other disciplines,” but also constitutes “a fertile ground for speculations regarding global administrative law.”

Indeed, the legal character of participation is far from a given. Several studies have highlighted the importance of participation (but also of transparency and accountability) in providing forms of democratic or legal legitimation (depending on the analysis) to certain international and transnational regulatory regimes in the absence of state-like controls of democratic government. But can procedural standards of participation be considered as part of law? Or, by attributing to participation the ability to structure and constrain the exercise of public authority, is one just dressing as law a phenomenon that effectively pertains to administrative practices, at the risk of providing them with a veil of legitimacy they would otherwise not have? These are the core questions to the argument of this article. The two aspects matter decisively in framing the discussion: first, the perspective from which one approaches participation, which defines this concept for the purposes of the current analysis; secondly, the methodological stance and normative premise that underpin the argument. Both shape the two terms of the equation under analysis.

From a legal perspective, participation entails a set of procedural rules that ensure consideration and balancing of the interests affected by decision-making, and, as a result, enhances the material justice of the decisions adopted. Material justice refers, in this context, to “the substantive quality of a decision that embodies a composition

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42 Cassese, supra note 1, 691 (but see id. at 694, where the author enumerates the rule of law and the principle of participation separately).
45 The literature on this issue is vast, in particular within the Global Administrative Law project. See, e.g., Cassese, supra note 1. Considering that this approach points more to a Weberian type of legal–rational legitimation, see Mockle, supra note 44, at 15; Chevallier, supra note 12, p. 64.
of interests which results from having taken in due consideration and having balanced the different public and private legally protected interests that the decision-maker is bound to take into account.” From this viewpoint, participation ought to be legally protected when such interests are themselves protected by the applicable law and, as such, need to be considered by the decision-maker in the balancing of options prior to the adoption of a decision. If in regulatory settings, such as those mentioned in the examples above, participation is not directly related to the protection of rights due to the absence of an adversarial-type situation, still in order to be relevant from a legal point of view, participation needs to be related to the protection of legally protected interests. From this perspective, participation is intrinsically linked with justification. Participation affords legal protection insofar as the decision-maker is required to reason its decisions, not with respect of a specific group of interest representatives, or with respect of a network of peers by simply referring to the decisions they approved, but in light of the law and of legally protected interests it is bound to pursue or respect. To what extent this understanding of participation matches the EU rules and practices of participation exemplified at the beginning of the article will be discussed below.

Informing the current analysis is a deeper normative concern with law’s capacity to extend beyond its traditional realm as well as beyond national borders, beyond international law. What follows builds on the methodological premise that traditional categories of public (state) law ought to be revisited and, as far as possible, reconceptualized, in view of capturing the instances of exercise of public authority that should be addressed with legal tools. Arguably, this path ultimately makes it possible to identify those elements in the regulatory spaces that can be captured by traditional categories of public (state) law, which will inevitably undergo a process of transformation when travelling to political and institutional contexts different from those where they originated. The challenges posed by this premise are greater than what this article can realistically address given its scope and purpose. Important questions will remain unanswered—namely, how to identify such elements, what to keep of the public law categories in the new regulatory contexts, and in what instances (admitting that not all processes of regulation occurring beyond the state will be able to be captured by law, or, at least, the advantages of doing so might not overcome the disadvantages).

46 Mendes, supra note 37, at 17n.39. See also, on the rationales of participation id. at Section 2.2, esp. at 35.

47 On the difficulties of ascertaining in a given situation whether a legally protected interest is protected or not, see Jerry Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U. L. REV. 889 (1981).

48 Although this risks strengthening the voice of only a few—see Benvenisti, supra note 7, at 171.

49 See Section 3.


51 This is in line with Zumbansen who underlines that “domestic experiences with law are crucial points of orientation” (id. at 324). Although his analysis focuses on transnational law, this reasoning applies also within the state to alternative modes of law production. For a contrary view, denying that the “law beyond the state” perspective is capable of grasping “the essence of transnational governance processes,” see Somek, Administration without Sovereignty, supra note 44, at 279–280.
This methodological standpoint is informed by a normative premise. Accepting that, at whichever level it is exercised, “public power stands in need of legitimation and limitation,” this article proposes that some of the mechanisms that are already in place in international and transnational settings—set up at least to create the impression of a structured exercise of discretion and to lend a sense of legitimacy to the respective decisions—be reinterpreted in light of the idea that the exercise of such authority ought to be constrained. This may require bringing those mechanisms into the purview of the law, and, in turn, extending law—and possibly also the rule of law—into the realm of regulation and governance where it does not always sit comfortably. The purpose of this reinterpretation would be to address the tension between authority and autonomy, in the sense of respect for a private sphere of liberty and dignity, as it unfolds today outside state-like sites of law production and, in particular, in supranational, international, and transnational spaces. Internationalized procedures, albeit resorting to alternative modes of regulation, and irrespective of their form, may ultimately jeopardize the balance between the exercise of authority and the protection of liberty/dignity that has been at the core of public law instruments in the liberal constitutional state. This may occur to the extent that such processes risk leaving a wide purview of discretion in the hands of decision-makers, whose decisions are perceived as not affecting legally protected interests and as not having a perceptible legal effect on individual legal spheres.

While these premises may bring us one step closer to establishing possible normative links between participation and the rule of law, they are still far from laying them down. Once established, those links will help flesh out the role of procedural standards of participation as a means of structuring and constraining the exercise of authority and, specifically, of subjecting administrative actors to the laws that bind them when they act beyond the borders of their domestic jurisdictions.

3. The rule of law: does participation fit?

3.1. The rule of law . . .

The rule of law is a dynamic concept, “a contingent legal theory.” In a late modern sense, it is the product of the legal–liberal traditions shaped in the political and institutional history of Britain, Germany, France, and the US (namely, by the different conceptions of the state predominant in these countries in the nineteenth and early twentieth centuries). Inevitably, the content of the rule of law is far from uniform, and disagreement “extends to its core.” Each political context produced distinct political


53 Arguing that too much discretion is left in the hands of the executive when acting in its international role and on other consequences of leaving the external action of the executive unbounded, see Benvenisti, supra note 7, esp. at 184–201.


55 Chevallier, supra note 12, at 9.

56 Tamanaha, supra note 54, at 3.
and doctrinal meanings and specific implications. On one reading, the rule of law conveys the limitation of power by law to avoid tyranny and potential abuses and misuses. Insofar as it translates into compelling the executive power to respecting the law, this notion is arguably common to the various conceptions of the rule of law that developed in the liberal public law traditions in modern Europe. The same idea has also progressively come under strain since the second half of the twentieth century.

Several qualifications have been added to this core idea of the limitation of power: in a liberal tradition, the limitation of authority is inseverable from the protection of individual liberties and rights; inspired by social democracy, the limitation of authority under the rule of law serves the preservation of human dignity, justice, and democracy. Liberal conceptions tend to convey a formal meaning of the rule of law—stressing generality, prospectiveness, stability, and clarity as qualities rules ought to have according to the paradigm of the rule of law. Substantive conceptions, which emerged more predominately in the period that followed Western totalitarian experiences, underline the values that inform the law and are usually associated with the interventionist role law acquired in the welfare state. Formal and substantive conceptions of the rule of law are, nevertheless, in a “symbiotic relationship”.

This highly concise overview of possible different meanings of the rule of law—unsatisfactory in many respects—inevitably falls short of heeding the richness of two centuries of both political and legal theoretical reflection and historical evolution. Including it in this article has, however, the purpose of supporting one argument: the content of the rule of law, being disputed, is also malleable. Or, more precisely, the core idea of the rule of law outlined above—the limitation of power to ensure certain values (be it freedom, dignity, justice or democracy)—while having manifold implications, also entails the potential for the rule of law to adjust to changing realities.

57 Contrasting essentially the meaning of “État de droit” and “Rechtstaat,” see Chevallier, supra note 12, at 13–66. On different historical and theoretical constructions, but with a stronger emphasis on the Anglo-Saxon traditions, see Tamanaoha, supra note 54, at ch. 3–8.
58 Tamanaoha, supra note 54, at 114–115.
60 Id., questioning and defending the ability of the rule of law to ensure control over the exercise of authority and the liberty of the “administré”; Paulo Otero, LEGALIDADE E ADMINISTRAÇÃO PÚBLICA. O SENTIDO DA VINCULAÇÃO ADMINISTRATIVA À JURIDICIDADE 137–191, and ch. 2, pt. 2 (2003).
61 Chevallier, supra note 12, at 51–52; Tamanaoha, supra note 54, at 32–36.
62 Chevallier, supra note 12, at 68, 87–95.
63 Tamanaoha, supra note 54, at 119 and 96–97.
64 David Dyzenhaus, The Rule of (Administrative) Law in International Law. 68 LAW & CONTEMP. PROB., 127, 130 (2004). Underlining that the formal–substantive distinction should not be overstated, see Tamanaoha, supra note 54, at 92; Chevallier, supra note 12, at 68.
65 Following a substantive conception of the rule of law, endorsed here, this argument needs to be qualified by an important normative caveat: the transformative capacity of the rule of law relies on the adaptability of its content, but this can neither deny the dignity of the human person nor the institutions and procedures that allow one to consider a society as democratic. See Rivero, supra note 59, at 100–101. For a different view, see, e.g., Joseph Raz, The Rule of Law and its Virtue, 93 LAW Q. REV. 194 (1977), who is critical of conceptions of the rule of law that make it “signify all the virtues of the state” (id. at 198).
One may still rightfully argue that the rule of law “flourished in a certain ideological ground, rooted in a certain social and political reality; deprived of this substrate, cut off from its references, [the theory of the rule of law] appears only as an empty shell, a formal frame and becomes itself ‘in-significant’.” 66 This is a sound observation, which advises against hasty extensions of the concept and theory. Nevertheless, even if seen as “a fragment of a civilization,” as a piece of an “ideological whole,” 67 and even if kept purely within its historical state-centric context, the rule of law risks ignoring that the tension between authority, on the one hand, and autonomy that connotes a private sphere of liberty and dignity vis-à-vis the exercise of authority, on the other, have also moved into a transnational space, beyond the national and the international spheres (and, within them, into sites of authority other than the state). The rule of law risks being “nullified by the process of transformation of the state,” 68 and by the internal and external diffusion of power. From this perspective, without denying the relevance of maintaining the rule of law within its less disputed realm—as referring to certainty, predictability, and publicity, an independent judiciary, due process of law in courts, and, by extension, in administrative adjudicatory procedures, and other core features 69—one would rather stress the “evolving nature” of the rule of law and, on this premise, inquire into its capacity to frame more recent transformations of public authority. 70

For the present purposes, the inquiry into the possible transformations of the rule of law focuses on procedural standards of participation and on a procedural meaning of the rule of law—one that zooms in on law-generating processes and how they are constructed when initiated in international and transnational settings. In itself, this focus may be contentious. Analyzing law-generating processes rather than law-applying processes from the perspective of the rule of law may be criticized on the ground that the rule of law is not about the making of law, but about its qualities and, if at all about process, then about processes of the application of law. 71 Yet, in the type of situations exemplified at the beginning of this article, the actors involved are at the same time law-makers and law-appliers and, in making law, they condition the choices they follow in applying the law. In addition, given the looser constraints of internationalized procedures, the limited judicial purview over the links between internal and external procedures and the virtual absence of public scrutiny of external regulatory...
activities, executive actors defining regulatory acts at the inter- and transnational level may more easily take biased decisions that have nonetheless a significant impact on internal law and on natural and legal persons.\footnote{See Benvenisti, \textit{supra} note 7, esp. at 171–175.}

3.2. \ldots and participation

The two poles—a procedural conception of the rule of law and participation—can be bridged by focusing on one of the core procedural principles of the rule of law (core, at least, in the common law world, but also, by English influence, in EU law): no one should be subject to a penalty or to a serious loss resulting from a unilateral public action without being given the opportunity to put forth their views on the facts adduced and legal norms relevant to the case. There are two distinct perspectives on this principle. From one point of view, its only translation in an administrative type of procedure is the right to be heard and the respective ancillary rights. As a guarantee of adjudicatory procedures, the right to be heard is pertinent outside the courtroom only when the application of the law to a particular situation implies the adoption of a measure that can have adverse effects in the legal sphere of those bound by that measure (typically, a sanction or a measure having a similar effect). Therefore, this principle is totally alien to the empirical reality that grounds the present normative analysis. This position is defensible. It has the support of administrative law in many EU countries, where as a matter of principle, and despite the extensions in its scope of application, the right to be heard does not apply to procedures leading to the adoption of general acts.\footnote{According to Raz, \textit{supra} note 65, at 196, “‘the rule of law’ means literally what it says: [t]he rule of the law.”} If coupled with a so-called “thin conception” of the rule of law, such as the one defended by Raz, this view definitively closes the path this article proposes to explore (that is, the possibility of reading participation in light of the rule of law). When considering the examples mentioned at the beginning of this article, the proponents of this conception may likely argue that the rule of law is the rule of \textit{the} law.\footnote{In the case of the EU, see Regulation No. 726/2004, \textit{supra} note 25, art. 57(1)(j). From a formal perspective, the ICH and the EMA rules of procedure can hardly be considered “law.”} In one of the examples mentioned, there is hardly any law to account for (ICH rulemaking is very thinly covered by legal rules);\footnote{Regulation No. 2371/2002, \textit{supra} note 18, Recital 27.} in the other, the legal rules that are sidestepped by the effect of reception of ICCAT recommendations enshrine duties of consultation of stakeholders, created to compensate the shortcomings in the knowledge resources of policy-makers.\footnote{Raz, \textit{supra} note 65, at 200.} In addition, proponents of a “thin conception” of the rule of law would maintain that the arguments in favor of control of law-making by non-elected bodies have nothing to do with the rule of law.\footnote{\textit{Mendes, supra} note 37, at 46–58.} Therefore, even admitting that a procedural conception of the rule of law could be defended, there is no way of linking it to the procedural standards of participation that form the object of the present analysis.

\footnote{See Benvenisti, \textit{supra} note 7, esp. at 171–175.}

\footnote{\textit{Mendes, supra} note 37, at 46–58.}

\footnote{According to Raz, \textit{supra} note 65, at 196, “‘the rule of law’ means literally what it says: [t]he rule of the law.”}

\footnote{In the case of the EU, see Regulation No. 726/2004, \textit{supra} note 25, art. 57(1)(j)). From a formal perspective, the ICH and the EMA rules of procedure can hardly be considered “law.”}

\footnote{Regulation No. 2371/2002, \textit{supra} note 18, Recital 27.}

\footnote{Raz, \textit{supra} note 65, at 200.}
From another perspective, the principle mentioned above can be extended to cover participation in procedures leading to the adoption of general acts. It does not translate merely into the right to be heard in adjudicatory procedures, but, arguably, it stresses more broadly “the value we place on government treating ordinary citizens with respect as active centers of intelligence,” irrespective of the form taken by a public authority’s action. This is also in line with the idea of the person as a bearer of fundamental rights: while subject to the exercise of public authority, a person must be treated in a way that respects him or her as a member of a collectivity and holder of rights. Their dignity would be respected when the persons subject to authority are not treated merely as objects of decisions that interfere with their legal spheres. On this procedural reading, the rule of law “requires that public institutions sponsor and facilitate reasoned argument in public affairs.” Respect for dignity requires an opportunity for argumentation. The freedom the rule of law protects is then a “positive freedom: active engagement in the administration of public affairs, the freedom to participate actively and argumentatively in the way one is governed.” Arguably, pursuing it requires the subjection of public authority to legal rules that structure its exercise accordingly. In constraining decision-makers to engage with those who are affected by their decisions, these rules can ensure due consideration for the legally protected (individual, collective, or diffuse) interests affected by public policy. Those rules thereby force decision-makers to consider the views voiced, to the extent that those views are relevant to the legally protected interests, and, thereby, create the conditions for the protection of the dignity of those affected (in the sense mentioned above) and favor the material justice of public acts. Procedural rules then ought to be connected to legally protected substantive interests. This is one conception on the basis of which different rules can be set up, depending on the constraining character of the acts adopted (which needs to be determined taking into account the regulatory cycle in which they are produced), on the type of power being exercised, on the

78 Mendes, supra note 37, at 58–70, 76–77, and 229–240.
79 Waldron, supra note 71, at 22.
80 Mashaw, supra note 47, at 896, points out that “as contemporary administrative activity ... moves increasingly toward the use of generally applicable rules, a due process jurisprudence oriented to the protection of rights through adjudication, rather than toward the ways rights are created by quasi-legislative processes, appears impoverished.”
81 Dyzenhaus, supra note 64, at 135. This is different from necessarily associating the rule of law with respect for fundamental rights.
82 Waldron, supra note 71, at 19.
83 Id. at 20. Waldron’s analysis focus on the tension between this strand of dignity and other strands of dignity associated with the rule of law which emphasize certainty and predictability: id. at 18–23. More broadly on the values underlying a concern for dignity in the realm of public law procedures, see Mashaw, supra note 47, at 886, and on the challenges of a dignitarian perspective, id. at 898–899.
84 Waldron, supra note 71, at 20.
85 In a similar sense, Dyzenhaus, supra note 64, at 129–130. For a critique of this way of conceiving the function of law, see Robin West, The Limits of Process, in Getting to the Rule of Law, supra note 71, 32, at 47–49 (to which one may counter-argue that a focus on the tension authority–liberty/dignity does not exhaust the function of law).
86 See Section 1, on the legal meaning of participation.
normative desirability and effective possibility of introducing legal rules in a given regulatory forum, on the trade-offs that such rules could have.

Implicit in this procedural conception of the rule of law is the idea that procedural rules need to be at least considered in the creation of regulatory regimes, even if in the end they may not be introduced because the possible disadvantages are likely to overcome the advantages. Participatory procedures might not be beneficial in every circumstance. Their risks and possible disadvantages are well known. Among others, the juridification of participation entails risks because it introduces a different logic and purpose both into the mechanisms of participation and into regulatory processes. Juridification may risk disrupting otherwise functional regulatory processes, since it may be inadequate to the specific ways of coordinating a variety of decisions and actors. Risks of capture, in particular by powerful corporate actors, are likely amplified in international and transnational settings where representation of diffuse interests (e.g., environment, consumer protection) is potentially weaker than nationally or locally, and institutional structures are looser than at the state level. At the same time, procedures and their respective standards lend a sense of legitimacy to the exercise of authority that ultimately reinforces it, instead of opening up possibilities of contestation and control, as defended above. Obstacles to practical feasibility; the difficulties in ensuring adequate links of representation within interest representatives; lack of adequate enforcement mechanisms that would secure a well-functioning procedure, are other critical points of participatory procedures. These risks and potential disadvantages advise against all-encompassing solutions and point to the need to strike “delicate balances” in specific regulatory contexts, taking into account the different realities to which procedures would apply. They do not, however, constitute a principled objection to the introduction of procedural rules of participation capable of upholding the rule of law, in the sense indicated above.

Using the image of concentric circles, one is certainly closer to the rule of law—in the procedural sense indicated above—when the act originating in the international and transnational sphere is an individualized determination, the potential addressees of which, or affected persons, can easily be identified. It is this type of situations that Waldron considered in his proposal for a procedural conception of the rule of law—the opportunity to make arguments about what law is and ought to be in cases where authority has a direct bearing on the person. However, under certain conditions, the procedural conception of the rule of law proposed is capable of encompassing the

87 Balancing the disadvantages of introducing procedural rules at the global level, but cautiously defending this option, see Giacinto della Cananea, Procedural Due Process of Law Beyond the State, in The Exercise of Public Authority, supra note 6, at 972–978.

88 Chevaller, supra note 12, at 65.

89 See Benvenisti, supra note 7, who, however, argues that procedures can be a tool to reduce capture.

90 Chevaller, supra note 12, at 62–65; West, supra note 85, at 42.

91 Benvenisti, supra note 7, at 204–211.

92 Waldron, supra note 71, at 19, 24, and 26. In his analysis, Waldron specifically considers situations where the law is being administered in judicial procedures, although he does not exclude the possibility of such a procedural conception of the rule of law having broader application.
participation of holders of rights and legally protected interests affected by general acts, that is, by law-making procedures. These types of situation would then constitute an outer circle, where the exercise of authority does not have a direct bearing on individuals—an effect that will nevertheless occur via a follow-up decision adopted elsewhere—but where the law is defined for more or less precise instances of regulation, with more or less detail regarding the specific entitlements and duties that emerge therefrom. Between the core and the outer circle there may be potentially a great variety of situations.

In the outer circle, the possibility of harm being produced that may ultimately have a detrimental impact on individual legal spheres cannot be excluded. The lack of consideration, or a manifest disproportionate weighing of competing legally protected interests can lead to such an effect. Issues of dignity can also be involved when decisions are adopted without due consideration of the interests concerned, which, by legal determination, ought to be balanced—and not only when rules are unclear, unstable, and retrospective. Arguably, if accompanied by requirements of justification, participation in the adoption of this type of decisions would favor the balancing of legally protected competing interests, and, in doing so, avoid compromising the material justice of the ensuing decisions. While the opportunity for a reasoned argumentation in the shaping of a rule or decision does not in itself guarantee this outcome, it creates the conditions to avoid biased, possibly self-interested, acts that deny material justice.

However, this is the point where the boundaries that could delimit a procedural conception of the rule of law, on the one hand, from a democracy argument that would ground the democratic legitimacy of decision-making in the search for the most adequate solution via an argumentative process, on the other, and also from participation as a governance principle, risk becoming blurred. At the same time, this is also the point beyond which on one can identify the situations in which the coordination between public and private actors that join efforts in decision-making procedures standing at the margins of law—or squarely falling outside its realm—should be subject to legal principles and rules inspired by a procedural conception of the rule of law.

3.3. Still the rule of law?

Would the subjection to procedural rules that structure the exercise of authority in such situations still be part of the rule of law? Already in the late 1970s, Raz argued: "we have reached the stage in which no purist can claim that truth

93 For more detail, see Mendes, supra note 37, at 61–70, 229–240.
94 Similarly, id. at 229–240
95 Id. at 369, drawing on José Joaquim Gomes Canotilho, Relações jurídicas poligonais, ponderação ecológica de bens e controlo judicial preventivo, 1 REVISTA JURÍDICA DO URBANISMO E AMBIENTE 55, 61 (1994).
96 Mashaw, supra note 47, at 897. But see also id. at 898, on the challenges of a dignitarian perspective.
97 On material justice, see text accompanying supra note 48. On the importance of reason giving from a dignitarian perspective, in addition to its instrumental value to political and legal accountability, see Jerry Mashaw, Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance, 76 GEORGE WASHINGTON LAW REVIEW 99 (2007), at pp. 115, 118.
is on his side and blame the others of distorting the notion of the rule of law.”

Participation can be, and usually is, defended on grounds different from the rule of law—transparency and participation of the public (democracy inspired argument), or as an instrument to achieve better regulatory outcomes that leaves the choices of participation fully in the hands of the decision-maker (governance). From a legal perspective, it is justified by the need to limit the exercise of authority due to the legal effects of the ensuing decisions. Whether participation in the latter sense can be considered from a rule of law perspective, is debatable. One may argue that invoking the rule of law in this case may only amount to invoking the symbolic meaning of this principle. However, the above analysis shows that the purpose of making such a claim is within the “rule of law ethos,” if this is perceived as encompassing the protection of the dignity of the person and the material justice of public acts, in the sense proposed. Participation can ensure that the persons affected by decisions of public authority (irrespective of their form) are treated in their autonomy as members of a collectivity and holders of rights, rather than as objects of decisions that are alien to them. Insofar as this is the case, participation is a legal tool to structure and constrain the exercise of authority.

Returning to the examples mentioned at the beginning of this article, harm to legally protected interests that ultimately may have a detrimental impact on individual legal spheres can result from the regulatory cycles initiated by the adoption of the ICH guidelines and of ICCAT recommendations. The procedures through which the initial decisions are adopted do not entail procedural guarantees that ensure due consideration of the interests protected by the laws of the participating entities (in the case analyzed, the EU). As mentioned, they are later applied in the domestic legal order as adopted in international and transnational fora, via decisions that concretize their legal effect in the legal sphere of those concerned, which in turn are adopted through procedures that do not entail such guarantees. As an effect of the reception of international and transnational decisions, the holders of legally protected interests concerned may suffer harm as a result of unilateral public action (in this case, intertwined decision-making adopted at different levels of governance) without being given the possibility—via interest representatives—of putting forth their views, and without procedural guarantees that the legally protected interests they hold have been taken into account by the decision-makers. What is at stake are interests that are legally protected in the EU also in the form of fundamental rights, the pursuance of which is dependent on technical and scientific issues such as those decided via internationalized rulemaking procedures. From an objective perspective—that is, one that is detached from the individual situation of the persons affected—there is a dearth of procedural mechanisms that ensure that the discretion exercised via these regulatory

98 Raz, supra note 65, at 196.
99 See Section 1.
100 Arts. 35 (insofar as it refers to a high level of human health protection) and 37 (environment) of the Charter of Fundamental Rights of the European Union, OJ C 303/1 (Dec. 14, 2007). I am grateful to Gareth Davies for pointing this out.
processes is structured and that authority is constrained in such a way that it complies with the law to which administrative entities are bound, while the legal effects of their decisions on legally protected interests are potentially significant. Arguably, this result contradicts the values conveyed by the rule of law, as discussed above.

It is this aspect—the capacity of procedural standards to structure discretion and constrain the exercise of authority—that risks being depleted by the effect of the interaction of legal regimes. One problem with this claim is that within the EU, the procedural standards that are depleted as a result of reception are not legal guarantees. What would be depleted then? At first sight, procedural standards of participation established in the realm of governance, outside legal parameters *stricto sensu*, that only due to a stretch of imagination could possibly be viewed through the lens of the rule of law. Nevertheless, the procedural rules that allow for participation in the decision-making procedures analyzed can have the effect of structuring and, hence, limiting authority. Certainly, a concern for the constraint of authority is not the main reason why they were created in the first place. However, the way they have developed—at least as far as this can be determined on the basis of written procedural rules enshrined in Commission Communications and agency’s rules of procedure applicable in the cases mentioned—does not differ in essence from legally binding rules of notice and comment that would constrain the procedures to which they apply. In this sense, they have at least the capacity of constraining the exercise of authority. This assertion means neither that they cannot be critically assessed in light of this aim, improved to better ensure it, nor that this is actually the effect that they have. On the contrary, it sheds a critical light on the procedural rules followed within the EU. The difference between governance or administrative practices and legally binding procedures remains the origin of such rules and the consequences of non-compliance—voluntarily followed practices (self-constrain), on the one hand, externally determined legal rules that can be enforced via judicial review, on the other. Admittedly, legal arguments to defend the transition from one model to the other do not apply in all circumstances. At any rate, it is precisely the capacity to structure discretion and constrain the exercise of authority that cannot be identified in the procedural rules that apply to decision-making procedures developed in the corresponding international and transnational spaces analyzed. At the same time, substantive decisions are effectively transferred to these spaces through international agreements or international regulatory cooperation. Those procedural rules are weaker because, in one case (fisheries), there is no legal determination according to which interest representatives should be consulted, and logically there is no duty to take the views received into account, contrary to the EU procedural rules that would otherwise apply; in the other case (medicines), there seems to be no concern regarding the feedback to be given to the participants or

101 They are more adequately interpreted as following the line of governance reforms that still build on the 2001 White Paper of the Commission on Governance. See Mendes, *EU Law and Global Regulatory Regimes*, supra note 1, at 997–999, 1011–1013.

102 Id.; and Mendes, *supra* note 37, at 370.

103 See the legal meaning of participation as characterized in Section 1.
regarding public explanations on the options finally followed. The value of participation remains sidelined, since it is hardly possible for interested persons to assess how their contribution was treated, which in turn compromises the ability of the respective procedures to structure discretion and constrain the exercise of authority.

Procedural standards of participation (accompanied by guarantees of justification) may be as good as it gets in terms of structuring and constraining the exercise of authority in areas of regulation where the role of law is unclear, whether they include the reception of international and transnational decisions or not. At stake is the limitation of authority that is characteristic of a legal system that purports to obey the rule of law and that is concerned with structuring the discretion of administrative decision-makers. What one then misses (what is depleted) is one of the mechanisms that constrain decision-makers to justify their decisions in light of the public interests they are legally bound to pursue.

4. The transformative potential of a rule of law-inspired perspective: reconceptualizing decision-making procedures?

If the depletion of procedural standards of participation by effect of reception of decisions adopted within international and transnational regulatory regimes can be perceived as a problem of rule of law, which consequences follow? Which adjustments and variations to the procedural rules that are practiced in transnational spaces would this perspective require? There are two different, but related aspects to this question. First, as implied above, approaching participation from the perspective of the rule of law requires reinterpreting processes and mechanisms that were introduced in decision-making with purposes that are far from the ideal of constraining authority or, even more so, from the concern of respecting “the freedom to participate actively and argumentatively in the way one is governed,” to use again Waldron’s terms.104 This way of viewing participation requires reinterpreting those processes and mechanisms in legal terms, transforming current practices into rules that would limit public authority, therefore, creating legality (or quasi- legality) where thus far it had not existed. Indeed, the very reason for approaching participation from a rule of law-inspired perspective is the subordination of the exercise of authority to law via procedural constrains of legal nature or via constraints that can be considered functionally equivalent, even if they remain formally different. Second, what would such a transformation imply in international and transnational settings? These two aspects point to two related consequences: a change in approaching the procedural standards that are currently in place, and a change in approaching the procedures where they apply.

The transformation of the procedural standards would occur along the lines indicated above. As argued, in instances where the exercise of public authority is at stake and, in addition, holders of the legally protected interests concerned may suffer harm as a result of unilateral public action, participation as a part of governance discourses

104 Waldron, supra note 71, at 20.
and participation inspired by a rule of law perspective could and should be bridged. The decision-making procedure should entail guarantees that the decision-makers duly balance the legally protected interests concerned. These may be legal guarantees, sanctioned by law, or they may stem from institutional practices that, nevertheless, have the capacity of constraining the exercise of authority through means other than the law. The precise shape of these guarantees would depend on a variety of factors.\(^{105}\) Moreover, the advantages of their introduction would need to be balanced against their possible disadvantages in the concrete regulatory settings at issue.\(^{106}\)

This claim points to the need at least to preserve the procedural standards that are capable of structuring the decision-makers’ discretion, and hence, of constraining the authority they exercise when adopting general acts—the ones depleted as an effect of reception of international decisions. But it also indicates that the EU procedures themselves ought to be re-thought in light of this conception, with a view to ensuring that self-imposed procedural rules may function as effective constraints, and do not merely coat decision-making with a veil of legitimacy.

This leads us to the second consequence mentioned. Advocating this transformation also postulates a new way of approaching procedures, for two reasons. First, the transformation of procedural standards is defended in the adoption of acts that, irrespective of their source or form, entail the exercise of public authority. In the cases analyzed above, such instances can only be properly identified if one takes into account the external links of decision-making procedures. This point has been made above.\(^ {107}\) Second, if procedures continue to be viewed in segmented terms, i.e., only in their horizontal dimension, possible solutions to constraining the exercise of authority face considerable hurdles or are unsatisfactory, for the reasons explained in what follows.

If one takes a horizontal view of internationalized procedures, separately analyzing their global and domestic (in our case, European) levels, the normative perspective defended above would lead to one of three possible claims: first, procedural standards that structure the administrative discretion and, hence, limit the exercise of authority, need to be introduced in international and transnational law-making procedures (centralized solution); second, and alternatively, when pursuing international activities, EU bodies and institutions ought to be bound, internally, by the same procedural rules that apply when there are no instances of reception (decentralized solution); third, both solutions need to be followed (combined solution).

The centralized solution raises one important objection: the procedures currently in place in those regulatory fora may be adequate to the type of decisions that are therein adopted. As mentioned above, the problem of unrestrained authority may only emerge from the vertical effects of these decisions. Therefore, one may argue that the problem lies only down the regulatory chain; hence, it is a problem of how

\(^{105}\) See supra text accompanying, and in between, notes 86 and 87.

\(^{106}\) See Section 3.2.

\(^{107}\) See Section 2.2.
these decisions are received—in other words, a problem of the domestic legal systems. If at all, changes would be needed there. If one still agrees that the procedural standards practiced in international and transnational fora should be changed, it would follow from the normative perspective defended above that such standards would need to be constructed in a highly complex way. They would need to accommodate the legally protected interests of the legal orders of the participating members, and consider the possible harmful effects of their decisions in third countries that suffer the effect of the decisions adopted. The potential complexity of this solution could block decision-making, ultimately rendering it both unfeasible and undesirable.

The decentralized solution would then be a suitable alternative, given the assumption that the problem lies in the domestic legal orders. Legal orders where the depletion of procedural guarantees may be problematic would need to adjust their mechanisms of reception. But this solution is equally unsatisfactory. First, the argument overlooks that domestic legal systems are either legally bound by the substantive decisions adopted externally or simply follow them for reasons of administrative convenience. Introducing procedural guarantees at the moment of reception would very likely be a window-dressing exercise, since it would be incapable of impacting in any way on substantive decisions already adopted elsewhere. Alternatively, it would place the domestic authorities in a difficult position, since they would face the possibility of needing to refuse reception (on legal grounds) if this meant deviation from their own law. The last option is unrealistic. Domestic authorities in charge of reception are often the same that have made the external decisions they then receive (which does not mean they will duly consider the legally protected interests they are bound to respect internally). Therefore, they will not be prone to setting aside the external decision, for procedural or substantive reasons. Domestic authorities will probably more easily use the argument that “unfiltered” reception (i.e., not subject to further internal procedural guarantees) is the result of their international duties, and compliance with the latter justifies that they do not follow procedures that would be practiced internally, as the example of reception of ICCAT decisions demonstrates. The decentralized solution is unsatisfactory for a second, related reason. The insistence on a domestic—internal—perspective, if at all, can only solve problems of depletion of procedural guarantees within the domestic legal system (in our case, the EU). It only alerts to an internal problem of consistency, in which case possible normative solutions following the views defended above would fail to address the problem of unrestrained authority in internationalized rulemaking. As pointed out, the challenge of creating adequate procedural guarantees may lie in the exit options provided by external regulatory fora, as the ICH example shows, or

108 Similarly, albeit referring to accountability for individual decisions, see Carol Harlow, Composite Decision-making and Accountability Networks: Some Deductions from a Saga, Jean Monnet Working Paper 04/12 (2012), at 27–28.
109 Mendes, EU Law and Global Regulatory Regimes, supra note 1, at 1000.
110 This can work in opposite directions: see id. at 1003–1004, 1008–1009.
in the very approach of domestic authorities regarding their international role and obligations.

The combined solution is compromised by the fact that it would still rely on a multi-level approach, which, for the reasons stated above, is unsuitable to tackling the problem of unrestrained authority addressed in this article. It does not escape the problems of the centralized and of the decentralized solutions, namely because it would follow a horizontally segmented perspective on the decision-making occurring at each level, and, thereby, it would likely overlook the fact that the actors involved in the different regulatory stages may be the same using with “different hats”.

If decision-making procedures are in essence neither European nor international, as the examples show, international regulatory activities are then better perceived as a continuation of internal activities, and vice versa, rather than a separate, diplomatic-type or necessarily expert-dominated fora. This leads us to stress a point made above: one needs to focus on the functional interdependence of regulatory decisions adopted at the international or transnational level and at the EU level, and, therefore, search for the external links of decision-making procedures. Thinking of international regulatory cooperation from the perspective of the links between the different procedures that support it has the advantage of capturing the entirety of the regulatory chain that is triggered by decisions adopted in global regulatory fora and given effect at the regional and national levels. Focusing on their links, across legal systems, contributes to assessing the legal relevance of normative acts adopted at different levels of governance, the legal value of which may be questionable on formal legal grounds (for example, informal legal acts may eventually be considered as preparatory acts of a final decision, adopted at a different regulatory level). This holistic view enables a better grasp of the reality of international or transnational regulation and a better perception of the problems involved, highlighting their effective impact on legally protected interests and, possibly, on the legal spheres of natural and legal persons. The decision-making procedures that operate the substantive coordination of the legal systems involved ought to be seen as segments of a broader regulatory cycle. This perspective may lead one to question whether domestic procedures are as autonomous as they appear to be when seen in isolation from those external links. Ultimately, this line of thought may lead to a reconceptualization of decision-making procedures, with a view to ensuring that the exercise of public authority that results from international regulatory cooperation remains structured and constrained by law or by quasi-legal institutional practices that are functionally equivalent to legal procedural guarantees.112


112 On the formal difference that remains despite this functional equivalence, see supra text accompanying notes 101 to 103.
4.1. Composite procedures

Highlighting the external links of decision-making procedures created as a result of international regulatory cooperation evokes composite administrative procedures. Composite procedures involve decisions by different bodies or entities—decisions which in the case of internationalized procedures are situated outside one legal system or regulatory regime—and therefore encompass one or more intertwined sub-procedures that are instrumental in the adoption of a final decision. The concept of composite procedure has been used in EU legal scholarship not only to describe the functional interdependences of decisions taken by different EU and national regulatory bodies, but also to highlight the problems of legal protection arising from the allocation of such procedures to different jurisdictions. The same concept may be useful to capture the reality of substantive regulation that depends on the confluence of decisions adopted at the international or transnational level and at the EU level. It may allow the interpreter to focus on the decisive moments of the definition of the content of regulatory acts, and, on this basis, redefine the role law should have in the respective regulatory cycle. For instance, when procedural rules are defined in view of the establishment of fishing quotas within the EU—whether policy-oriented or not—it can hardly be ignored that many of these measures may be pre-defined by Regional Fisheries Management Organizations (RFMOs). When total allowable catches are transposed into EU law, they are not subject to the rules of participation functionally equivalent to those that apply to similar substantive decisions adopted purely within the EU. Is such a situation normatively justified? Are the procedural rules followed by the RFMO Fisheries Commissions’ decision-making designed with a view to structure the exercise of public authority in a way that complies with requirements of the rule of law that are valid within the legal orders of the RFMO member states? Shouldn’t they be designed in view of the vertical effects they produce? By approaching this instance of regulation from the angle of composite procedures, the interpreter is led to questioning the effects that international regulatory collaboration may have in legal guarantees valid within the legal systems that serve such collaboration. More importantly, focusing on the links between what may be segments

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113 The concept is related but not identical to “composite administration.” Proposing this concept as an analytical tool to explain international cooperation, see Bogdandy & Dunn, supra note 113. “Composite administration,” as proposed by Bogdandy and Dann, focuses broadly on bureaucratic cooperation between international institutions and other legal entities of bureaucratic nature, including exchanges of information, irrespective of specific processes of decision-making (id. at 886, 892). “Composite administrative procedures” is a more limited concept (see supra text that following this note). It can be seen as an instance of composite administration. Both concepts also have in common the fact that, beyond the state, they have been first conceptualized to explain administrative and procedural collaboration within the EU. Arguing that the terminology of “composite decision-making” extends to any situation of joined action between autonomous entities pursuing common public aims, see Harlow, supra note 108, p. 4.


115 See further Mendes, EU Law and Global Regulatory Regimes, supra note 1.
of a broader regulatory cycle may lead, in some cases, to defending the juridification of segments of the composite procedures where the substantive decisions are effectively shaped.116

Yet, using composite administrative procedures as an analytical tool may open more questions than it offers solutions. If the term is used as developed in EU administrative law literature, composite administrative procedures require, first, a legal connection on the basis of which one may establish that the coordination of different administrative actors is directed at one final outcome:117 second, they require the lack of autonomy of the sub-procedures that compose them, due to their structural connectedness.118 There is no necessity to transpose these two characteristics to a possible conceptualization of composite procedures in the context of international cooperation.119 “Composite procedures” is not an established legal term and using it in a different setting opens the way for different conceptualizations.120 Nevertheless, pointing out these traits indicates the conceptual difficulty of analyzing internationalized procedures as composite. In the context of international regulatory cooperation, what are the legal links on the basis of which a sufficient interdependence can be established? More importantly, would it be possible, on the basis of such links, to identify the moment (or moments) in which the content of the regulatory decisions is defined, and propose, accordingly, a redefinition of the procedural guarantees within the overall composite procedure? This latter question points to a normative difficulty: would composite administrative procedures be an effective tool in ensuring that the exercise of authority is constrained by procedure? It should be recalled that in the EU’s integrated administrative system, such procedures remain a challenge to legal protection. Legislative acts may design procedures that combine the regulatory decisions adopted by EU and national authorities, but the scope of procedural rules remains separate. The segments of composite administrative procedures developed at the national level are subject primarily to national rules of procedure, but also to EU law; those developed at the EU level are subject to EU rules of procedure.121 Procedural rules that ensure participation tend to fall through the mesh that supports the administrative

116 A similar idea was defended, in a different context, in Mendes, supra note 37, at 159–160.

117 Cananea identifies this as the structural element that allows distinguishing what he terms “mixed administrative proceedings” managed by two or more administrations from “linked proceedings” that remain legally distinct (id. at 210). See also Massimo Severo Giannini, 2 Diritto Amministrativo 652–653 (2d ed. 1988). On the notion of administrative procedure, as requiring the production of one final outcome, id. at 529–530.


119 I am grateful to Benedict Kingsbury for this point.

120 See Bogdandy & Dann’s analysis with regard to composite administration, supra note 113.

collaboration between national and EU administrations. In the international and transnational sphere, when considering the interconnections between different legal systems and regulatory regimes outside integrated administrative structures, the possibility that constructing decision-making procedures as composite would have normative effects of the type envisaged here is even dimmer.

These difficulties and open questions do not deny per se the explanatory value of this approach. For the reasons indicated above, it can be a useful starting point for addressing the normative problems that emerge from internationalized procedures. Using the lens of composite procedures highlights that structuring and constraining the exercise of authority may “entail a complex structure, capable of functioning at various levels . . . of including all the relevant actors . . . and of organizing various sub-sectors.” But it requires an analysis that cannot be further developed here.

4.2. Actors and their procedural duties

Another way of avoiding a level-segmented conception of procedural rules and their depletion is to focus on the actors involved in the regulatory cycle and on the legal and institutional requirements valid within their legal systems. The members of international or transnational regulatory fora, insofar as they represent public entities, are bound by formal and informal rules that shape their procedural behavior and their substantive decisions. These are valid within their legal orders, but to the extent that their international regulatory functions are a continuation of their internal regulatory functions, such rules should also be binding on their external actions. Moving decision-making from one forum to another cannot a priori lead to sidestepping those rules. Focusing on the EU and on the examples used in this article, EU representatives in Regional Fisheries Management Organizations are bound, among other rules, by the basic regulation that defines the legally protected interests and the governance principles valid in that field (the EU Common Fisheries Policy). The EMA acting in its external role, when sitting on the ICH expert committee, is bound by the substantive requirements of the EU pharmaceutical law and should also be bound by rules of procedure it defined in order to respond to claims of legitimacy and accountability of its constituencies. Focusing on the responsibility of the EU institutions and bodies when they act in an external role, in the sense proposed, and highlighting the need for consistency between its external action and its internal policies (in line with what is prescribed now in article 21(3) TEU) would have both internal and external consequences.

Given the eventual domestic ramifications of the decisions the EU co-authors externally, deviations from internal substantive and procedural rules ought to be justified internally. EU decision-makers ought to demonstrate that the decisions adopted externally—or, at least, what the EU strove for in their adoption—do not

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122 See, e.g., the procedure for the authorization of novel foods in Mendes, supra note 37, at 334–341. See id. at 159–160, on the drawbacks of a divided system for the effectiveness of the right to be heard.

123 Delmas-Marty, supra note 13, at 208.

124 See Black, supra note 9, at 144–146.
contradict the content of the law by which they are bound. Deviations may of course
be required by the very fact that these decision-makers are members of international
and transnational regulatory fora. Also new issues not envisaged in the laws of the
participating members are likely to arise. But their external decisions and actions
should still be subsumed under the constitutional and legislative framework under
which they operate. Justification, as proposed above, would ensure that link. In addi-
tion, stressing the functional interconnectedness between these external decisions
and the internal decisions of reception would create the conditions for identifying
the situations in which external decisions may have a detrimental effect on legally
protected interests, through a regulatory chain of interwoven decisions. This may
require the transformation of internal procedural standards, if not by adjusting the
possibilities of participation accordingly, then by strengthening the requirements of
justification, which would need to take this effect into account. This is different from
introducing procedural guarantees at the level of reception that would potentially
mirror equivalent internal decision-making procedures. As pointed out above, such
guarantees would hardly function as filters for depletion. The procedural adjustment
of the type proposed here would apply to the external action of domestic actors,
eventually piercing international and transnational decision-making procedures.\footnote{See, e.g., the proposal regarding the Treaty on the Functioning of the European Union, Consolidated Version, 2012 O.J. (C 326/47), art. 218(9) and the resulting challenges, in Mendes, EU Law and Global Regulatory Regimes, supra note 1, at 1017–1019.}
Justification, as envisaged here, is important because reason-giving creates the con-
ditions for contestation and control, but it can also help avoid treating the holders
of legally protected interests merely as objects of decision-making.\footnote{As underlined by Mashaw, “authority without reason is literally dehumanizing”; but justification also proceduralizes rationality, thereby converting “the demand for nonarbitrariness into a demand for understandable reason giving”—Mashaw, supra note 97, at 118. See also, id. at 111, 114, and 115.} Ultimately, the
emphasis on procedural duties of EU institutions and bodies acting in an external
role would structure their administrative discretion and avoid “exit ways” that could
lead to instances of unrestrained authority.\footnote{On the consequences of such “exit ways,” see Benvenisti, supra note 7.}

This way of conceiving the external conduct of domestic administrative actors
would be consequential externally. If applicable to domestic administrative actors of
other jurisdictions gathered in international and transnational regulatory fora, the
effect would be multiplied. It would then lead to a web of justification that enables legal
and political control over the external role of those actors, in light of the internal laws
that bind them. Whether this change would be capable of impacting the procedures
followed within those fora in a meaningful way is another matter.\footnote{On the problem of “many hands” of polycentric regulatory regimes, from the perspective of accountability, see Black, supra note 9, at 143.} “Meaningful”,
from the normative perspective adopted in this article, would mean finding an ade-
quate way of structuring discretion and constraining authority in internationalized
procedures, which would capture the vertical effects of international and transna-

\footnote{See, e.g., the proposal regarding the Treaty on the Functioning of the European Union, Consolidated Version, 2012 O.J. (C 326/47), art. 218(9) and the resulting challenges, in Mendes, EU Law and Global Regulatory Regimes, supra note 1, at 1017–1019.}
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\footnote{On the consequences of such “exit ways,” see Benvenisti, supra note 7.}
\footnote{On the problem of “many hands” of polycentric regulatory regimes, from the perspective of accountability, see Black, supra note 9, at 143.}
these fora function, what it means for the participating members to act under the law, how incompatible claims inherent to the laws of the participating members could be articulated, and what consequences such articulation would entail. However, it is plausible that, if internally constrained by duties of justification which link their external actions back to the substantive and procedural rules that bind them internally, these actors may be also pressured to adjust international and transnational decision-making procedures in order to comply with the same claims of legitimacy they face internally. Internal procedural constraints regarding external regulatory actions of domestic actors could therefore contribute to transform international and transnational procedures, given the functional links of the respective decisions. While it would be impossible to accommodate all legitimacy claims stemming from the internal laws of the participating members, it is arguably unlikely that such claims would not have any impact upward in the regulatory chain. Admittedly, the pull towards different procedural rules will most probably come from the most powerful actors on the international and transnational scene, eventually eliciting criticism of Americanization or Europeanization of procedures. But this observation only timidly lifts the veil from the more complex factors and incentives that influence decision-making and the relationships between actors within the varied international and transnational regulatory fora.

5. Conclusions

Regulatory decisions ensuing from decision-making procedures developed at different governance levels may be interlinked in such a way that it may be artificial to ascribe them to distinct legal systems. The argument is not new. Yet, hitherto, the discussion of the internationalization of EU and national administrative procedures, having highlighted the external ramifications of internal regulatory decisions, has to a large extent ignored the impact of such internationalization on procedural guarantees which structure administrative discretion and, hence, constrain public authority.

129 From a different perspective, see id. at 143–144, 152–157.
130 Defending that decision-making in international institutions should reflect the interplay between participating actors, Eyal Benvenisti, The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions, 68 LAW & CONTEMP. PROB. 319 (2012). Arguing that, in the case of the ICH, a bottom up insistence on good administrative practices would be the most efficient way to bind network, despite the limitations such approach would have from an accountability perspective, see Berman, supra note 27, esp. at 15, 25–30.
131 On the possible results of incompatible legitimacy claims, see Black, supra note 9, at 153–157.
132 In the cases exemplified in the beginning of the article, the EU is one of the “big four” members of ICCAT, together with the United States, Japan, and Canada (Report of the Independent Review, supra note 22, at 70). With the exception of Canada, these are the same members represented within the ICH. On the impact of ICH guidelines (co-authored by representatives of the EU, the US, and Japan) vis-à-vis external parties, and the problems this poses, see Berman, supra note 27.
133 Benvenisti, supra note 130, at 325–330.
134 See, supra note 111.
exercised through general regulatory acts of varied legal nature and form. Taking as a starting point the author’s previous research on this matter, this article has questioned whether internationalized rulemaking procedures may constitute instances of unrestrained authority, and whether they may, as such, defy the premise according to which law ought to ground and limit public authority, upsetting the difficult balance between discretion and law, and eventually privileging discretion.

Focusing only on the way decisions are formed as a result of a combination of a series of acts adopted in international, transnational, and supranational fora—therefore isolating this aspect from posterior controls that may eventually apply—this article has argued that unrestrained authority, when it occurs, results from two combined factors: the absence of constraints in the law-making of international bureaucracies that takes into account the vertical effect their acts eventually have through the effect of reception; the sidestepping of procedural constraints that would constrain domestic administrative decision-makers if their decisions were adopted only internally and not triggered by reception of external decisions of which they are also authors. By effect of reception, inter- and transnational decisions of varied legal nature—recommendations to which states are legally bound to give effect, guidelines, standards, and so forth—eventually become binding on natural and legal persons. Neither the international or transnational procedures, nor the EU internal procedures that incorporate them, are designed in a way that considers this effective constraining character of a cascade of interlinked decisions. The problem is enhanced by the arguable limits of judicial review in this respect.

The procedural standards of participation that are depleted by the effect of reception have the capacity to structure and constrain the exercise of authority internally. This capacity is absent in the cases of international and transnational decision-making analyzed. Some of the standards depleted by effect of reception of external decisions do pertain more to administrative practice than to law. Yet, they are capable of fulfilling the function equivalent legal rules of procedure would serve in structuring and defining limits to the exercise of discretion. Notwithstanding the differences between administrative practices and legal rules, procedural standards of participation, irrespective of their origin, nature, or rationale, can usefully be reinterpreted through the lens of law and redesigned accordingly. From a legal perspective, they ought to ensure the procedural protection of the legally protected interests affected by decision-making. They do so to the extent that, when accompanied by requirements of justification, they force the decision-makers to duly balance the public and private legally protected interests that they are bound to pursue and respect, by force of the applicable laws. In this way, procedural constraints of participation and justification can create the conditions to avoid biased decisions that potentially deny material justice.

The case of UN Security Council listing of terrorist and terrorist-associated suspects has of course conspicuously alerted to this problem, but only with regard to decisions with a clear bearing on individual legal spheres. The works of Stewart, supra note 1, and of David Livshiz, supra note 1, constitute exceptions to the observation above, with a focus on the case of the US.
There are varied meanings of participation, but if reinterpreted and redesigned in the way proposed in this article, procedural standards of participation can be read in light of the rule of law. There are also varied views on the rule of law, and the possibility that, even with this meaning, participation can be seen as a rule of law requirement is contestable. This article has endorsed a procedural conception of the rule of law, based on the work of Waldron, and moved on to argue that unrestrained authority challenges the rule of law when there are little or no guarantees of due consideration of the legally protected interests affected by decisions that result from internationalized rulemaking procedures. Lack of procedural guarantees puts at stake the dignity of the persons affected—holders of those interests are treated as objects of decisions in which they do not have a voice. The lack of procedural guarantees also hinders the material justice of the public acts adopted—legally protected interests may be disregarded while, by law, decision-makers should at least take them into consideration (along with the possible effects of their decisions) in the balancing and composition of interests that underlies decision-making. In the absence of procedural constrains that ensure due consideration for the legally protected interests affected, the conditions for biased decisions increase, as do the conditions to evade public interests that decision-makers are legally bound to pursue. This is the reason why, from the perspective defended in this article, the rule of law is challenged when procedural standards of participation, that have the ability to structure discretion and constrain authority in a way that protects those values, are depleted.

The construction proposed here would require, first, a reinterpretation of the procedural standards of participation that are currently in place not only in international and transnational procedures but also in the EU. In the EU, current procedural constraints triggered by concerns of transparency, responsiveness, and accountability have the capacity of functioning as legal guarantees against unrestrained authority, or at least can be reinterpreted in this light. In the decision-making procedures analyzed, this capacity is absent at the international and transnational levels. While the EU institutional practices are closer to the transformation proposed here, approaching them from a rule of law perspective would require that they would be capable of functioning as effective constraints. This stresses the limits of current EU procedures and procedural practices. These procedures and practices would need to be transformed accordingly. The effect would be creating legality (or quasi-legality) where it has not existed heretofore. The advantages and disadvantages of this transformation would need to be balanced in each regulatory setting.

Importantly, this transformation would only be capable of constraining the exercise of authority that results from internationalized procedures if accompanied by a new way of approaching these procedures. Instances of exercise of authority can only be adequately identified if the procedures that operate the coordination of the different legal systems involved stop being viewed in segmented terms from a multi-level perspective. Likewise, adequate solutions to structuring discretion and constraining authority depend on viewing internationalized procedures in their entirety, focusing on the functional interdependence of the segments developed at different levels of governance, and thereby capturing the regulatory chain triggered by decisions adopted
at the international or transnational level. Ultimately, this perspective may lead to a reconceptualization of the administrative procedures that operate the coordination of decisions taken in different regulatory sites. The article discussed the potential explanatory value but also the difficulties of constructing them as composite procedures. Alternatively, it suggested an actor-based approach to redesigning internationalized procedures, in light of the domestic ramifications of their external decisions, by focusing on the procedural duties of domestic actors when acting in an external role.

Framing the problem of depletion of procedural standards from the normative perspective proposed in this article highlights the fact that, in whichever way processes of regulating public interests are organized, decisions made in pursuance of public interests should be linked back to the law that identifies them, with all that this linkage symbolically entails. Decision-making processes where the balancing of competing public interests takes place are undoubtedly political and technical processes. In this sense, law may have a very limited role in defining the boundaries of positive action by decision-makers. Be that as it may, there ought to be mechanisms that ensure that decision-makers balance and duly consider the effects their decisions have on legally protected interests, while still acting within their legal mandate. Participation and justification, as approached in this article, are one such mechanism and, if seen in this light, can constitute a guarantee that internationalized administrative procedures are not bypassing and denying the law.